Customary International Humanitarian Law

Volume II: Practice

Part 2

Edited by

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AND LOUISE DOSWALD-BECK

ICRC

CAMBRIDGE

INTERNATIONAL COMMITTEE OF THE RED CROSS

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

VOLUME II

PRACTICE
Part 2

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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge, CB2 2RU, UK
40 West 20th Street, New York, NY 10011–4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2005
Reprinted 2005

Printed by Rotolito Lombarda, Italy

Typeface Trump Medieval 10/13 pt. *System* LaTeX 2$_\varepsilon$ [TB]

A catalogue record for this book is available from the British Library

Volume II Part 2 ISBN 0 521 83155 5
Only available as:
ISBN 0 521 83937 8 Volume II hardback, Parts 1 and 2
ISBN 0 521 53925 0 set including Volume I hardback

PART V

TREATMENT OF CIVILIANS AND PERSONS HORS DE COMBAT

CHAPTER 32

FUNDAMENTAL GUARANTEES

A. Humane Treatment

General

I. Treaties and Other Instruments

Treaties

1. Common Article 3 of the 1949 Geneva Conventions provides that "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely".

2. Article 75(1) AP I provides that "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances". Article 75 AP I was adopted by consensus.[1]
3. According to Article 4(1) AP II, "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, . . . shall in all circumstances be treated humanely". Article 4 AP II was adopted by consensus.[2]
4. Article 5 of the 1981 ACHPR provides that "every individual shall have the right to the respect of the dignity inherent in a human being".

Other Instruments
5. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75(1) AP I.
6. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions and Article 75(1) AP I.
7. Article 4(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "persons hors de combat and those who do not take a direct part in hostilities . . . shall be . . . treated humanely".
8. According to Section 7.1 of the 1999 UN Secretary-General's Bulletin, "persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely".

II. National Practice

Military Manuals
9. Argentina's Law of War Manual (1969) incorporates the provisions of common Article 3 of the 1949 Geneva Conventions and, in respect of occupied territories, states that protected persons "shall be treated, at all times, with humanity".[3]
10. Argentina's Law of War Manual (1989) considers that, in the course of armed conflicts not of an international character, "all persons who do not

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[2] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[3] Argentina, *Law of War Manual* (1969), §§ 8.001 and 4.010.

directly participate in the hostilities shall be treated with humanity in all circumstances".[4]

11. Australia's Defence Force Manual provides that "the general rule is that persons are to be treated humanely". It also states that "an obligation is imposed on all parties to deal humanely with protected persons".[5]

12. Belgium's Law of War Manual states, with reference to common Article 3 of the 1949 Geneva Conventions, that in internal armed conflicts, "persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat*, must be treated humanely".[6]

13. Benin's Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be treated humanely.[7]

14. Burkina Faso's Disciplinary Regulations instructs combatants to "treat humanely ... all persons *hors de combat* ".[8]

15. Cameroon's Disciplinary Regulations instructs combatants to "treat humanely ... all persons *hors de combat* ".[9]

16. Cameroon's Instructors' Manual instructs combatants to "treat humanely ... all regular combatants *hors de combat* ".[10]

17. According to Canada's LOAC Manual, "AP I provides that all persons in the power of a party to the conflict are entitled to at least a minimum humane treatment".[11] With regard to non-international armed conflicts, the manual incorporates the provisions of common Article 3 of the 1949 Geneva Conventions.[12]

18. Colombia's Circular on Fundamental Rules of IHL provides that "persons *hors de combat* and who do not participate directly in hostilities ... shall be protected and treated in all circumstances with humanity".[13]

19. Colombia's Basic Military Manual provides that humane treatment is one of the fundamental aspects of common Article 3 of the 1949 Geneva Conventions.[14] It stipulates that "in Colombia's application of AP II, the State demonstrates that it respects the fundamental guarantees of humane treatment of persons not participating directly in hostilities".[15]

20. Colombia's Soldiers' Manual and Instructors' Manual underline the importance of humane treatment of the enemy.[16]

[4] Argentina, *Law of War Manual* (1989), § 7.04.
[5] Australia, *Defence Force Manual* (1994), §§ 945 and 953.
[6] Belgium, *Law of War Manual* (1983), p. 17 and Chapter IX, § 2.
[7] Benin, *Military Manual* (1995), Fascicule II, p. 4 and Fascicule III, p. 4.
[8] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).
[9] Cameroon, *Disciplinary Regulations* (1975), Article 31.
[10] Cameroon, *Instructors' Manual* (1992), § 421(1).
[11] Canada, *LOAC Manual* (1999), p. 11-7, § 63.
[12] Canada, *LOAC Manual* (1999), p. 17-2, § 10(a).
[13] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 1.
[14] Colombia, *Basic Military Manual* (1995), p. 42.
[15] Colombia, *Basic Military Manual* (1995), p. 43.
[16] Colombia, *Soldiers' Manual* (1999), p. 12; *Instructors' Manual* (1999), p. 22.

21. Congo's Disciplinary Regulations instructs combatants to "treat humanely . . . all persons *hors de combat* ".[17]
22. Croatia's Instructions on Basic Rules of IHL instructs soldiers to treat humanely and show respect for persons and their property.[18]
23. The Military Manual of the Dominican Republic requires that all persons in the power of a party, whether combatants or civilians, be treated humanely, according to the laws of war.[19]
24. France's Disciplinary Regulations as amended instructs combatants to "treat humanely . . . all persons *hors de combat* ".[20]
25. France's LOAC Summary Note provides that persons *hors de combat* shall be treated humanely.[21]
26. France's LOAC Teaching Note provides that "combatants placed *hors de combat*, certain categories of military personnel, as well as the entire civilian population, must be particularly protected and treated with humanity".[22]
27. Germany's Military Manual states that combatants must be treated humanely.[23]
28. India's Army Training Note orders troops not to "ill treat any one, and in particular, women and children".[24]
29. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that as a general policy, all individuals falling in the power of a party to a conflict should, at a minimum, be treated in accordance with the principles of humanity.[25]
30. Kenya's LOAC Manual states that "persons not involved in the fighting because they are not taking part in hostilities, or because they are wounded or have surrendered, or have been detained, must be treated humanely".[26]
31. According to Madagascar's Military Manual, one of the seven fundamental rules of IHL is that "persons placed *hors de combat* and who do not take a direct part in hostilities shall, in all circumstances, be protected and treated with humanity, without any adverse distinction".[27]
32. Mali's Army Regulations provides that "the refusal to treat with humanity all persons *hors de combat* " is a violation of the laws and customs of war.[28]
33. Morocco's Disciplinary Regulations instructs combatants to "treat humanely . . . all regular combatants *hors de combat* ".[29]

[17] Congo, *Disciplinary Regulations* (1986), Article 32.
[18] Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 1–3.
[19] Dominican Republic, *Military Manual* (1980), pp. 6 and 7.
[20] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis*.
[21] France, *LOAC Summary Note* (1992), §§ 2.1 and 3.2.
[22] France, *LOAC Teaching Note* (2000), pp. 4 and 5.
[23] Germany, *Military Manual* (1992), § 704.
[24] India, *Army Training Note* (1995), p. 4/24, § 10.
[25] Report on the Practice of Israel, 1997, Chapter 5.6, referring to *Law of War Booklet* (1986), p. 12.
[26] Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6, see also Précis No. 3, p. 14.
[27] Madagascar, *Military Manual* (1994), p. 91, Rule 1.
[28] Mali, *Army Regulations* (1979), Article 36.
[29] Morocco, *Disciplinary Regulations* (1974), Article 25(1).

34. The Military Manual of the Netherlands provides that protected persons shall be treated humanely. With respect to non-international armed conflicts in particular, the manual states that persons protected by common Article 3 of the 1949 Geneva Conventions "shall in all circumstances be treated humanely".[30]
35. The Military Handbook of the Netherlands provides for the punishment of "a war law violation which contains inhuman treatment".[31]
36. New Zealand's Military Manual stipulates that "protected persons must be humanely treated at all times". It qualifies "inhuman treatment of protected persons" as a grave breach.[32] The manual adds that, in non-international armed conflicts, persons protected by common Article 3 of the 1949 Geneva Conventions "shall in all circumstances be treated humanely".[33]
37. Nicaragua's Military Manual reproduces common Article 3 of the 1949 Geneva Conventions.[34]
38. In Peru's Human Rights Charter of the Security Forces, respect for the integrity of persons and their human dignity is one of the ten basic rules.[35]
39. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "members of the AFP and PNP shall treat suspects and enemies who are out of combat . . . humanely and with respect".[36]
40. Romania's Soldiers' Manual provides that it is one of the fundamental principles and rules of IHL that "persons *hors de combat* (e.g. those who surrender or the wounded) and those not taking a direct part in hostilities . . . shall be protected and treated humanely".[37]
41. Russia's Military Manual provides that war victims "shall be granted such a status that would guarantee humane treatment".[38]
42. Senegal's Disciplinary Regulations instructs combatants to "treat humanely . . . all persons *hors de combat* ".[39]
43. Senegal's IHL Manual restates common Article 3 of the 1949 Geneva Conventions.[40]
44. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[41]
45. Switzerland's Basic Military Manual provides that "foreigners of enemy nationality who are in the territory of one of the parties to the conflict or in occupied territory must in all cases be treated humanely".[42] It adds that AP II

[30] Netherlands, *Military Manual* (1993), pp. VIII–2 and XI-1.
[31] Netherlands, *Military Handbook* (1995), p. 7-44.
[32] New Zealand, *Military Manual* (1992), §§ 1137 and 1812.
[33] New Zealand, *Military Manual* (1992), § 1807(1).
[34] Nicaragua, *Military Manual* (1982), Articles 6 and 14.
[35] Peru, *Human Rights Charter of the Security Forces* (1991), Rule 3.
[36] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(3).
[37] Romania, *Soldiers' Manual* (1991), p. 32.
[38] Russia, *Military Manual* (1990), § 7.
[39] Senegal, *Disciplinary Regulations* (1990), Article 34(1).
[40] Senegal, *IHL Manual* (1999), p. 4.
[41] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[42] Switzerland, *Basic Military Manual* (1987), Article 146.

and common Article 3 of the 1949 Geneva Conventions are applicable during internal armed conflicts and contain "some minimal guarantees for persons involved in the conflict".[43]

46. Togo's Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be treated humanely.[44]

47. The UK LOAC Manual states that "in the event of a civil war, Common Article 3 to the 1949 Geneva Conventions provides: a. that persons out of the fighting . . . because they are wounded . . . must be treated humanely", notably they "may not be subjected to any form of violence".[45]

48. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.[46]

49. According to the US Air Force Pamphlet, common Article 3 of the 1949 Geneva Conventions "represents the first attempt to provide protection for victims of all internal armed conflicts. Its general provisions insure humane treatment to civilians and others who are *hors de combat*."[47]

50. The US Soldier's Manual states that the "humane treatment of non-combatants may produce valuable information, gain active support and deny support for the enemy. Mistreatment serves only the interests of the enemy." The manual specifies that non-combatants include civilians, medical personnel, chaplains, detained or captured persons and the wounded and sick.[48]

51. The US Instructor's Guide provides that the rules of IHL "are based on one general principle: treat all non-combatants . . . humanely".[49]

National Legislation

52. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[50]

53. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of common Article 3, and of AP I, including violations of Article 75(1) AP I, as well as any "contravention" of AP II, including violations of Article 4(1) AP II, are punishable offences.[51]

54. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions

[43] Switzerland, *Basic Military Manual* (1987), Article 4.
[44] Togo, *Military Manual* (1996), Fascicule I, p. 11, Fascicule II, pp. 4 and 5 and Fascicule III, pp. 4 and 5.
[45] UK, *LOAC Manual* (1981), Section 12, p. 42, § 2.
[46] US, *Field Manual* (1956), § 11.
[47] US, *Air Force Pamphlet* (1976), § 11-3.
[48] US, *Soldier's Manual* (1984), p. 5.
[49] US, *Instructor's Guide* (1985), pp. 4, 8 and 17.
[50] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[51] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[52]

55. Paraguay's Law on the Status of Military Personnel provides that respect for human dignity is one of the duties imposed on military personnel because of the constitutional responsibility of the armed forces.[53]

56. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions are war crimes.[54]

National Case-law

57. In its judgement in the *Videla case* in 1994, Chile's Appeal Court of Santiago held that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons".[55]

58. In its judgement in the *Situation in Chechnya case* in 1995, Russia's Constitutional Court recognised the applicability of AP II to the conflict in Chechnya and while noting that amendments to domestic legislation to ensure its application had not been adopted, it stated that "nevertheless, provisions of [AP II] regarding the humane treatment of all persons who did not directly take part in hostilities or who ceased to take part in hostilities, of wounded, sick and civilian population . . . must be respected by both parties to the armed conflict".[56]

Other National Practice

59. The Report on the Practice of Colombia refers to a draft working paper in which the Colombian government stated that "persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely".[57]

60. During the Iran–Iraq War, the Iranian authorities emphasised that Iraqi combatants who were *hors de combat* were well treated on the basis of Islamic law.[58]

61. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that, during the Iran–Iraq War, members of the opposing forces who were *hors de combat* were well treated.[59]

[52] Norway, *Military Penal Code as amended* (1902), § 108.
[53] Paraguay, *Law on the Status of Military Personnel* (1997), Article 15(j).
[54] US, *War Crimes Act as amended* (1996), Section 2441(c).
[55] Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.
[56] Russia, Constitutional Court, *Situation in Chechnya case*, Judgement, 31 July 1995, § 5.
[57] Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillerra Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled "El Derecho Internacional Humanitario", § 1.
[58] Report on the Practice of Iran, 1997, Chapter 2.1.
[59] Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.1.

62. According to the Report on the Practice of Israel, the protection of persons who are *hors de combat* is a basic tenet of the IDF.[60]
63. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[61]
64. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

> We support in particular the fundamental guarantees contained in Article 75 [AP I] such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions.[62]

65. According to the Report on US Practice, "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II ".[63]

III. Practice of International Organisations and Conferences

United Nations
66. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[64]

Other International Organisations
67. No practice was found.

International Conferences
68. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

69. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions

[60] Report on the Practice of Israel, 1997, Chapter 2.1.
[61] Report on the Practice of Jordan, 1997, Chapter 5.
[62] US, Remarks by Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.
[63] Report on US Practice, 1997, Chapter 5.3.
[64] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[65]

70. In its judgement in the *Aleksovski case* in 1999, the ICTY held that:

> A reading of paragraph (1) of common Article 3 [of the 1949 Geneva Conventions] reveals that its purpose is to uphold and protect the inherent human dignity of the individual. It prescribes humane treatment without discrimination based on "race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria". Instead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of mistreatment that are without question incompatible with humane treatment ... Hence, while there are four sub-paragraphs which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation, the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual qua human being and, therefore, it must safeguard the entitlements which flow therefrom.[66]

71. In a case concerning Peru in 1996, the IACiHR reinforced the principle that the right to humane treatment must be respected at all times, even during emergency or conflict situations, by State agents responsible for law enforcement.[67]

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

72. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rules contained in common Article 3 of the 1949 Geneva Conventions and that "humane treatment shall be given in all circumstances".[68]

73. In 1978, the ICRC indicated to a National Red Crescent Society that there are persons and objects that must be respected and protected in all circumstances, *inter alia*, combatants who have laid down their arms.[69]

74. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "persons not participating or no longer participating in the hostilities ... must be respected and protected in all circumstances".[70]

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[65] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.
[66] ICTY, *Aleksovski case*, Judgement, 25 June 1999, § 49.
[67] IACiHR, *Case 10.559 (Peru)*, Report, 1 March 1996, Section V(2).
[68] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 31 and 187.
[69] ICRC archive document.
[70] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

75. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that "combatants placed *hors de combat* must be treated humanely".[71]
76. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia "respect and protect all those not or no longer participating in hostilities".[72]
77. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to treat with humanity non-combatants and persons *hors de combat*. It recalled the Geneva Conventions and AP I.[73]
78. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "persons not or no longer taking part in hostilities . . . shall be protected and respected in all circumstances, regardless of the party to which they belong".[74]
79. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "persons not participating or no longer participating in confrontations . . . shall be protected and respected in all circumstances".[75]
80. In a communication to the press issued in 2001, the ICRC reminded the parties to the conflict in Afghanistan of "the requirement that persons not taking part in hostilities must be treated with humanity in all circumstances . . . Threats to their lives, their physical integrity and their dignity are prohibited."[76]

VI. Other Practice

81. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "persons *hors de combat* and those who do not take part in hostilities . . . shall in all circumstances be protected and treated humanely".[77]

[71] ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26; see also Press Release No. 1659, Middle East Conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.
[72] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.
[73] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de Enero de 1994, 3 January 1994.
[74] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.
[75] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994 § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.
[76] ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.
[77] ICRC archive document.

Civilians

I. Treaties and Other Instruments

Treaties

82. Article 5 GC IV provides that an individual protected person suspected of or engaged in activities hostile to the security of the State in the territory of a Party to the conflict or an individual protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, "shall nevertheless be treated with humanity".

83. Article 27, first paragraph, GC IV provides that protected persons "shall at all times be humanely treated".

84. Upon ratification of GC IV, China stated that:

> Although the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, does not apply to civilian persons outside enemy-occupied areas and consequently does not completely meet humanitarian requirements, it is found to be in accord with the interest of protecting civilian persons in occupied territory and in certain other cases.[78]

85. Article 8(b) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provides that "all Vietnamese civilian personnel captured and detained in South Vietnam shall be treated humanely at all times, and in accordance with international practice".

Other Instruments

86. Article 22 of the 1863 Lieber Code provides that "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit".

87. Article 7 of the 1880 Oxford Manual provides that "it is forbidden to maltreat inoffensive populations".

88. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75(1) AP I.

89. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75(1) AP I.

[78] China, Reservations made upon ratification of GC IV, 28 December 1956, § 4.

II. National Practice

Military Manuals

90. Argentina's Law of War Manual (1969) provides that persons not entitled to claim rights and benefits under GC IV "shall always be treated with humanity".[79]

91. Argentina's Law of War Manual (1989) stipulates that "when ... people in the power of a party to the conflict ... do not benefit from a better protection than the one provided by the Conventions and the Protocol, they shall be treated ... with humanity".[80]

92. Australia's Commanders' Guide provides that civilians "are to be treated with compassion and respect".[81]

93. Australia's Defence Force Manual stipulates that the inhabitants of an occupied territory "must be humanely treated at all times and be especially safeguarded against all acts of violence or threats of violence and against insults and public curiosity".[82]

94. Belgium's Law of War Manual states that, in internal armed conflicts, the following must be respected: "humanitarian treatment of persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat* ". It also provides that "the population in occupied territory must be treated with humanity".[83]

95. Benin's Military Manual provides that the soldier must treat civilians humanely.[84]

96. Cameroon's Instructors' Manual instructs the soldier to treat civilian persons in his or her power humanely.[85]

97. Canada's LOAC Manual states that, in occupied territories, "protected persons must be treated humanely at all times".[86] With regard to non-international armed conflict, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[87]

98. Canada's Code of Conduct instructs: "Treat all civilians humanely". It explains that "in your daily interaction with the civilian population, they must at all times be humanely treated".[88] It also provides a list of 11 fundamental rules, among which is "treat all civilians humanely".[89]

[79] Argentina, *Law of War Manual* (1969), § 4.003.
[80] Argentina, *Law of War Manual* (1989), § 4.15.
[81] Australia, *Commanders' Guide* (1994), § 603.
[82] Australia, *Defence Force Manual* (1994), § 1218.
[83] Belgium, *Law of War Manual* (1983), p. 17 and Chapter IX, § 2.
[84] Benin, *Military Manual* (1995), Fascicule I, p. 16, Fascicule II, p. 19 and Fascicule III, p. 5.
[85] Cameroon, *Instructors' Manual* (1992), § 532.
[86] Canada, *LOAC Manual* (1999), p. 12-4, § 37.
[87] Canada, *LOAC Manual* (1999), p. 17-2, § 10(a).
[88] Canada, *Code of Conduct* (2001), Rule 4, § 2.
[89] Canada, *Code of Conduct* (2001), Chapter 3, § 4.

99. Colombia's Soldiers' Manual and Instructors' Manual provide that civilians must be treated humanely.[90]
100. Croatia's Commanders' Manual provides that civilians must be respected and treated humanely.[91]
101. Croatia's Instructions on Basic Rules of IHL requires soldiers to treat captured civilians with humanity.[92]
102. France's LOAC Manual incorporates the content of Article 5 GC IV.[93]
103. Germany's Military Manual provides that civilians not benefiting from the protection of the Geneva Conventions and their Additional Protocols shall be treated humanely.[94]
104. Italy's IHL Manual provides that, in occupied territories, civilians shall be treated with humanity in all circumstances.[95]
105. Italy's LOAC Elementary Rules Manual provides that civilians must be treated humanely. It adds that "the occupying Power must treat the inhabitants humanely".[96]
106. Madagascar's Military Manual instructs the armed forces to "treat humanely civilians who are in your power".[97]
107. New Zealand's Military Manual provides that "protected persons must be humanely treated" in both international and non-international armed conflicts.[98]
108. Nigeria's Operational Code of Conduct provides that "male civilians hostile to the Federal Forces are to be dealt with firmly but fairly. They must be humanely treated."[99]
109. Nigeria's Military Manual provides that "civilians shall . . . be treated humanely".[100]
110. The Soldier's Rules of the Philippines instruct soldiers to "treat all civilians . . . in your power with humanity".[101]
111. Romania's Soldiers' Manual instructs soldiers to "treat humanely [civilian] persons in your power" and "protect them from ill-treatment".[102]
112. Russia's Military Manual states that the civilian population "shall be granted such a status that would guarantee humane treatment".[103]

[90] Colombia, *Soldiers' Manual* (1999), p. 10; *Instructors' Manual* (1999), p. 8.
[91] Croatia, *Commanders' Manual* (1992), Rule No. 15.
[92] Croatia, *Instructions on Basic Rules of IHL Manual* (1993), Instruction No. 5.
[93] France, *LOAC Manual* (2001), p. 64.
[94] Germany, *Military Manual* (1992), § 518.
[95] Italy, *IHL Manual* (1991), Vol. I, § 41(a).
[96] Italy, *LOAC Elementary Rules Manual* (1991), §§ 15 and 104 and p. 29.
[97] Madagascar, *Military Manual* (1994), p. 82, Rule 23 and p. 85, Rule 6.
[98] New Zealand, *Military Manual* (1992), §§ 1114 and 1321(2).
[99] Nigeria, *Operational Code of Conduct* (1967), § 4(j).
[100] Nigeria, *Military Manual* (1994), p. 39, § 5(k).
[101] Philippines, *Soldier's Rules* (1989), § 6.
[102] Romania, *Soldiers' Manual* (1991), pp. 14–15.
[103] Russia, *Military Manual* (1990), § 7.

113. Spain's LOAC Manual provides that in occupied territory, "the Occupying Power shall treat the inhabitants humanely".[104]
114. Switzerland's military manuals provide that the enemy civilian population is to be treated with humanity.[105]
115. Togo's Military Manual stipulates that the soldier shall "treat [civilians] humanely and protect them".[106]
116. Uganda's Code of Conduct instructs: "Never abuse, insult, shout or beat any member of the public".[107]
117. The UK Military Manual provides that civilians "must be humanely treated". This also applies in occupied territories.[108]
118. The UK LOAC Manual explains that "an obligation is imposed on belligerents to deal humanely with protected persons". With regard to enemy aliens, the manual specifies that "[GC III] ensures the humane treatment of those who remain".[109]
119. The US Field Manual recalls Article 27 GC IV, which provides that in occupied territories, civilians must be treated humanely.[110]
120. The US Soldier's Manual states that "inhumane treatment of civilians [is a violation] of the law of war for which you can be prosecuted".[111]
121. The US Instructor's Guide provides that "persons taking no direct part in hostilities shall in all circumstances be treated humanely".[112]
122. The US Rules of Engagement for Operation Desert Storm instructs forces to "treat all civilians and their property with respect and dignity".[113]
123. The US Air Force Pamphlet states that Articles 27–34 GC IV "provide for humane treatment of the individuals protected". It also states that "Articles 27 and 38 require protected persons in the territory of a belligerent to be humanely treated".[114]

National Legislation
124. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, "civilian persons belonging to the adverse party, who are in the hands of the Republic of Azerbaijan are respected and treated humanely".[115]

[104] Spain, *LOAC Manual* (1996), Vol. I, § 10.8.i.
[105] Switzerland, *Basic Military Manual* (1987), Articles 4 and 146; *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43.
[106] Togo, *Military Manual* (1996), Fascicule I, p. 17 and Fascicule II, p. 19.
[107] Uganda, *Code of Conduct* (1986), Rule 1.
[108] UK, *Military Manual* (1958), §§ 39 and 547.
[109] UK, *LOAC Manual* (1981), Section 9, p. 35, §§ 9 and 11, see also Annex A, p. 49, § 20.
[110] US, *Field manual* (1956), § 266.
[111] US, *Soldier's Manual* (1984), p 20.
[112] US, *Instructor's Guide* (1985), pp. 4, 8 and 17.
[113] US, *Rules of Engagement for Operation Desert Storm* (1991), § H.
[114] US, *Air Force Pamphlet* (1996), §§ 11-3, 14-4 and 14-5.
[115] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 14.

125. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[116]
126. Under El Salvador's Penal Code, "the civilian ... who commits any inhumane act against the civilian population before, during or after the war" is guilty of a crime.[117]
127. Under the Draft Amendments to the Penal Code of El Salvador, the civilian "who commits an inhumane act against the civilian population before, during or after the war" is punishable.[118]
128. Under Hungary's Criminal Code as amended, anyone who treats a civilian person inhumanely, is guilty, upon conviction, of a war crime.[119]
129. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 5 and 27 GC IV, is a punishable offence.[120]
130. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... is liable to imprisonment".[121]
131. Vietnam's Penal Code provides for the punishment of "any person who commits an act of harassment that harms civilians or causes a loss of unity between the military and civilians".[122]

National Case-law
132. No practice was found.

Other National Practice
133. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense noted some specific Iraqi war crimes, including inhumane treatment of Kuwaiti and third country civilians.[123]

III. Practice of International Organisations and Conferences

United Nations
134. No practice was found.

[116] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[117] El Salvador, *Penal Code* (1997), Article 363.
[118] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Violación de los deberes de humanidad".
[119] Hungary, *Criminal Code as amended* (1978), Section 158(1).
[120] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[121] Norway, *Military Penal Code as amended* (1902), § 108(a).
[122] Vietnam, *Penal Code* (1990), Article 273(1).
[123] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

Other International Organisations
135. No practice was found.

International Conferences
136. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC I, II and III in the Middle East in which it called for "the total application" of these conventions by the parties to the conflict, in particular, "those provisions which relate to the treatment of . . . civilian victims of the conflict".[124]

IV. Practice of International Judicial and Quasi-judicial Bodies

137. No practice was found.

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

138. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "persons not participating or no longer participating in the hostilities, such as . . . civilians, must be respected and protected in all circumstances" and that "civilians and all non-combatants must be respected and protected".[125]
139. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia "to respect and protect all those not participating or no longer participating in hostilities, such as . . . civilians".[126]
140. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "persons not or no longer taking part in hostilities, such as . . . civilians, shall be protected and respected in all circumstances, regardless of the party to which they belong" and that "civilians do not constitute a military danger and must be respected and humanely treated".[127]
141. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "persons not participating or no longer participating in confrontations, such as . . . civilians, shall be protected and respected in all circumstances" and that "civilian persons who refrain from acts of hostility must be respected and treated humanely".[128]

[124] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. IV.
[125] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.
[126] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.
[127] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, pp. 502–503.
[128] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

VI. Other Practice

142. No practice was found.

Wounded and sick

I. Treaties and Other Instruments

Treaties
143. Article 12, first paragraph, GC I provides that wounded and sick members of the armed forces in the field "shall be treated humanely".
144. Article 12, first paragraph, GC II provides that wounded, sick and shipwrecked members of the armed forces at sea "shall be treated humanely".
145. Article 10(2) AP I provides that "in all circumstances [all the wounded, sick and shipwrecked] shall be treated humanely". Article 10 AP I was adopted by consensus.[129]
146. Article 7(2) AP II provides that "in all circumstances [all the wounded, sick and shipwrecked] shall be treated humanely". Article 7 AP II was adopted by consensus.[130]

Other Instruments
147. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook "to apply the following fundamental principles: wounded and ill persons must be helped and protected in all circumstances".
148. Article 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "all the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected. In all circumstances, they shall be respected and protected."
149. In Article IX of the 1994 Comprehensive Agreement on Human Rights in Guatemala, the parties recognised the need "to respect the human rights of the wounded".
150. According to Section 9.1 of the 1999 UN Secretary-General's Bulletin, "members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall be . . . treated humanely".

II. National Practice

Military Manuals
151. Argentina's Law of War Manual (1969) provides that the sick and wounded must be respected and protected in all circumstances.[131]

[129] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.
[130] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.
[131] Argentina, *Law of War Manual* (1969), § 3.001.

152. Argentina's Law of War Manual (1989) provides for the protection of and respect for the wounded, sick and shipwrecked in both international and non-international armed conflicts.[132]
153. Australia's Defence Force Manual provides that "sick, wounded and shipwrecked combatants are to be . . . treated humanely".[133]
154. Benin's Military Manual provides that the "wounded, sick and shipwrecked . . . shall be treated humanely".[134]
155. Bosnia and Herzegovina's Military Instructions provides that the wounded and sick must be treated humanely.[135]
156. Burkina Faso's Disciplinary Regulations provides that all persons *hors de combat* must be treated with humanity.[136]
157. Cameroon's Instructors' Manual provides that "the sick, wounded and shipwrecked shall be treated humanely . . . and protected".[137]
158. Canada's LOAC Manual provides that "the wounded, sick and shipwrecked are to be . . . treated humanely".[138]
159. Colombia's Instructors' Manual provides that the "wounded, sick and shipwrecked shall be treated humanely".[139]
160. The Military Manual of the Dominican Republic provides that the rule for "wounded and sick . . . is to treat [them] in a human way".[140]
161. Ecuador's Naval Manual provides that "wounded and sick personnel falling into enemy hands must be treated humanely".[141]
162. According to France's LOAC Teaching Note, wounded, sick and shipwrecked persons must be protected and treated humanely.[142]
163. Germany's Soldiers' Manual provides that the wounded, sick and shipwrecked shall be treated with humanity.[143]
164. Germany's Military Manual states that wounded and sick persons shall be treated humanely.[144]
165. Kenya's LOAC Manual provides that the wounded, sick and shipwrecked shall be treated humanely.[145]
166. According to Madagascar's Military Manual, the "wounded, sick and shipwrecked shall be . . . treated with humanity".[146]

[132] Argentina, *Law of War Manual* (1989), §§ 2.03 and 7.05.
[133] Australia, *Defence Force Manual* (1994), § 990.
[134] Benin, *Military Manual* (1995), Fascicule II, p. 9.
[135] Bosnia and Herzegovina, *Military Instructions* (1992), Item 14, § 1.
[136] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).
[137] Cameroon, *Instructors' Manual* (1992), p. 44, § 163, see also p. 41, § 152.
[138] Canada, *LOAC Manual* (1999), p. 9-2, § 17.
[139] Colombia, *Instructors' Manual (* 1999), p. 24.
[140] Dominican Republic, *Military Manual* (1980), p. 6.
[141] Ecuador, *Naval Manual* (1989), § 11.4.
[142] France, *LOAC Teaching Note* (2000), p. 4.
[143] Germany, *Soldiers' Manual* (1991), p. 5.
[144] Germany, *Military Manual* (1992), §§ 608 and 1057.
[145] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 10.
[146] Madagascar, *Military Manual* (1994), p. 77, Rule 21.

167. New Zealand's Military Manual provides that the sick, wounded and shipwrecked shall be treated humanely.[147]
168. Nigeria's Operational Code of Conduct provides that "all military and civilian wounded . . . must be respected and protected in all circumstances".[148]
169. Nigeria's Manual on the Laws of War provides that the wounded and sick who are in the power of a belligerent must be humanely treated.[149]
170. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "members of the AFP and PNP shall treat enemies who are *hors de combat* (e.g. wounded) humanely and with respect".[150]
171. Russia's Military Manual provides that belligerents are obliged to ensure the legal protection of war victims, namely the wounded, sick and shipwrecked.[151]
172. Senegal's Disciplinary Regulations provides that soldiers in combat shall treat with humanity all persons placed *hors de combat*.[152]
173. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the 1948 UDHR is that all the wounded and sick shall be treated with humanity.[153]
174. South Africa's LOAC Manual provides that "all wounded, sick and shipwrecked . . . shall be treated humanely".[154]
175. Spain's LOAC Manual provides that the wounded and sick shall be treated humanely.[155]
176. Sweden's Military Manual provides that the wounded and sick, whether civilian or combatant, shall be humanely treated.[156]
177. Switzerland's Basic Military Manual provides that the wounded and sick shall be humanely treated. It adds that the "enemy sick and wounded who have laid down their arms or are *hors de combat* shall be respected".[157]
178. Togo's Military Manual provides that wounded, sick and shipwrecked combatants "shall be treated humanely".[158]
179. The UK Military Manual and LOAC Manual provide that "the wounded and sick . . . must be humanely treated".[159]
180. The US Field Manual restates Article 12 GC II.[160]

147 New Zealand, *Military Manual* (1992), § 1003(1).
148 Nigeria, *Operational Code of Conduct* (1967), § 4(l).
149 Nigeria, *Manual on the Laws of War* (undated), § 35.
150 Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(3).
151 Russia, *Military Manual* (1990), § 7.
152 Senegal, *Disciplinary Regulations* (1990), § 1.
153 Senegal, *IHL Manual* (1999), pp. 3 and 24.
154 South Africa, *LOAC Manual* (1996), § 31.
155 Spain, *LOAC Manual* (1996), Vol. I, §§ 5.5b, and 7.3.a.(11).
156 Sweden, *Military Manual* (1976), p. 16.
157 Switzerland, *Basic Military Manual* (1987), Articles 69 and 70(1).
158 Togo, *Military Manual* (1996), Fascicule II, pp. 9 and 12.
159 UK, *Military Manual* (1958), § 339; *LOAC Manual* (1981), Section 6, p. 22, § 2.
160 US, *Field Manual* (1956), § 215.

181. The US Air Force Pamphlet provides that "one of the important principles relating to wounded and sick requires . . . humane treatment".[161]
182. According to the US Naval Handbook, "wounded and sick personnel falling into enemy hands must be treated humanely".[162]

National Legislation
183. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[163]
184. Under El Salvador's Penal Code, "the civilian who violates the duties of humanity . . . against the wounded . . . or persons placed in hospitals or places designed for the wounded . . . before, during or after the war" is guilty of a crime.[164]
185. Under the Draft Amendments to the Penal Code of El Salvador, the civilian who commits an inhumane act against the wounded and sick or persons placed in medical institutions or camps for the wounded and sick is punishable.[165]
186. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 GC I and 12 GC II, and of AP I, including violations of Article 10 AP I, as well as any "contravention" of AP II, including violations of Article 7 AP II, are punishable offences.[166]
187. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[167]

National Case-law
188. No practice was found.

Other National Practice
189. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal "to make protection and treatment of all wounded and sick persons possible".[168]

[161] US, *Air Force Pamphlet* (1976), § 3-4(d).
[162] US, *Naval Handbook* (1995), § 11-4.
[163] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[164] El Salvador, *Penal Code* (1997), Article 363.
[165] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Violación de los deberes de humanidad".
[166] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[167] Norway, *Military Penal Code as amended* (1902), § 108.
[168] Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

190. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that all wounded and sick and shipwrecked be respected and protected".[169]
191. According to the Report on US Practice, it is the *opinio juris* of the US that the wounded and sick in internal armed conflicts should be treated humanely.[170]

III. Practice of International Organisations and Conferences

United Nations
192. In resolutions adopted in 1985 and 1986 on the conflict in El Salvador, the UN General Assembly recommended that the UN Special Representative report on the observance of rules pertaining to the humanitarian treatment of and respect for wounded combatants.[171]

Other International Organisations
193. No practice was found.

International Conferences
194. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC I, II and III in the Middle East in which it called for "the total application" of these conventions by the parties to the conflict, in particular, "those provisions which relate to the treatment of . . . the sick and wounded".[172]

IV. Practice of International Judicial and Quasi-judicial Bodies

195. No practice was found.

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

196. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the wounded, sick and shipwrecked shall be treated humanely".[173]

[169] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.
[170] Report on US Practice, 1997, Chapter 5.1.
[171] UN General Assembly, Res. 40/139, 13 December 1985, § 3; Res. 41/157, 4 December 1986, § 4.
[172] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. IV.
[173] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 504.

197. In 1978, the ICRC indicated to a National Red Crescent Society that the wounded, sick and shipwrecked must be respected and protected in all circumstances.[174]

198. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "persons not participating or no longer participating in the hostilities, such as the wounded, sick [and] shipwrecked . . . must be respected and protected in all circumstances".[175]

199. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia "to respect and protect all those not participating or no longer participating in hostilities, such as . . . wounded [and] sick".[176]

200. In a declaration issued in 1994, in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to provide treatment and protection to wounded persons in their power.[177]

201. In a press release issued in 1994, the ICRC reminded all parties to the conflict in Afghanistan that the wounded and sick must benefit from a special protection and be respected in all circumstances.[178]

202. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "persons not or no longer taking part in hostilities, such as the wounded [and] the sick . . . shall be protected and respected in all circumstances, regardless of the party to which they belong".[179]

203. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "persons not participating or no longer participating in confrontations, such as the wounded [and] the sick . . . shall be protected and respected in all circumstances".[180]

VI. Other Practice

204. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

[174] ICRC archive document.

[175] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

[176] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

[177] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1 de Enero de 1994, 3 January 1994.

[178] ICRC, Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994.

[179] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 502.

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

University in Turku/Åbo, Finland in 1990, provides that "in every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, shall be . . . treated humanely".[181]

Persons deprived of their liberty

I. Treaties and Other Instruments

Treaties

205. Article 4, second paragraph, of the 1899 HR provides that POWs "must be humanely treated".

206. Article 4, second paragraph, of the 1907 HR provides that POWs "must be humanely treated".

207. Article 2, second paragraph, of the 1929 Geneva POW Convention provides that POWs "shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity".

208. Article 13 GC III provides that "prisoners of war must at all times be humanely treated . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity".

209. Article 27, first paragraph, GC IV provides that protected persons "shall at all times be humanely treated".

210. Paragraph I(3) of the Annex to the 1953 Panmunjon Armistice Agreement (establishing a Neutral Nations Repatriation Commission) provides that:

> no . . . affront to their dignity or self-respect [of prisoners of war] shall be permitted in any manner for any purpose whatsoever . . . This Commission shall ensure that prisoners of war shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention [GC III], and with the general spirit of that Convention.

211. Article 10(1) of the 1966 ICCPR provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

212. Article 5 of the 1969 ACHR provides that "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person".

213. Article 8(a) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian

[181] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 12, *IRRC*, No. 282, 1991, p. 335.

Personnel provides that "all captured military personnel of the parties . . . shall be treated humanely at all times, and in accordance with international practice".

214. Article 5(3) AP II provides that "persons . . . whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely". Article 5 AP II was adopted by consensus.[182]

Other Instruments

215. Article 76 of the 1863 Lieber Code provides that "prisoners of war shall . . . be treated with humanity".

216. Article 23(2) of the 1874 Brussels Declaration provides that POWs must be treated humanely.

217. Article 63 of the 1880 Oxford Manual provides that POWs must be treated humanely.

218. According to Article XXV of the 1948 American Declaration on the Rights and Duties of Man, "every individual who has been deprived of his liberty has the right to . . . humane treatment during the time he is in custody".

219. Rule 1 of the 1987 European Prison Rules states that "the deprivation of liberty shall be effected in material and moral conditions which ensure respect for human dignity and are in conformity with these rules".

220. Principle 1 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person".

221. Paragraph 1 of the 1990 Basic Principles for the Treatment of Prisoners provides that "all prisoners shall be treated with the respect due to their inherent dignity and value as human beings".

222. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook "to apply the following fundamental principles: . . . all arrested persons, and notably combatants who have surrendered, must be treated with humanity; all detaining authorities must ensure the protection of the prisoners".

223. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that all persons deprived of their liberty for reasons related to the armed conflict shall be treated humanely.

224. According to Section 8 of the 1999 UN Secretary-General's Bulletin, "the United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention".

[182] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

II. National Practice

Military Manuals

225. Argentina's Law of War Manual (1969) provides that POWs shall be treated humanely.[183]

226. Argentina's Law of War Manual (1989) stipulates that "prisoners of war shall at all times be treated humanely".[184]

227. Australia's Commanders' Guide states that POWs "must be treated humanely and not subjected to cruel, degrading or unfair treatment".[185]

228. Australia's Defence Force Manual provides that "the fundamental principle underlying the treatment of PW is that they are . . . entitled to humane and decent treatment throughout their captivity . . . The fundamental rules for the treatment of PW are . . . they must be treated humanely and honourably".[186]

229. Belgium's Law of War Manual provides that:

> POWs shall be treated at all times with humanity. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the Convention [GC III]. POWs shall at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.[187]

230. Belgium's Teaching Manual for Soldiers provides that "prisoners of war must be treated humanely and protected".[188]

231. Benin's Military Manual provides that all captured combatants shall be treated humanely.[189]

232. Burkina Faso's Disciplinary Regulations stipulates that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."[190]

233. Cameroon's Disciplinary Regulations provides that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."[191]

234. Cameroon's Instructors' Manual provides that captured enemy combatants shall be treated humanely.[192]

235. Canada's LOAC Manual provides that "PWs must at all times be treated humanely and must be protected, particularly against any acts of violence or intimidation, as well as against insults and public curiosity".[193] With regard to

[183] Argentina, *Law of War Manual* (1969), § 2.013.
[184] Argentina, *Law of War Manual* (1989), § 3.12.
[185] Australia, *Commanders' Guide* (1994), § 716, see also § 701.
[186] Australia, *Defence Force Manual* (1994), §§ 1001–1002.
[187] Belgium, *Law of War Manual* (1983), p. 44.
[188] Belgium, *Teaching Manual for Soldiers* (undated), p. 10.
[189] Benin, *Military Manual* (1995), Fascicule I, p. 16, Fascicule II, pp. 9 and 11 and Fascicule III, p. 5.
[190] Burkina Faso, *Disciplinary Regulations* (1994), Article 36(1).
[191] Cameroon, *Disciplinary Regulations* (1975), Article 33.
[192] Cameroon, *Instructors' Manual* (1992), §§ 152 and 532 and p. 96.
[193] Canada, *LOAC Manual* (1999), p. 10-3, § 19.

internees, it states that "in many respects the articles contained in [GC IV] as to the treatment of internees are comparable to provisions of [GC III] concerned with the treatment of PWs".[194] With regard to non-international armed conflicts, the manual provides that "the wounded and sick among [persons whose liberty has been restricted] are to be treated humanely".[195]

236. Canada's Code of Conduct states that Canadian forces must "treat all detained persons humanely in accordance with the standard set by the Third Geneva Convention".[196] The Code specifies that "the concept of humane treatment towards those under your control and the standard of treatment which applies to all detained persons ... is a long standing rule".[197] It further states that "humane treatment includes not only the proper provision of necessities of life but also the type of treatment provided to detained persons".[198]

237. Colombia's Soldiers' Manual and Instructors' Manual provide that enemy combatants who surrender must be treated humanely.[199]

238. Congo's Disciplinary Regulations provides that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."[200]

239. Croatia's Commanders' Manual provides that POWs and captured medical and religious personnel must be respected and treated humanely.[201]

240. Croatia's Soldiers' Manual states that captured combatants must be treated humanely.[202]

241. Croatia's Instructions on Basic Rules of IHL requires soldiers to treat captured combatants with humanity.[203]

242. The Military Manual of the Dominican Republic requires that all prisoners and detainees, i.e. any persons in the power of the armed forces, whatever their status, be treated humanely.[204]

243. Ecuador's Naval Manual provides that captured enemy combatants and internees shall be treated humanely.[205]

244. El Salvador's Soldiers' Manual provides that enemy combatants who lay down their arms and surrender shall be treated humanely.[206]

245. France's LOAC Summary Note provides that "captured combatants shall be treated humanely".[207]

[194] Canada, *LOAC Manual* (1999), p. 11-6, § 49.
[195] Canada, *LOAC Manual* (1999), p. 17-3, § 25.
[196] Canada, *Code of Conduct* (2001), Rule 6.
[197] Canada, *Code of Conduct* (2001), Rule 6, § 3.
[198] Canada, *Code of Conduct* (2001), Rule 6, § 5.
[199] Colombia, *Soldiers' Manual* (1999), p. 18; *Instructors' Manual* (1999), p. 22.
[200] Congo, *Disciplinary Regulations* (1986), Article 33.
[201] Croatia, *Commanders' Manual* (1992), Rule No. 15.
[202] Croatia, *Soldiers' Manual* (1992), p. 4.
[203] Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.
[204] Dominican Republic, *Military Manual* (1980), pp. 6 and 7.
[205] Ecuador, *Naval Manual* (1989), § 11.8.
[206] El Salvador, *Soldiers' Manual* (undated), p. 8.
[207] France, *LOAC Summary Note* (1992), § 2.1.

246. France's LOAC Teaching Note provides that "every captured combatant . . . has the right to respect for his dignity. He shall be treated humanely."[208]
247. France's LOAC Manual provides that "prisoners of war must be spared and treated with humanity . . . They shall be protected from acts of violence, insults and intimidation."[209]
248. Germany's Military Manual states that "unlawful combatants do, however, have a legitimate claim to certain fundamental guarantees, including the right to humane treatment". It also states that civilian "internees shall be treated humanely".[210] The manual further provides that captured combatants shall be treated with dignity and their person and honour respected.[211]
249. Hungary's Military Manual provides that captured combatants and internees shall be treated humanely.[212]
250. India's Army Training Note states that "Prisoners of War must at all times be humanely treated".[213]
251. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that all individuals falling under the power of a party to a conflict should, at a minimum, be treated in accordance with the principles of humanity.[214]
252. Italy's IHL Manual provides that POWs shall be treated with humanity in all cases.[215]
253. Italy's LOAC Elementary Rules Manual stipulates that "captured enemy combatants shall be . . . treated humanely".[216]
254. Kenya's LOAC Manual provides that "those who have surrendered must be treated humanely as POWs or prisoners depending on the nature of the conflict".[217]
255. According to Madagascar's Military Manual, "prisoners of war are entitled to humane treatment".[218]
256. Mali's Army Regulations provides that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."[219]
257. Morocco's Disciplinary Regulations provides that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."[220]

[208] France, *LOAC Teaching Note* (2000), p. 3. [209] France, *LOAC Manual* (2001), p. 102.
[210] Germany, *Military Manual* (1992), §§ 302 and 595.
[211] Germany, *Military Manual* (1992), § 704; see also *Soldiers' Manual* (1991), p. 7, § 3.
[212] Hungary, *Military Manual* (1992), pp. 75 and 99.
[213] India, *Army Training Note* (1995), p. 3/7, § 15(a).
[214] Report on the Practice of Israel, 1997, Chapter 5.6, referring to *Law of War Booklet* (1986), pp. 12 and 14.
[215] Italy, *IHL Manual* (1991), Vol. II, Chapter I, §§ 2 and 84.
[216] Italy, *LOAC Elementary Rules Manual* (1991), §§ 15 and 74 and p. 29.
[217] Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 6, 7 and 14.
[218] Madagascar, *Military Manual* (1994), p. 22, Rule 15, p. 32, Rule 21, p. 78, Rule 26 and p. 85, Rule 7.
[219] Mali, *Army Regulations* (1979), Article 37.
[220] Morocco, *Disciplinary Regulations* (1974), Article 25(3).

258. The Military Manual of the Netherlands provides that "prisoners of war must at all times be treated humanely".[221]

259. The Military Handbook of the Netherlands states that POWs "have the right to humane treatment. They cannot be exposed to acts of violence, insults and public curiosity."[222]

260. New Zealand's Military Manual provides that, in both international and non-international armed conflicts, all detainees must at all times be treated humanely and protected against insults and public curiosity and particularly against any acts of violence or intimidation.[223]

261. Nicaragua's Military Manual states that prisoners have the right to be protected against all forms of violence, in both internal and international armed conflicts.[224]

262. Nigeria's Operational Code of Conduct states that "soldiers who surrender . . . are entitled in all circumstances to humane treatment and respect for their person and their honor".[225]

263. Nigeria's Military Manual states that "enemy prisoners . . . shall be treated humanely".[226]

264. Nigeria's Manual on the Laws of War provides that "prisoners of war must at all times be humanely treated . . . Prisoners of war must be protected from violence, threats and the curiosity of the public."[227]

265. Peru's Human Rights Charter of the Security Forces requires that detained persons be treated humanely.[228]

266. The Soldier's Rules of the Philippines instructs soldiers that "prisoners must be treated humanely".[229]

267. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "members of the AFP and PNP shall treat enemies who are *hors de combat* (e.g. surrendered/captured) humanely and with respect".[230]

268. Romania's Soldiers' Manual provides that enemy combatants who surrender shall be treated humanely.[231]

269. Russia's Military Manual provides that the humane treatment of war victims, namely prisoners of war, must be guaranteed.[232]

270. Senegal's IHL Manual provides, with regard to the rights of persons deprived of their liberty, that "all wounded and sick shall be treated humanely in any circumstances".[233]

221 Netherlands, *Military Manual* (1993), p. VII-3, § 2.
222 Netherlands, *Military Handbook* (1995), p. 7-41.
223 New Zealand, *Military Manual* (1992), §§ 915, 1137(1) and 1814.
224 Nicaragua, *Military Manual* (1996), Articles 6 and 14(18).
225 Nigeria, *Operational Code of Conduct* (1967), § 4(e).
226 Nigeria, *Military Manual* (1994), p. 39, § 5(j).
227 Nigeria, *Manual on the Laws of War* (undated), § 37.
228 Peru, *Human Rights Charter of the Security Forces* (undated), p. 19.
229 Philippines, *Soldier's Rules* (1989), § 6.
230 Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(3).
231 Romania, *Soldiers' Manual* (1991), p. 7.
232 Russia, *Military Manual* (1990), §§ 7 and 8(e).
233 Senegal, *IHL Manual* (1999), p. 24.

271. South Africa's LOAC Manual states that "soldiers who have surrendered or who are in the control of the enemy . . . must be protected".[234]
272. Spain's LOAC Manual provides that captured enemy combatants, those who surrender and prisoners of war must be respected and treated with humanity.[235]
273. Switzerland's military manuals provide that prisoners have the right to be treated humanely and protected against all forms of violence.[236]
274. Togo's Military Manual provides that all captured combatants shall be treated humanely.[237]
275. The UK Military Manual provides that prisoners of war "must at all times be humanely treated".[238] According to the manual, all violations of the Geneva Conventions that do not amount to grave breaches are also war crimes. In the non-exhaustive list of such war crimes, the manual includes "ordering punishment drill for internees" and "exposing prisoners of war to public insults or mob violence".[239]
276. The UK LOAC Manual provides that "PW must at all times be humanely treated".[240]
277. The US Field Manual states that "prisoners of war must at all times be humanely treated". The manual stipulates that "protected persons who are confined pending proceedings or serving a sentence involving loss of liberty shall during confinement be humanely treated".[241]
278. The US Air Force Commander's Handbook provides that "a prisoner of war is always to be humanely treated, and must be protected against violence, intimidation, insults and public curiosity".[242]
279. The US Soldier's Manual provides that all captured combatants, whether POWs or not, shall be treated humanely.[243]
280. The US Instructor's Guide states that "American soldiers must treat all prisoners of war, other captured or detained personnel . . . humanely". It reminds commanders that "the Hague and the Geneva conventions and the customary law of war explicitly require you to treat captured and detained personnel humanely".[244]
281. The US Operational Law Handbook recognises that soldiers have a duty to treat all POWs humanely.[245]

[234] South Africa, *LOAC Manual* (1996), § 30.
[235] Spain, *LOAC Manual* (1996),Vol. I, §§ 7.3.a.(7), 8.4.a.(1), 10.6.b.(2), 10.6.c. and 10.8.f.(2).
[236] Switzerland, *Military Manual* (1984), p. 24; *Basic Military Manual* (1987), Article 97; *Teaching Manual* (1986), p. 43.
[237] Togo, *Military Manual* (1996), Fascicule I, p. 16, Fascicule II, pp. 9 and 11 and Fascicule III, p. 5.
[238] UK, *Military Manual* (1958), § 133(b).
[239] UK, *Military Manual* (1958), § 626.
[240] UK, *LOAC Manual* (1981), Section 8, p. 29, § 5.
[241] US, *Field manual* (1956), §§ 89 and 276.
[242] US, *Air Force Commander's Handbook* (1980), § 4-1(a).
[243] US, *Soldier's Manual* (1984), pp. 12–15.
[244] US, *Instructor's Guide* (1985), pp 4 and 24.
[245] US, *Operational Law Handbook* (1993), p. Q-191.

282. The US Air Force Pamphlet refers to Article 13 GC III and provides that "prisoners of war must at all times be humanely treated".[246]
283. The US Naval Handbook provides that "combatants that have surrendered or otherwise fallen into enemy hands are entitled to prisoner-of-war status and, as such, must be treated humanely".[247] It stipulates that "all interned persons must be treated humanely".[248]
284. The US Rules of Engagement for Operation Desert Storm instruct forces to "treat all prisoners humanely and with respect and dignity".[249]
285. The YPA Military Manual of the SFRY (FRY) provides that prisoners must be treated humanely.[250]

National Legislation
286. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, prisoners of war must be humanely treated and their person and honour respected.[251]
287. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[252]
288. Under El Salvador's Penal Code, "the civilian who violates the duties of humanity against prisoners of war or hostages . . . before, during or after the war" is guilty of a crime.[253]
289. Under the Draft Amendments to the Penal Code of El Salvador, the civilian who commits an inhumane act against prisoners of war is punishable.[254]
290. Under Hungary's Criminal Code as amended, the person who treats a prisoner of war inhumanely is guilty, upon conviction, of a war crime.[255]
291. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 13 GC III and 27 GC IV, as well as any "contravention" of AP II, including violations of Article 5(3) AP II, are punishable offences.[256]
292. Nicaragua's Military Penal Code punishes any soldier "who maltreats an enemy who has surrendered".[257]

[246] US, *Air Force Pamphlet* (1976), §§ 13-2, 14-2 and 14-7.
[247] US, *Naval Handbook* (1995), § 11-7.
[248] US, *Naval Handbook* (1995), § 11-8.
[249] US, *Rules of Engagement for Operation Desert Storm* (1991), § I.
[250] SFRY (FRY), *YPA Military Manual* (1988), § 253(3).
[251] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22.
[252] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[253] El Salvador, *Penal Code* (1997), Article 363.
[254] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Violación de los deberes de humanidad".
[255] Hungary, *Criminal Code as amended* (1978), Section 158(1).
[256] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[257] Nicaragua, *Military Penal Code* (1996), Article 53.

293. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[258]
294. Uruguay's Military Penal Code as amended punishes the violation of "respect for [a POW's] dignity".[259]
295. Vietnam's Penal Code provides that "whoever has mistreated ... soldiers who have surrendered shall be punished".[260]

National Case-law
296. In its judgement in the *Brocklebank case* in 1996, in the context of events that occurred during UN operations in Somalia, the Canadian Military Court of Appeal stated that it was a general principle of law that a person who had custody of a prisoner had the duty to protect him or her.[261]
297. In the *Maelzer case* in 1946, the US Military Commission in Florence convicted the accused of having exposed prisoners of war in his custody to acts of violence, insults and public curiosity in violation of Article 2, second paragraph, of the 1929 Geneva POW Convention. The prisoners had, among other things, been forced to march through the streets of Rome in a parade emulating ancient triumphal marches.[262]

Other National Practice
298. It is reported that during Algeria's war of independence, "the ALN has always tried to treat French prisoners as humanely as possible".[263]
299. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal to "treat all imprisoned persons humanely".[264]
300. The Report on the Practice of Malaysia notes that it has been the policy of the Malaysian security forces not to mistreat captured enemies as part of a strategy to give a positive image of themselves, particularly in relation to communist sympathisers.[265]
301. The US Directives on the Combined Screening of Detainees in Vietnam issued in 1967 stated that "detainees are entitled to humane treatment in accordance with the provisions of the Geneva Conventions".[266]

[258] Norway, *Military Penal Code as amended* (1902), § 108.
[259] Uruguay, *Military Penal Code as amended* (1943), Article 58(8).
[260] Vietnam, *Penal Code* (1990), Article 275.
[261] Canada, Military Court of Appeal, *Brocklebank case*, Judgement, 2 April 1996.
[262] US, Military Commission in Florence, *Maelzer case*, Trial of 9-14 September 1946.
[263] *El Moudjahid*, Vol. 1, p. 440.
[264] Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.
[265] Report on the Practice of Malaysia, 1997, Chapter 2.1.
[266] US, Military Assistance Command, Vietnam, Directive No. 381-46, Military Intelligence: Combined Screening of Detainees, 27 December 1967.

302. An instruction card issued to all US troops engaged in Vietnam directed soldiers always to treat prisoners humanely, adding that "all persons in your hands, whether suspects, civilians, or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind".[267]
303. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that "Iraqi prisoners of war will not be mistreated and will be provided humane and safe detention".[268]
304. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[269]
305. In a statement in 1991, the Federal Executive Council of the SFRY (FRY) reiterated that "it is essential . . . to ensure humane treatment of all detainees and particularly of the participants in the armed conflicts who surrender".[270]

III. Practice of International Organisations and Conferences

United Nations

306. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that "the Bosnian Serb party respect fully the rights of [all persons detained against their will]".[271]
307. In a resolution adopted in 1995, the UN Security Council called upon the government of Rwanda to take further steps to resolve the humanitarian problems in its prisons.[272]
308. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly urged that "combatants in all armed conflicts not covered by Article 4 GC III be accorded the same humane treatment defined by the principles of international law applied to POWs".[273]
309. In resolutions on El Salvador adopted in 1985 and 1986, the UN General Assembly, considering that common Article 3 of the 1949 Geneva Conventions

[267] US, The enemy in your hands, Reproduction of 3x5 instruction card issued to all troops, Major General G. S. Prugh, *Law at War: Vietnam 1964–1973*, Department of the Army, Vietnam Studies, 1975, Appendix H.
[268] US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, 21 January 1991, UN Doc. S/22122, Annex I, p. 2.
[269] Report on US Practice, 1997, Chapter 5.3.
[270] SFRY (FRY), Statement by the Federal Executive Council regarding the Need for Respect for the Norms of International Humanitarian Law in the Armed Conflicts in Yugoslavia, Belgrade, 31 October 1991.
[271] UN Security Council, Res. 1010, 10 August 1995, § 2; see also Res. 1019, 9 November 1995, § 3.
[272] UN Security Council, Res. 1011, 16 August 1995, § 6.
[273] UN General Assembly, Res. 2676 (XXV), 9 December 1970, § 5.

and AP II were applicable, recommended that the Special Representative report on the observance of rules pertaining to the humanitarian treatment of and respect for prisoners of war.[274]

310. In a resolution adopted in 1980 in the context of the conflict in Kampuchea, the UN Commission on Human Rights urged the parties to treat enemy combatants who surrendered or who were captured humanely.[275]

311. In several resolutions on Afghanistan adopted between 1989 and 1992, the UN Commission on Human Rights demanded that all parties treat their prisoners according to the recognised principles of IHL and protect them from acts of violence, including ill-treatment.[276]

312. In resolutions adopted in 1991 and 1992 in the context of the Iraqi occupation of Kuwait, the UN Commission on Human Rights strongly condemned Iraq for not treating prisoners of war and detained civilians according to recognised IHL principles and insisted that it abstain from acts of violence against them, including ill-treatment.[277]

313. In 1992, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission of Human Rights noted that the field commanders who were members of the nation-wide *Shura* (Council) stated that they would treat their prisoners humanely.[278]

Other International Organisations

314. In a resolution adopted in 1994 on the follow-up of the Intifada's developments, the Council of the League of Arab States decided "to ask the International Organisations concerned with Human Rights . . . to treat the prisoners and those put under arrest in accordance with the provisions of the Fourth Geneva Convention of 1949".[279]

International Conferences

315. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it recognised that "the international community has consistently demanded humane treatment for prisoners of war". The Conference called upon all authorities involved in an armed conflict "to ensure that every prisoner of war is given the treatment

[274] UN General Assembly, Res. 40/139, 13 December 1985, § 3; Res. 41/157, 4 December 1986, § 4.
[275] UN Commission on Human Rights, Res. 29 (XXXVI), 11 March 1980, § 5.
[276] UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11; Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.
[277] UN Commission on Human Rights, Res. 1991/67, 6 March 1991, § 5; Res. 1992/60, 3 March 1992, § 3.
[278] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1992/33, 17 February 1992, § 51.
[279] League of Arab States, Council, Res. 5414, 15 September 1994, § 4.

and full measure of protection prescribed by the Geneva Convention of 1949 on the protection of prisoners of war".[280]

316. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, "the international community has consistently demanded humane treatment for prisoners of war".[281]

317. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the status of combatants in non-international armed conflicts in which it stated that:

> Combatants and members of resistance movements who participate in non-international armed conflicts and who conform to the provisions of Article 4 of the Third Geneva Convention . . . should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war.[282]

318. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC I, II and III in the Middle East in which it called for "the total application" of these conventions by the parties to the conflict, in particular, "those provisions which relate to the treatment of prisoners of war".[283]

319. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "all persons deprived of their liberty for reasons related to the armed conflict are fully respected and protected".[284]

IV. Practice of International Judicial and Quasi-judicial Bodies

320. In its General Comment on Article 10 of the 1966 ICCPR in 1992, the HRC held that:

> Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[285]

[280] 20th International Conference of the Red Cross, Vienna, 2–9 October, 1965, Res. XXIV.
[281] 21st International Conference of the Red Cross, Istanbul, 6–13 September, 1969, Res. XI.
[282] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XVIII.
[283] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. IV.
[284] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(d).
[285] HRC, General Comment No. 21 (Article 10 ICCPR), 10 April 1992, § 4.

321. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.[286]

322. In 1982, in *Améndola Massiotti and Baritussio v. Uruguay*, the HRC found that:

The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay) disclose the following violations of the International Covenant on Civil and Political Rights, in particular of:

In the case of Carmen Améndola Massiotti

Articles 7 and 10 (1), because the conditions of her imprisonment amounted to inhuman treatment.[287]

323. In *Drescher Caldas v. Uruguay* in 1983, the HRC found that holding a detainee *incommunicado* for six weeks after arrest was incompatible with the standard of humane treatment required by Article 10(1) of the 1966 ICCPR.[288]

324. In *Martínez Machado v. Uruguay* in 1983, the HRC found a violation of Article 10(1) of the 1966 ICCPR because the detainee in question, arrested for security reasons, was held *incommunicado* for more than five months.[289]

325. In *Arzuaga Gilboa v. Uruguay* in 1985, the HRC found that holding the plaintiff *incommunicado* for a period of 15 days was a violation of Article 10(1) of the 1966 ICCPR.[290]

326. In 1998, in *Deidrick v. Jamaica*, the HRC found that:

With regard to the deplorable conditions of detention at St. Catherine's District Prison, the Committee notes that author's counsel has made precise allegations, related thereto, i.e. that the author is locked-up in his cell 23 hours a day, no mattress or bedding are provided, that there is lack of artificial light and no integral sanitation, inadequate medical services, deplorable food and no recreational facilities etc.

[286] HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 13(a).
[287] HRC, *Améndola Massiotti and Baritussio v. Uruguay*, Views, 26 July 1982, § 13.
[288] HRC, *Drescher Caldas v. Uruguay*, Views, 21 July 1983, § 14.
[289] HRC, *Martínez Machado v. Uruguay*, Views, 4 November 1983, p. 148.
[290] HRC, *Arzuaga Gilboa v. Uruguay*, Views, 1 November 1985, § 14.

All of this has not been contested by the State party, except in a general manner saying that these conditions affect all prisoners. In the Committee's opinion, the conditions described above, which affect the author directly are such as to violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to the Covenant. It finds that holding a prisoner in such conditions of detention constitutes inhuman treatment in violation of article 10, paragraph 1, and of article 7 [of the 1966 ICCPR].[291]

327. In 1999, in *Civil Liberties Organisation v. Nigeria (151/96)*, the ACiHPR stated that "deprivation of light, insufficient food and lack of access to medicine or medical care [of persons deprived of their liberty] also constitute violations of Article 5" of the ACHPR.[292]

328. In 1969, in the *Greek case*, the ECiHR concluded that accommodation in the Lakki camp violated article 3 of the 1950 ECHR because of "the conditions of gross overcrowding and its consequences"; the dormitories could hold 100 to 150 persons.[293]

329. In 1980, the IACiHR recommended that Argentina:

provide humanitarian treatment to those detained for reasons of security or public order, which treatment should in no case be inferior to that given to common prisoners, bearing in mind in both cases the internationally accepted Standard Minimum Rules for the Treatment of Prisoners.[294]

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

330. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "prisoners of war shall be spared and treated humanely".[295]

331. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC stated that all parties to the conflict must "give humane treatment to all captured enemy combatants".[296]

332. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "persons not participating or no longer participating in the hostilities, such as . . . prisoners of war . . ., must be respected and protected in all circumstances".[297]

[291] HRC, *Deidrick v. Jamaica*, Views, 9 April 1998, § 9.3.
[292] ACiHPR, *Civil Liberties Organisation v. Nigeria (151/96)*, Decision, 15 November 1999, § 27.
[293] ECiHR, *Greek case*, Report, 5 November 1969, §§ 14 and 21.
[294] IACiHR, Report on Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19, 11 April 1980, Conclusions, Section B, § 8.
[295] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 496.
[296] ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.
[297] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

333. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC enjoined the military and civilian authorities of the parties involved to take all the necessary steps to "treat all captured combatants humanely".[298]

334. In 1991, the President of the ICRC appealed personally to the highest authorities of the parties to a non-international armed conflict to treat captured enemy combatants humanely.[299]

335. In a press release in 1992, the ICRC urged the parties to the conflict in Nagorno-Karabakh "to ensure that combatants who surrender or who are no longer able to take part in the fighting are treated humanely".[300]

336. In a press release in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina to "treat all captured combatants humanely".[301]

337. In a press release in 1992, the ICRC appealed to the parties to the conflict in Bosnia and Herzegovina to treat captured combatants and any captured civilians humanely, and to instruct all combatants in the field to respect captured persons.[302]

338. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Afghanistan to "treat all captured combatants humanely".[303]

339. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan to ensure the protection of civilians and military victims, in compliance with the basic rules of IHL and, in particular, to treat all captured combatants humanely.[304]

340. In a communication to the press in 1993, the ICRC stated that its delegates in Bosnia and Herzegovina were once more witnessing "blatant violations of the basic principles of international humanitarian law" and cited as an example that "prisoners are not treated humanely".[305]

341. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia "to respect and protect all those not or no longer participating in hostilities, such as prisoners" and to "treat all prisoners humanely".[306]

[298] ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.
[299] ICRC archive documents.
[300] ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.
[301] ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.
[302] ICRC, Press Release No. 1725, Bosnia and Herzegovina: ICRC issues solemn appeal to all parties to the conflict, 13 August 1992.
[303] ICRC, Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules 14 August 1992; see also Press Release No. 1712, Afghanistan: ICRC appeal for respect for humanitarian rules, 5 May 1992.
[304] ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.
[305] ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.
[306] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

342. In a press release issued in 1994 during the non-international conflict in Yemen, the ICRC appealed to the parties to treat persons captured or arrested in connection with the conflict according to the principles and relevant provisions of international humanitarian law.[307]

343. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "persons not or no longer taking part in hostilities, such as . . . prisoners . . . shall be protected and respected in all circumstances, regardless of the party to which they belong". It further stated that "captured combatants and persons who have laid down their arms no longer represent any danger and must be respected; . . . subjecting them or threatening to subject them to ill-treatment . . . is a violation of international humanitarian law at all times".[308]

344. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "persons not participating or no longer participating in confrontations, such as . . . prisoners . . . shall be protected and respected in all circumstances". It further states that combatants and other persons who are captured, and those who have laid down their arms, shall not, in particular, be "ill-treated".[309]

345. In a press release issued in 1994 regarding the situation in Bihac (Bosnia and Herzegovina), the ICRC appealed to the parties to respect IHL and reminded them that captured combatants must be treated humanely.[310]

346. In a press release in 1994, the ICRC requested all concerned parties to the conflict in Chechnya to treat humanely all captured combatants and civilians detained in connection with the conflict.[311]

347. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey's military operations in northern Iraq "to accord humane treatment to captured combatants and arrested civilians".[312]

348. In a communication to the press in 1996, the ICRC appealed to the parties to the conflict in Chechnya to ensure that all captured combatants and civilians were treated humanely.[313]

[307] ICRC, Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.
[308] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.
[309] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.
[310] ICRC, Press Release No. 1792, Bihac: urgent appeal, 26 November 1994.
[311] ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.
[312] ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and Northern Iraq, 22 March 1995.
[313] ICRC, Communication to the Press No. 96/10, Chechen conflict: ICRC Appeal, 8 March 1996.

VI. Other Practice

349. In 1979, in a letter to the ICRC; an armed group confirmed its commitment to IHL and to "grant humane treatment to prisoners of war".[314]
350. On several occasions in the context of the conflict in Lebanon, Amnesty International called upon both the governmental party and the militias to guarantee the physical safety of all detainees.[315]
351. In 1990, an armed opposition group issued strict orders to treat all prisoners "correctly".[316]
352. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "all persons deprived of their liberty shall be treated humanely".[317]
353. In 1996, a separatist entity proposed good treatment of detainees on the basis of reciprocity, that is, it would agree to respect international standards on the treatment of prisoners if the ICRC could prove that the other party did the same.[318]
354. According to the Report on the Practice of Indonesia, the leader of an armed opposition group during the insurgencies of the 1950s and 1960s in Western Java stated that the Indonesian armed forces treated the rebels humanely.[319]

B. Non-discrimination

General

I. Treaties and Other Instruments

Treaties
355. Article 1(3) of the 1945 UN Charter provides that one of the purposes of the UN is "to achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".
356. Common Article 3 of the 1949 Geneva Conventions provides that:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness,

[314] ICRC archive document.
[315] Amnesty International, *Annual Report 1984*, London, pp. 405-406; *Annual Report 1988*, London, p. 308; *Annual Report 1989*, London, p. 298; *Annual Report 1991*, London, p. 170.
[316] ICRC archive document.
[317] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4(4), *IRRC*, No. 282, 1991, p. 332.
[318] ICRC archive document.
[319] Report on the Practice of Indonesia, 1997, Chapter 5.7.

wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

357. Article 14 of the 1950 ECHR stipulates that the rights and freedoms contained in the Convention shall be secured "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Article 15(1) provides that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

358. Article 2 of the 1965 Convention on the Elimination of Racial Discrimination provides that "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races". Article 5 provides that State parties undertake "to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law".

359. Article 2(1) of the 1966 ICCPR stipulates that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

360. Article 4(1) of the 1966 ICCPR provides that during war, public danger and other emergencies, in which derogations from the obligations of the Convention are allowed, a State party is nonetheless not permitted to take measures "inconsistent with its other obligations under international law" and involving "discrimination on the ground of race, colour, sex, language, religion or social origin".

361. Article 26 of the 1966 ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

362. Article 2(2) of the 1966 ICESCR provides that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any

kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

363. Article 3 of the 1966 ICESCR provides that "the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".

364. Article 1 of the 1969 ACHR provides that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

365. Article 27 of the 1969 ACHR provides that during war, public danger and other emergencies, in which derogations from the obligations of the Convention are allowed, a State party is nonetheless not permitted to take measures "inconsistent with its other obligations under international law" and involving "discrimination on the ground of race, color, sex, language, religion or social origin".

366. The preamble to AP I states that:

> The provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

367. Article 9(1) AP I states that the provisions of the Protocol shall apply "without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria". Article 9 AP I was adopted by consensus.[320]

368. Article 75(1) AP I provides that persons who are in the power of a party shall be treated humanely and enjoy the protection provided "without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria". Article 75 AP I was adopted by consensus.[321]

369. Article 2(1) AP II provides that "this Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria". Article 2 AP II was adopted by consensus.[322]

[320] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.
[321] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[322] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 85.

370. Article 4(1) AP II specifies that "all persons who do not take a direct part or who have ceased to take part in hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction". Article 4 AP II was adopted by consensus.[323]

371. Article 2 of the 1979 Convention on the Elimination of Discrimination against Women provides that "State Parties condemn discrimination against women in all its forms".

372. Article 2 of the 1981 ACHPR provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

373. Article 2(1) of the 1989 Convention on the Rights of the Child provides that:

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

374. Under Article 7(1)(h) of the 1998 ICC Statute, the following is a crime against humanity subject to the jurisdiction of the Court, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

> Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

375. Article 1 of the 2000 Protocol 12 to the 1950 ECHR provides that:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Other Instruments

376. Article 2 of the 1948 UDHR provides that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any

[323] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

377. Article 7 of the 1948 UDHR provides that "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

378. According to Article 1 of the 1990 Cairo Declaration on Human Rights in Islam, "all men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations".

379. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

380. In paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

381. Article 18(e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "persecution on political, racial, religious or ethnic grounds" constitutes a crime against humanity.

382. Article 2(10) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the "right to equal protection of the law and against any form of discrimination on the basis of race, ethnicity, gender, belief, age, physical condition or civil status and against any incitement to such discrimination". Article 4(1) of Part IV of the Agreement stipulates that "persons *hors de combat* and those who do not take a direct part in hostilities . . . shall be . . . treated . . . without any adverse distinction founded on race, color, faith, sex, birth, social standing or any other similar criteria".

383. Section 7.1 of the 1999 UN Secretary-General's Bulletin provides that:

> Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely and without any adverse distinction based on race, sex, religious convictions or any other ground.

384. Article 21 of the 2000 EU Charter of Fundamental Rights prohibits "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of national minority, property, birth, disability, age or sexual orientation".

II. National Practice

Military Manuals

385. Argentina's Law of War Manual (1969) restates the provisions of common Article 3 of the 1949 Geneva Conventions.[324]

386. Argentina's Law of War Manual (1989) stipulates that the provisions of the chapter regarding non-international armed conflicts are applicable "without any adverse distinction for reasons of race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other analogous condition or criteria, to persons affected by an armed conflict".[325]

387. Australia's Defence Force Manual states that, with regard to non-international armed conflicts, "the general rule is that persons are to be treated humanely without adverse discrimination on the ground of race, sex, language, religion, political discrimination or similar criteria".[326] The manual stipulates that inhabitants of an occupied territory "must be treated with the same consideration, without any adverse distinction based, in particular, on race, religion or political opinion".[327]

388. Belgium's Law of War Manual states, with reference to common Article 3 of the 1949 Geneva Conventions, that in internal armed conflicts "persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat* must be treated . . . without any adverse distinction".[328]

389. Benin's Military Manual provides that persons placed *hors de combat* "shall in any circumstances be protected . . . without any adverse distinction".[329]

390. The Military Instructions of Bosnia and Herzegovina provides that the wounded and sick *hors de combat* must be treated without any discrimination.[330]

391. Burkina Faso's Disciplinary Regulations provides that it is a custom of war to treat all persons *hors de combat* humanely and without distinction.[331]

392. Cameroon's Disciplinary Regulations and Instructors' Manual provide that each soldier must treat "all persons placed *hors de combat* without distinction".[332]

393. Canada's LOAC Manual establishes non-discrimination as an operational principle of the law of armed conflict, stating that "the LOAC is to be applied without any adverse distinction founded on race, colour, religion or faith,

[324] Argentina, *Law of War Manual* (1969), § 8.001.
[325] Argentina, *Law of War Manual* (1989), § 7.02.
[326] Australia, *Defence Force Manual* (1994), § 945.
[327] Australia, *Defence Force Manual* (1994), § 1218.
[328] Belgium, *Law of War Manual* (1983), p. 17 and Chapter IX, § 2.
[329] Benin, *Military Manual* (1995), Fascicule II, p. 4.
[330] Bosnia and Herzegovina, *Military Instructions* (1992), Item 14, § 1.
[331] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).
[332] Cameroon, *Disciplinary Regulations* (1975), Article 31; *Instructors' Manual* (1992), § 421(1).

gender, birth or wealth, or any other similar criteria".[333] The manual restates common Article 3 of the 1949 Geneva Conventions and specifies that:

> AP II applies without any adverse distinction founded on race, colour, gender, language, religion, or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.
>
> AP II provides that all persons not participating in the conflict or who have ceased to do so are entitled to respect ... and to be treated ... without adverse distinction.[334]

394. Colombia's Circular on Fundamental Rules of IHL provides that "persons placed *hors de combat* or who do not participate directly in the hostilities ... shall be protected ... without any adverse distinction".[335]

395. Colombia's Soldiers' Manual and Instructors' Manual provide that:

> All persons are born free and equal before the law, receive the same protection and treatment from the authorities and possess the same rights, freedoms and opportunities without any discrimination based on sex, race, family or nationality, origin, language, religion or political or philosophical opinion.[336]

396. Congo's Disciplinary Regulations stipulates that persons placed *hors de combat* "shall be treated without distinction".[337]

397. El Salvador's Human Rights Charter of the Armed Forces provides that "according to the law, we are all equal, without distinction based on sex, race, ideology or religion".[338]

398. France's Disciplinary Regulations as amended exhorts combatants to "treat humanely and without distinction all persons *hors de combat*".[339]

399. France's LOAC Manual restates Article 75(1) AP I.[340] It further emphasises that one of the three main principles common to IHL and human rights is the principle of non-discrimination, according to which "individuals are treated without any distinction based on race, sex, nationality, philosophical, religious or political opinion".[341]

400. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that:

> As a general policy ... all individuals falling in the power of a party to a conflict should, at a minimum, be treated in accordance with the principles of humanity, without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.[342]

[333] Canada, *LOAC Manual* (1999), p. 2-2, § 14.
[334] Canada, *LOAC Manual* (1999), p. 17-2, §§ 10–12, p. 17-3, §§ 18 and 19.
[335] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 1.
[336] Colombia, *Soldiers' Manual* (1999), p. 12; *Instructors' Manual* (1999), p. 12.
[337] Congo, *Disciplinary Regulations* (1986), Article 32.
[338] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 7.
[339] France, *Disciplinary Regulations as amended* (1975); Article 9 *bis*.
[340] France, *LOAC Manual* (2001), p. 51.
[341] France, *LOAC Manual* (2001), pp. 51–52.
[342] Report on the Practice of Israel, 1997, Chapter 5.6, referring to *Law of War Booklet* (1986), p. 12.

401. Kenya's LOAC Manual states that "persons not involved in the fighting because they are not taking part in hostilities, or because they are wounded or have surrendered, or have been detained, must be treated . . . without adverse discrimination".[343]

402. Madagascar's Military Manual states that one of the seven fundamental rules of IHL is that "persons placed *hors de combat* and those who do not take a direct part in hostilities . . . shall in all circumstances be protected and treated humanely, without any adverse distinction".[344]

403. Mali's Army Regulations provides that the refusal to treat without distinction all persons *hors de combat* is a serious breach of its rules.[345]

404. Morocco's Disciplinary Regulations provides that as a custom of war, soldiers are required to treat without distinction all regular combatants placed *hors de combat*.[346]

405. The Military Manual of the Netherlands provides that protected persons shall be treated humanely "without adverse distinction based on race, colour, sex, language, religion or belief, political or other opinion, nationality or social origin, wealth, birth or other status, or on any other similar criteria".[347] With respect to non-international armed conflict, the manual restates the principle of non-discrimination contained in common Article 3 of the 1949 Geneva Conventions and Article 4 AP II.[348]

406. The Military Handbook of the Netherlands provides in respect of protected persons that "any discrimination based on race, religion, sex . . . is prohibited".[349]

407. New Zealand's Military Manual states that the principle of non-discrimination is one of the key principles of the law of armed conflict. It states that "the law is to be applied without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".[350] It further provides that "all protected persons must be treated with the same consideration, without any adverse distinction based, in particular, on race, religion or political opinion".[351] The manual also emphasises the principle of non-discrimination with regard to non-international armed conflicts, and provides that AP II "is to apply without any adverse distinction founded on race, colour, sex, language, religion or other opinion, national or social origin, wealth, birth or other status or any other similar criteria". It adds that "all persons not participating in the conflict or who have ceased so to do are entitled, whether under restriction or not, to respect for their persons, honour and

[343] Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6.
[344] Madagascar, *Military Manual* (1994), p. 91, Rule 1.
[345] Mali, *Army Regulations* (1979), Article 36.
[346] Morocco, *Disciplinary Regulations* (1974), Article 25(1).
[347] Netherlands, *Military Manual* (1993), pp. VIII-2/VIII–3.
[348] Netherlands, *Military Manual* (1993), pp. XI-1 and XI-4.
[349] Netherlands, *Military Handbook* (1995), p. 7-38.
[350] New Zealand, *Military Manual* (1992), § 206.
[351] New Zealand, *Military Manual* (1992), § 1321.2.

convictions, and religious practices and are, in all circumstances, to be treated humanely and without adverse distinction.[352]

408. Nicaragua's Military Manual reproduces common Article 3 of the 1949 Geneva Conventions.[353]

409. Peru's Human Rights Charter of the Armed Forces states that non-discrimination, i.e. respect for all without any distinction on the grounds of nationality, race, religion, social condition or political opinion, is one of the three common principles of the Geneva Conventions which represent the minimum level of protection to which every human being is entitled.[354]

410. Senegal's Disciplinary Regulations provides that all persons placed *hors de combat* must be treated without distinction.[355]

411. Senegal's IHL Manual restates common Article 3 of the 1949 Geneva Conventions.[356]

412. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.[357]

413. Togo's Military Manual provides that persons placed *hors de combat* "shall in any circumstances be protected ... without any adverse distinction".[358]

414. The UK LOAC Manual incorporates the provisions of common Article 3 of the 1949 Geneva Conventions.[359]

415. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.[360] It provides that the wounded and sick in the hands of one party to the conflict shall be cared for "without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria".[361] The manual also states that:

> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.[362]

416. The US Air Force Pamphlet provides that the provisions of common Article 3 of the 1949 Geneva Conventions "insure humane treatment to civilians and others who are *hors de combat*, without regard to race, colour, religion, sex, birth, or wealth".[363] It also stipulates that under GC IV, "any distinction in treatment based upon race, religion or political opinion is specially

[352] New Zealand, *Military Manual* (1992), § 1810.
[353] Nicaragua, *Military Manual* (1996), Article 6.
[354] Peru, *Human Rights Charter of the Armed Forces* (1994), § 24.
[355] Senegal, *Disciplinary Regulations* (1990), Article 34(1).
[356] Senegal, *IHL Manual* (1999), p. 4.
[357] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[358] Togo, *Military Manual* (1996), Fascicule II, p. 4.
[359] UK, *LOAC Manual* (1981), Section 12, p. 42, § 2(a).
[360] US, *Field Manual* (1956), § 11.
[361] US, *Field Manual* (1956), § 215.
[362] US, *Field Manual* (1956), § 266.
[363] US, *Air Force Pamphlet* (1976), § 11-3.

forbidden".[364] The Pamphlet quotes Article 1 of the 1945 UN Charter and adds that the set of documents elaborated by the UN and the Geneva Conventions safeguard such fundamental freedoms as "freedom from discrimination based on race, sex, language, or religion".[365]

417. The US Instructor's Guide restates the provisions of common Article 3 of the 1949 Geneva Conventions.[366]

National Legislation

418. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including persecution.[367]

419. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[368]

420. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[369]

421. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.[370]

422. Croatia's Criminal Code provides for the punishment of "any person who, on the basis of race, sex, skin colour, nationality or ethnic origin, violates basic human rights and freedoms accepted by the international community".[371]

423. Finland's Revised Penal Code, under the heading "Offences against humanity", provides for the punishment of "any persons who, in their private or public functions, discriminate on grounds of race, national or ethnic origin, language, colour, sex, age, family ties, sexual preferences, state of health, religion, political orientation, political or industrial activity or other comparable circumstance".[372]

424. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of common Article 3 and of AP I, including violations of Articles 9(1) and 75(1) AP I, as well as any

[364] US, *Air Force Pamphlet* (1976), § 14-4.
[365] US, *Air Force Pamphlet* (1976), § 11-4.
[366] US, *Instructor's Guide* (1985), p. 8.
[367] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.20.
[368] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[369] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[370] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
[371] Croatia, *Criminal Code* (1997), Article 174.
[372] Finland, *Revised Penal Code* (1995), Chapter 11, Section 9.

"contravention" of AP II, including violations of Articles 2(1) and 4(1) AP II, are punishable offences.[373]

425. Israel's Nazis and Nazi Collaborators (Punishment) Law includes "persecution on national, racial, religious or political grounds" in its definition of crimes against humanity.[374]

426. Kenya's Constitution provides that every person in Kenya is entitled to the fundamental rights and freedoms of the individual whatever his or her race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.[375]

427. Under the International Crimes Act of the Netherlands, "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this subsection or any other crime as referred to in this Act", is a crime against humanity. Persecution is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".[376]

428. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crime defined in Article 7(1)(h) of the 1998 ICC Statute.[377]

429. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[378]

430. Poland's Penal Code provides for the repression of incitement and use of violence or unlawful threat against a group or a particular person because he or she belongs to a particular racial group.[379]

431. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(h) of the 1998 ICC Statute.[380]

432. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(h) of the 1998 ICC Statute.[381]

433. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions are war crimes.[382]

[373] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[374] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).
[375] Kenya, *Constitution* (1992), Article 70.
[376] Netherlands, *International Crimes Act* (2003), Articles 4(1)(h) and 4(2)(c).
[377] New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).
[378] Norway, *Military Penal Code as amended* (1902), § 108.
[379] Poland, *Penal Code* (1997), Article 119.
[380] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[381] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[382] US, *War Crimes Act as amended* (1996), Section 2441(c).

434. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as "persecution on political, racial, national or religious grounds".[383]

435. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as "persecution on political, racial, national or religious grounds".[384]

436. The Penal Code as amended of the SFRY (FRY) provides that racial and other discrimination is a war crime.[385]

National Case-law

437. No practice was found.

Other National Practice

438. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that, during the Iran–Iraq War, members of the opposing forces who were *hors de combat* were treated without distinction based on military rank or category.[386]

439. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[387]

440. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

> We support in particular the fundamental guarantees contained in article 75 [AP I], such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favourable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria.[388]

441. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3 [of the 1949 Geneva Conventions]".[389]

383 US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

384 US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(*b*).

385 SFRY (FRY), *Penal Code as amended* (1976), Article 154.

386 Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.1.

387 Report on the Practice of Jordan, 1997, Chapter 5.

388 US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

389 Report on US Practice, 1997, Chapter 5.3.

442. A memorandum on the responsibilities and obligations applicable to contacts with the local population issued by the Ministry of Defence of a State engaged in an international military operation in 1992 included a prohibition on discrimination founded on race, religion, sex or any other similar criteria.[390]

III. Practice of International Organisations and Conferences

United Nations

443. In a resolution on the former Yugoslavia adopted in 1995, the UN Sub-Commission on Human Rights demanded that "those who have engaged in incitement to ethnic or religious hatred be brought to justice and held individually accountable for their acts".[391]

444. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[392]

Other International Organisations

445. In an opinion adopted in 1995 in the context of Turkey's military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe observed that "ICRC efforts have been directed towards a pragmatic approach, whose operational objectives are . . . to assess on the spot the medical and sanitary needs of the wounded and sick, civilian or combatant, regardless of their origin".[393]

International Conferences

446. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the elimination of racial discrimination in which it condemned "all forms of racism and racial discrimination at all levels".[394]

447. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . all forms of racism, racial discrimination and . . . discrimination against women".[395]

[390] ICRC archive document.
[391] UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 9.
[392] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[393] Council of Europe, Parliamentary Assembly, Doc. 7295, 25 April 1995, §§ 10 and 11.
[394] 22nd International Conference of the Red Cross, Teheran, 8-15 November 1973, Res. X.
[395] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

IV. Practice of International Judicial and Quasi-judicial Bodies

448. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[396]

449. In its General Comment on non-discrimination under the 1966 ICCPR in 1989, the HRC held that:

> The Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[397]

450. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

> According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (article 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.[398]

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

451. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "any discriminatory distinction of treatment is prohibited if based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria".[399]

452. At its Teheran Session in 1973, the Council of Delegates adopted a resolution on action in the struggle against racism and racial discrimination in which it noted that "racism and racial discrimination constitute a serious violation of basic human rights" and of the Red Cross principle of impartiality. The resolution recalled the "provisions of the Geneva Conventions forbidding

396 ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.
397 HRC, General Comment No. 18 (Non-discrimination), 10 November 1989, § 7.
398 HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 8.
399 Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 199.

any discrimination of a racial character" and stressed the necessity "to engage still more actively in the struggle for the elimination of racism and racial discrimination".[400]

453. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that Transitional Government in Salisbury "allow the ICRC to provide medical care without discrimination to all wounded and sick war victims".[401]

454. In a communication to the press issued in 1993, the ICRC stated that its delegates in Bosnia and Herzegovina were once more witnessing "blatant violations of the basic principles of international humanitarian law" and cited the "adverse discrimination . . . practiced in the medical care given to sick and wounded civilians and combatants" as an example.[402]

455. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to treat without any distinction non-combatants and persons *hors de combat*. It recalled the Geneva Conventions and AP I.[403]

VI. Other Practice

456. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (f) systematic racial discrimination".[404]

457. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "all persons, even if their liberty has been restricted . . . shall in all circumstances be treated . . . without any adverse distinction".[405]

458. The SPLM Constitution provides that a member of the SPLM has the duty and obligation to "combat racism, tribalism, political sectarianism, religious intolerance and all other forms of discrimination in the New Sudan".[406]

[400] International Red Cross and Red Crescent Movement, Council of Delegates, Teheran, 8–15 November 1973, Resolution on action in the struggle against racism and racial discrimination.

[401] ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 6, *IRRC*, No. 209, 1979, p. 88.

[402] ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.

[403] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1 de Enero de 1994, 3 January 1994.

[404] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(f).

[405] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(1), *IRRC*, No. 282, 1991, p. 331.

[406] SPLM, Constitution, March 1996, Article 7(2).

Civilians

Note: *For practice concerning non-discrimination towards returning displaced persons, see Chapter 38, section D.*

I. Treaties and Other Instruments

Treaties

459. Article 13 GC IV provides that the general protection of populations against certain consequences of war is applicable "without any adverse distinction based, in particular, on race, nationality, religion or political opinion".

460. Article 27, third paragraph, GC IV stipulates that:

> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

461. Article 54, first paragraph, GC IV provides that, should judges and public officials in the occupied territories abstain from fulfilling their functions for reasons of conscience, "the occupying power may not . . . take any measures of coercion or discrimination against them".

462. Article 69(1) AP I provides that the occupying power shall provide food, medical and other supplies necessary for the survival of the civilian population in the occupied territory "without any adverse distinction". Article 69 AP I was adopted by consensus.[407]

463. Article 70(1) AP I provides that the relief actions of the occupying power and of relief societies are to be "conducted without any adverse distinction". Article 70 AP I was adopted by consensus.[408]

464. Article 18(2) AP II states that the relief actions of the occupying power and of relief societies are to be "conducted without any adverse distinction". Article 18 AP II was adopted by consensus.[409]

Other Instruments

465. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that all civilians shall be treated in accordance with Article 75 AP I".

466. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "in the treatment of the civilian population, there shall be no distinction founded on race, religion or faith, or any other similar criteria".

467. Under Article 5(h) of the 1993 ICTY Statute, "persecution on political, racial and religious grounds", "when committed in armed conflict, whether

[407] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.
[408] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.
[409] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

international or internal in character, and directed against any civilian population", constitutes a crime against humanity.

468. Under Article 3(h) of the 1994 ICTR Statute, "persecution on political, racial and religious grounds", "when committed as part of a widespread and systematic attack against any civilian population", constitutes a crime against humanity.

II. National Practice

Military Manuals

469. Argentina's Law of War Manual restates the provisions of Article 75(1) AP I.[410]

470. Canada's LOAC Manual states that in occupied territories, "protected persons must receive equal treatment without any adverse distinction based on race, religion, or political opinion".[411] It also stipulates that Article 75 AP I "provides that all persons in the power of a party to the conflict are entitled to at least a humane treatment without adverse discrimination on grounds of race, gender, language, religion, political discrimination or similar criteria".[412] With regard to non-international armed conflicts, the manual states that "AP II applies without any adverse distinction founded on race, colour, gender, language, religion or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria".[413]

471. Canada's Code of Conduct provides that all civilians must be treated humanely and that "subject to favourable considerations based on sex, health or age, [civilians] must be treated with the same consideration and without any adverse distinction based in particular on race, religion or political opinion".[414]

472. Germany's Military Manual provides that, in case of occupation, "any discrimination for reasons of race, nationality, language, religious convictions and practices, political opinion, social origin or position or similar considerations is unlawful".[415]

473. Italy's IHL Manual provides that, in occupied territories, civilians shall be treated without any distinction based on sex, race, religion or political opinion.[416]

474. New Zealand's Military Manual provides that "protected persons must receive equal treatment without any adverse distinction based on race, religion or political opinion".[417]

[410] Argentina, *Law of War Manual* (1989), § 4.15.
[411] Canada, *LOAC Manual* (1999), p. 11-4, § 30.
[412] Canada, *LOAC Manual* (1999), p. 11-7, § 63.
[413] Canada, *LOAC Manual* (1999), p. 17-3, § 18.
[414] Canada, *Code of Conduct* (2001), Rule 4, § 2.
[415] Germany, *Military Manual* (1992), § 533.
[416] Italy, *IHL Manual* (1991), Vol. I, § 41(b).
[417] New Zealand, *Military Manual* (1992), §§ 1114 and 1137.

475. Nicaragua's Military Manual provides that civilian persons "benefit from the fundamental guarantees without any discrimination".[418]
476. Sweden's IHL Manual states with regard to civilians within an occupied area that "there may be no discrimination on racial, religious or political grounds or the like".[419]
477. Switzerland's Basic Military Manual provides that "all civilian persons shall benefit from an equal treatment. No one can be disadvantaged because of race, colour, language, religion, political or other opinions, social origin, faith, sex, wealth or any other circumstance".[420]
478. The UK Military Manual prohibits discrimination in the treatment of protected civilians and also stipulates that non-discrimination also applies in occupied territories.[421]
479. The UK LOAC Manual prohibits discrimination in the treatment of protected civilians.[422]
480. The US Field Manual restates Article 13 GC IV.[423]
481. The US Air Force Pamphlet refers to Article 27 GC IV and provides that "any distinction in treatment based upon race, religion or political opinion is specifically forbidden".[424]

National Legislation
482. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, "civilian persons belonging to the adverse party, who are in the hands of the Azerbaijan Republic, are respected and treated humanely without any adverse distinction founded on race, sex, language, religion, national and social origin or any other similar criteria".[425]
483. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[426]
484. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 13, 27 and 54 GC IV, and of AP I, including violations of Articles 69(1) and 70(1) AP I, as well as any "contravention" of AP II, including violations of Article 18(2) AP II, are punishable offences.[427]

418 Nicaragua, *Military Manual* (1996), Article 14(31).
419 Sweden, *IHL Manual* (1991), Section 6, p. 122.
420 Switzerland, *Basic Military Manual* (1987), Article 148.
421 UK, *Military Manual* (1958), §§ 39, 133 and 547.
422 UK, *LOAC Manual* (1981), Section 9, p. 35, § 9.
423 US, *Field Manual* (1956), § 252.
424 US *Air Force Pamphlet* (1976), § 14-4.
425 Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 14.
426 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
427 Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

485. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[428]

National Case-law
486. No practice was found.

Other National Practice
487. According to the Report on the Practice of China, China protects foreigners in China, provided that they obey local laws, and makes no distinction between persons on the basis of whether they are from a country that is neutral or belligerent in relation to China.[429]

III. Practice of International Organisations and Conferences

United Nations
488. In a resolution on Lebanon adopted in 1982, the UN Security Council called for "respect for the rights of the civilian populations without any discrimination".[430]

Other International Organisations
489. No practice was found.

International Conferences
490. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

491. In its judgement in the *Cyprus case* in 2001, the ECtHR found, in relation to living conditions of Greek Cypriots in the Karpas region of northern Cyprus, that there had been a violation of Article 3 of the 1950 ECHR in that the Greek Cypriots had been subjected to discrimination amounting to degrading treatment.[431]

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

492. No practice was found.

[428] Norway, *Military Penal Code as amended* (1902), § 108.
[429] Report on the Practice of China, 1997, Chapter 5.
[430] UN Security Council, Res. 513, 4 July 1982, § 1.
[431] ECtHR, *Cyprus case*, Judgement, 10 May 2001, § 311.

VI. Other Practice

493. No practice was found.

Wounded and sick

Note: *For practice concerning distinction among the wounded and sick on medical grounds, see Chapter 34, section B.*

I. Treaties and Other Instruments

Treaties

494. Article 12, second paragraph, GC I provides that the protection due to wounded and sick members of the armed forces in the field shall be granted "without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria".

495. Article 12, second paragraph, GC II provides that the protection due to wounded, sick and shipwrecked members of the armed forces at sea shall be granted "without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria".

496. Article 30, first paragraph, GC II provides that military hospital ships and the hospital ships of National Red Cross Societies of the parties to the conflict and of neutral States and small craft employed for coastal rescue operations "shall afford relief and assistance to the wounded and sick and the shipwrecked without distinction of nationality".

Other Instruments

497. Paragraphs 1 and 2 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provide that "all wounded and sick" and "all wounded and sick at sea" shall be treated in accordance with GC I.

498. Section 9.1 of the 1999 UN Secretary-General's Bulletin provides that "members of the armed forces and other persons in the power of the United Nations force who are wounded or sick . . . shall . . . receive the medical care and attention required by their condition, without adverse distinction".

II. National Practice

Military Manuals

499. Argentina's Law of War Manual states that the wounded and sick "shall be treated and cared for . . . without any adverse distinction based on sex, race, nationality, religion, political opinions or on any other similar criteria".[432]

[432] Argentina, *Law of War Manual* (1969), § 3.001.

500. Australia's Commanders' Guide provides with regard to the wounded and sick that "no regard is to be paid to the nationality of the patient".[433]

501. Australia's Defence Force Manual provides that "while there is no absolute obligation to accept civilian wounded and sick, once civilian patients have been accepted, discrimination against them, on any grounds other than medical, is not permissible". Concerning wounded, sick and shipwrecked combatants, the manual states that they "are to be protected and respected, treated humanely . . . and cared for by any detaining power without any adverse discrimination".[434]

502. Belgium's Field Regulations provides that wounded and sick soldiers who have laid down their arms shall be treated without distinction based on nationality.[435]

503. Belgium's Teaching Manual for Soldiers provides that during search and rescue operations, "no difference shall be made between fellow or enemy wounded and sick".[436]

504. Benin's Military Manual instructs soldiers to "collect and care for the wounded and sick, whether they are friends or enemies".[437]

505. Bosnia and Herzegovina's Military Instructions provides that the wounded and sick must be treated without any discrimination.[438]

506. Canada's LOAC Manual provides that "regardless of the party to which they belong, or whether they are combatants or non-combatants, the wounded, sick and shipwrecked are to be respected and protected without any adverse discrimination".[439]

507. Croatia's military manuals provide that wounded and sick persons shall be cared for and protected without distinction.[440]

508. The Military Manual of the Dominican Republic provides that enemy sick and wounded and wounded and sick enemy captives shall receive the same medical care as for one's own troops.[441]

509. Ecuador's Naval Manual provides that wounded and sick members of the armed forces shall be cared for without any distinction with regard to nationality.[442]

510. France's LOAC Summary Note states that "captured combatants whether they are wounded, sick or shipwrecked shall be cared for . . . and benefit from the same treatment as friendly military personnel".[443]

[433] Australia, *Commanders' Guide* (1994), § 622.
[434] Australia, *Defence Force Manual* (1994) §§ 987 and 990.
[435] Belgium, *Field Regulations* (1964), Article 23.
[436] Belgium, *Teaching Manual for Soldiers* (undated), p. 17.
[437] Benin, *Military Manual* (1995), Fascicule II, p. 18.
[438] Bosnia and Herzegovina, *Military Instructions* (1992), Item 14, § 1.
[439] Canada, *LOAC Manual* (1999), p. 9-2, §§ 19–20.
[440] Croatia, *LOAC Compendium* (1991), p. 45; *Soldiers' Manual* (1992), p. 3; *Commanders' Manual* (1992), Rule No. 71, p. 10; *Instructions on Basic Rules of IHL* (1993), p. 11, Articles 1–3.
[441] Dominican Republic, *Military Manual* (1980), p. 6.
[442] Ecuador, *Naval Manual* (1989), § 11.4.
[443] France, *LOAC Summary Note* (1992), § 2.1

511. Germany's Military Manual states that in conflicts at sea, "hospital ships shall afford assistance to all wounded, sick and shipwrecked without distinction of nationality".[444]
512. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that:

The IDF has a strict policy [according to which] all wounded and sick shall be treated, respected and protected, irrespective of whichever party they belong to, and without any distinction based upon race, colour, sex, language, religion, belief, political or other opinion, national or social origin, wealth, birth or other similar criteria.[445]

513. Italy's IHL Manual provides that "the wounded and sick enemy will receive the same care as members of national forces".[446]
514. Morocco's Disciplinary Regulations states that wounded and sick persons shall be protected without distinction.[447]
515. The Military Manual of the Netherlands provides that the wounded and sick "must be treated without any distinction based on race, skin colour, sex, language, religion, political beliefs, nationality, birth or any other criteria".[448]
516. The IFOR Instructions of the Netherlands instructs troops to take care of the wounded whether they are friends or enemies.[449]
517. Nicaragua's Military Manual provides that:

People who do not participate directly in hostilities, including persons placed *hors de combat* because . . . of sickness or wounds . . . shall be treated in all circumstances with humanity without any adverse distinction based on race, colour, language, religion or belief, sex, birth, economic status or any other similar criteria or situation.[450]

518. Nigeria's Operational Code of Conduct states that wounded and sick persons shall be protected without distinction.[451]
519. Nigeria's Manual on the Laws of War provides that no discrimination with regard to the wounded or sick "based on sex, race, nationality, religion, political belief, or any other similar criteria" is permitted.[452]
520. Spain's LOAC Manual states that wounded and sick prisoners and one's own troops shall be evacuated under the same conditions.[453]

444 Germany, *Military Manual* (1992), § 1057.
445 Report on the Practice of Israel, 1997, Chapter 5.1, referring to *Law of War Booklet* (1986), p. 16.
446 Italy, *IHL Manual* (1991), Vol. IV, Article 93.
447 Morocco, *Disciplinary Regulations* (1974), Article 25.
448 Netherlands, *Military Manual* (1993), p. VI-1, § 2 and p. VI-2.
449 Netherlands, *IFOR Instructions* (1995), § 1.
450 Nicaragua, *Military Manual* (1996), Article 6.
451 Nigeria, *Operational Code of Conduct* (1967), § 4(l).
452 Nigeria, *Manual on the Laws of War* (undated), § 35.
453 Spain, *LOAC Manual* (1996), Vol. I, Article 7.3.a.(11).

521. Switzerland's military manuals provide that medical personnel shall collect and care for enemy wounded, as well as those of friendly forces.[454]
522. Togo's Military Manual instructs soldiers to "collect and care for the wounded and sick, whether they are friends or enemies". It recalls the duties of States which have ratified the Geneva Conventions, *inter alia*, "to care for friends or enemies without distinction".[455]
523. The UK Military Manual states that the wounded and sick "must be cared for . . . without adverse distinction based on sex, race, nationality, religion, political belief or any other similar test".[456]
524. The UK LOAC Manual provides that, in the event of a civil war, "persons out of the fighting . . . because they are wounded must be treated . . . without any adverse discrimination".[457]
525. The US Field Manual provides that sick and wounded captives shall be provided with the same medical care as friendly sick and wounded. It also restates Article 12 GC II.[458]
526. The US Air Force Pamphlet states that "one of the important principles relating to wounded and sick requires medical care and humane treatment to friend and foe without distinction founded on sex, race, nationality, religion, political opinions or similar criteria".[459]
527. The US Naval Handbook provides that "wounded and sick personnel falling into enemy hands must be . . . cared for without adverse distinction".[460]
528. The YPA Military Manual of the SFRY (FRY) states that there is an obligation to treat the wounded and sick humanely, without any discrimination.[461]

National Legislation
529. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[462]
530. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 GC I, 12 and 30 GC II, is a punishable offence.[463]
531. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

[454] Switzerland, *Military Manual* (1984), p. 15; *Teaching Manual* (1986), p. 43; *Basic Military Manual* (1987), Article 70.
[455] Togo, *Military Manual* (1996), Fascicule II, p. 18 and Fascicule I, p. 11.
[456] UK, *Military Manual* (1958), § 339.
[457] UK, *LOAC Manual* (1981), Section 12, p. 42, § 2(a).
[458] US, *Field Manual* (1956), §§ 92 and 215.
[459] US, *Air Force Pamphlet* (1976), § 3-4(d), see also §§ 12-2(a) and 13-2.
[460] US, *Naval Handbook* (1995), § 11-4.
[461] SFRY (FRY), *YPA Military Manual* (1988), Articles 161–166.
[462] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[463] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[464]

532. Spain's Royal Ordinance for the Armed Forces specifies that assistance will be lent to both one's own and enemy wounded whenever the circumstances of security and of the mission permit.[465]

National Case-law

533. No practice was found.

Other National Practice

534. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal to ensure the protection of all wounded and sick persons "regardless of the side they belong to".[466]

III. Practice of International Organisations and Conferences

United Nations

535. In 1995, in a report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights condemned the alleged practice of both parties of withholding medical care on the basis of ethnic origin.[467]

Other International Organisations

536. No practice was found.

International Conferences

537. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

538. No practice was found.

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

539. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of

[464] Norway, *Military Penal Code as amended* (1902), § 108(a).
[465] Spain, *Royal Ordinance for the Armed Forces* (1978), Article 140.
[466] Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.
[467] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Initial report, UN Doc. E/CN.4/1996/16, 14 November 1995, § 121.

the Gulf War, the ICRC stated that "the wounded, the sick and the shipwrecked must be collected and cared for regardless of the party to which they belong".[468]
540. In a press release issued in 1992, the ICRC urged all parties involved in the conflict in Nagorno-Karabakh "to ensure that the wounded and sick are cared for in all circumstances, regardless of the side to which they belong".[469]
541. In a press release issued in 1992, the ICRC urged the parties to the conflict in Tajikistan to ensure that "the wounded and sick are cared for in all circumstances, regardless of the side to which they belong".[470]
542. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all the wounded and sick, both civilian and military, must be collected and cared for, without distinction".[471]
543. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "all the wounded and sick must be collected and cared for, without distinction".[472]
544. In a press release issued in 1994, the ICRC called on the parties to the conflict in Chechnya to ensure that "the wounded and sick are cared for, regardless of the side to which they belong".[473]
545. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC recalled that "the wounded and sick must be collected and cared for regardless of the party to which they belong".[474]

VI. Other Practice

546. No practice was found.

Persons deprived of their liberty

I. Treaties and Other Instruments

Treaties
547. Article 14, second paragraph, GC III provides that "women shall be treated with all regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men".

[468] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.
[469] ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect of humanitarian law, 12 March 1992.
[470] ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.
[471] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.
[472] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War!*, ICRC, Geneva, 1999, p. 1308.
[473] ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.
[474] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

548. Article 16 GC III provides that "all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria".

Other Instruments

549. Rule 6(1) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "the following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

550. Rule 2 of the 1987 European Prison Rules provides that "the rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, birth, economic or other status".

551. Principle 5 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "these principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status".

552. Paragraph 2 of the 1990 Basic Principles for the Treatment of Prisoners provides that "there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

553. Paragraph 3 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "captured combatants shall enjoy the treatment provided for by [GC III]".

II. National Practice

Military Manuals

554. Argentina's Law of War Manual (1969) provides that "all prisoners shall be treated in the same way by the detaining power, without any adverse distinction based on race, nationality, religion, political opinions or any other similar criteria".[475]

555. Argentina's Law of War Manual (1989) provides that "prisoners of war, at all times, shall be treated . . . equally without distinction based on rank, sex, race, nationality, age, religion, political opinion, professional skills, etc.".[476]

[475] Argentina, *Law of War Manual* (1969), § 2.015.
[476] Argentina, *Law of War Manual* (1989), § 3.12.

556. Australia's Defence Force Manual states that one of the fundamental rules for the treatment of POW s is that "any discrimination on the grounds of race, nationality, religious belief or political opinions is unlawful".[477]

557. Benin's Military Manual provides that "prisoners of war . . . shall be treated alike".[478]

558. Canada's LOAC Manual provides that "all POW s are to be treated alike without any adverse distinction based on race, nationality, religious belief, or political opinions, or any other distinction founded on similar criteria".[479] With regard to non-international armed conflict, the manual states that "the wounded and sick among [persons whose liberty has been restricted] are to be treated humanely".[480]

559. Canada's Code of Conduct states that "the standard of treatment which applies to all detained persons, without adverse distinction based on race, nationality, sex, religious belief or political opinion, is a long standing rule".[481]

560. Ecuador's Naval Manual provides that "when prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones".[482]

561. Germany's Soldiers' Manual recalls the prohibition of any distinction based on race, nationality, religion or political opinions in the treatment of captured combatants.[483]

562. Germany's Military Manual provides that, with regard to the treatment of POW s, one of the fundamental rules is the unlawfulness of any discrimination on the grounds of race, nationality, religious belief or political opinions or similar criteria.[484]

563. The Military Manual of the Netherlands states that "prisoners shall be treated with equality, without any distinction based on race, nationality, religion, political beliefs or any other criteria. The only exception is the preferential treatment based on the health situation, age . . .".[485]

564. New Zealand's Military Manual, under the heading "Adverse discrimination prohibited", recalls that "by Article 16 of [GC III], subject to differences in treatment based on rank, sex, or health, all prisoners are to be treated alike without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria".[486]

565. Nigeria's Manual on the Laws of War provides that no discrimination with regard to POW s is permitted.[487]

[477] Australia, *Defence Force Manual* (1994), § 1002.
[478] Benin, *Military Manual* (1995), Fascicule II, p. 13.
[479] Canada, *LOAC Manual* (1999), p. 10-3, § 18.
[480] Canada, *LOAC Manual* (1999), p. 17-3 § 25.
[481] Canada, *Code of Conduct* (2001), Rule 4, § 3.
[482] Ecuador, *Naval Manual* (1989), § 11.8.
[483] Germany, *Soldiers' Manual* (1991), p. 7, § 4.
[484] Germany, *Military Manual* (1992), § 704.
[485] Netherlands, *Military Manual* (1993), p. VII-3, § 2.
[486] New Zealand, *Military Manual* (1992), § 914.
[487] Nigeria, *Manual on the Laws of War* (undated), § 37.

566. Spain's LOAC Manual lists among the rules for the basic treatment of POW s the prohibition of any "discrimination based on sex, race, nationality or political opinion".[488]

567. Switzerland's Basic Military Manual recalls that "no adverse distinction can be based on race, nationality, religion, political opinions, language, colour, social condition, birth or other similar criteria".[489]

568. Togo's Military Manual provides that "prisoners of war . . . shall be treated alike".[490]

569. The UK Military Manual and LOAC Manual prohibit discrimination in the treatment of POW s and restate the provisions of common Article 3 of the 1949 Geneva Conventions. The Military Manual also quotes Article 14 GC III.[491]

570. The US Field Manual provides that "all POW s shall be treated alike without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria".[492]

571. The US Air Force Pamphlet prohibits any adverse distinction with regard to POW s.[493]

572. The US Naval Handbook provides that "when prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones".[494]

National Legislation

573. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts:

> Persons detained by an individual, a group of persons, some organisation or military unit from the Republic of Azerbaijan as a party to the conflict, are entitled to respect for their dignity and honour irrespective of their status, nationality, religion, language, political opinions, their belonging to a defined social group or other similar criteria.[495]

574. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[496]

[488] Spain, *LOAC Manual* (1996), Vol. I, § 8.4.a.(1).
[489] Switzerland, *Basic Military Manual* (1987), Article 97.
[490] Togo, *Military Manual* (1996), Fascicule II, p. 13.
[491] UK, *Military Manual* (1958), §§ 39 and 133; *LOAC Manual* (1981), Section 8, §§ 2 and 9.
[492] US, *Field Manual* (1956), § 92.
[493] US, *Air Force Pamphlet* (1976), §§ 12-2(a) and 13-2.
[494] US, *Naval Handbook* (1993), § 11-7.
[495] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 18.
[496] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

575. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 14 and 16 GC III, is a punishable offence.[497]
576. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... is liable to imprisonment".[498]

National Case-law
577. No practice was found.

Other National Practice
578. No practice was found.

III. Practice of International Organisations and Conferences

579. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

580. No practice was found.

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

581. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "all prisoners of war must be treated alike, subject ... to the provisions of [GC III and AP I] relating to rank, sex and age ... [and] to any privileged treatment accorded to them by reason of their state of health, age or professional qualification".[499]

VI. Other Practice

582. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "persons *hors de combat* and those who do not take part in hostilities ... shall in all circumstances be ... treated ... without any adverse distinction".[500]

[497] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[498] Norway, *Military Penal Code as amended* (1902), § 108(a).
[499] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 667.
[500] ICRC archive document.

Apartheid

I. Treaties and Other Instruments

Treaties

583. In Article I of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, the State Parties declared that "apartheid is a crime against humanity" and that "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law".

584. Article 85(4)(c) AP I provides that "practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination" shall be regarded as grave breaches of the Protocol. Article 85 AP I was adopted by consensus.[501]

585. Article 7(1)(j) of the 1998 ICC Statute provides that "the crime of apartheid" constitutes a crime against humanity.

Other Instruments

586. Article 20 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

1. An individual who as a leader or organizer commits or orders the commission of the crime of apartheid shall, on conviction thereof, be sentenced.
2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:
   (a) denial to a member of a racial group of the right to life and liberty of person;
   (b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;
   (c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;
   (d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;
   (e) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;
   (f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

587. Under Article 18(f) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "institutionalized discrimination on racial, ethnic or

[501] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population" is considered a crime against humanity.

588. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including crimes against humanity. According to Section 6(1)(j) "the crime of apartheid" constitutes a crime against humanity.

II. National Practice

Military Manuals

589. Argentina's Law of War Manual stipulates that the practice of apartheid and similar practices are grave breaches of the Geneva Conventions and AP I.[502]

590. Canada's LOAC Manual provides that "practices of apartheid and other inhumane and degrading practices involving outrages upon personal dignity based on racial discrimination" are a grave breach of AP I.[503]

591. France's LOAC Manual quotes Article 7(1)(j) of the 1998 ICC Statute, which defines the crime of apartheid as a crime against humanity.[504]

592. Germany's Military Manual provides that "practices of apartheid and other inhuman and degrading practices based on racial discrimination" are a grave breach of IHL.[505]

593. Italy's IHL Manual states that "the practice of apartheid and other inhuman and degrading treatments based on racial discrimination which offends the dignity of the human person is a grave breach of the . . . [Geneva] conventions and their additional protocols".[506]

594. The Military Manual of the Netherlands provides that "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, are a grave breach of the Geneva Conventions and their Additional Protocols".[507]

595. New Zealand's Military Manual provides that "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination", when committed wilfully, are grave breaches of the Geneva Conventions or AP I.[508]

596. Russia's Military Manual provides that the "practice of apartheid" is prohibited.[509]

[502] Argentina, *Law of War Manual* (1989), § 8.03.
[503] Canada, *LOAC Manual* (1999), p. 16-3, § 17(c).
[504] France, *LOAC Manual* (2001), pp. 32, 51 and 52.
[505] Germany, *Military Manual* (1992), § 1209.
[506] Italy, *IHL Manual* (1991), Vol. I, § 85.
[507] Netherlands, *Military Manual* (1993), p. IX-6.
[508] New Zealand, *Military Manual* (1992), § 1703.4.
[509] Russia, *Military Manual* (1990), § 5(l).

597. South Africa's LOAC Manual provides that "segregation and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination" is a grave breach of the Geneva Conventions and their Additional Protocols.[510]
598. Spain's LOAC Manual states that "carrying out practices of apartheid and other inhuman and degrading practices" is a grave breach and is qualified as a war crime.[511]
599. Switzerland's Basic Military Manual provides that "practices of apartheid or other inhumane and humiliating treatment based on racial discrimination, implying a serious violation of human dignity", is a grave breach of AP I.[512]

National Legislation
600. Under Armenia's Penal Code, "outrage upon personal self-esteem, based on apartheid or racial discrimination, application of inhuman and other humiliating practices", during an armed conflict, constitute crimes against the peace and security of mankind.[513]
601. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".[514]
602. Australia's ICC (Consequential Amendments) Act incorporates into the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including apartheid.[515] In addition, it incorporates into the Criminal Code the war crimes that are grave breaches of AP I, including apartheid.[516]
603. Azerbaijan's Criminal Code provides a punishment for the crime of apartheid and inhuman and degrading practices based on racial discrimination.[517]
604. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides for the punishment of anyone "indulging in practices of apartheid or other inhuman or degrading practices based on racial discrimination and resulting in outrages upon personal dignity".[518]
605. Bulgaria's Penal Code as amended punishes the crime of apartheid and practices based on racial discrimination.[519]

[510] South Africa, *LOAC Manual* (1996), § 38(b).
[511] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).
[512] Switzerland, *Basic Military Manual* (1987), Article 193(2)(c).
[513] Armenia, *Penal Code* (2003), Article 390.4(3).
[514] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[515] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.22.
[516] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.100.
[517] Azerbaijan, *Criminal Code* (1999), Article 111.
[518] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(19), see also Article 1(2)(8) (crime against humanity).
[519] Bulgaria, *Penal Code as amended* (1968), Article 418.

606. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that the crime of apartheid is a crime against humanity.[520]
607. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".[521]
608. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[522]
609. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, orders or carries out against protected persons practices of racial segregation or other inhuman or degrading practices based on racial discrimination and which result in outrages upon personal dignity".[523]
610. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "crimes of discrimination: tribal, ethnic or religious", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, are crimes against humanity.[524]
611. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".[525]
612. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".[526]
613. The Czech Republic's Criminal Code as amended provides for the punishment of anyone who carries out practices of apartheid.[527]
614. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who carries out against protected persons practices of racial segregation and other practices based on racial discrimination and resulting in outrages upon personal dignity" is punishable.[528]
615. Georgia's Criminal Code punishes the carrying out of practices of apartheid or other inhuman and degrading practices involving outrages upon personal dignity.[529]

[520] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(j).
[521] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[522] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[523] Colombia, *Penal Code* (2000), Article 147.
[524] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
[525] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[526] Cyprus, *AP I Act* (1979), Section 4(1).
[527] Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(1).
[528] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Prácticas de segregación racial".
[529] Georgia, *Criminal Code* (1999), Article 411(1)(i).

616. Hungary's Criminal Code as amended punishes anyone who commits the crime of apartheid.[530]

617. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.[531]

618. Jordan's Draft Military Criminal Code provides that apartheid and any other form of racial discrimination involving outrages upon personal dignity constitutes a war crime.[532]

619. Under the Draft Amendments to the Code of Military Justice of Lebanon, the practice of apartheid or other inhuman and degrading practices involving outrages upon personal dignity is a war crime.[533]

620. Mali's Penal Code states that apartheid is a crime against humanity.[534]

621. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".[535]

622. Under the International Crimes Act of the Netherlands, it is a crime to commit, in an international armed conflict, "the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . . practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination".[536]

623. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".[537]

624. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crime defined in Article 7(1)(j) of the 1998 ICC Statute.[538]

625. Nicaragua's Draft Penal Code provides for the punishment of "anyone who during international or internal armed conflicts or in peacetime carries out practices of racial segregation or other practices based on racial discrimination which involve outrages upon personal dignity".[539]

626. According to Niger's Penal Code as amended, it is a war crime to carry out against persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 "practices of apartheid or other inhuman and degrading practices involving outrages upon personal dignity".[540]

[530] Hungary, *Criminal Code as amended* (1978), Section 157.
[531] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[532] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(17).
[533] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(17).
[534] Mali, *Penal Code* (2001), Article 29(j).
[535] Moldova, *Penal Code* (2002), Article 391.
[536] Netherlands, *International Crimes Act* (2003), Article 5(2)(d)(iii), see also Article 4(1)(j) (apartheid as a crime against humanity).
[537] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[538] New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).
[539] Nicaragua, *Draft Penal Code* (1999), Article 448.
[540] Niger, *Penal Code as amended* (1961), Article 208.3(19).

627. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[541]
628. Peru's Penal Code punishes the carrying out of practices of apartheid.[542]
629. Slovakia's Criminal Code as amended provides for the punishment of anyone who carries out practices of apartheid.[543]
630. Spain's Penal Code provides for the punishment of anyone who orders or carries out practices of racial segregation or other inhuman and degrading practices involving outrages upon personal dignity.[544]
631. Tajikistan's Criminal Code provides for the punishment of anyone who orders or carries out practices of apartheid or other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination.[545]
632. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(j) of the 1998 ICC Statute.[546]
633. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".[547]
634. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Articles 7(1)(j) of the 1998 ICC Statute.[548]
635. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".[549]

National Case-law
636. No practice was found.

Other National Practice
637. In 1979, during a debate in the UN General Assembly, Bulgaria stated that under international law, the practice of apartheid was a crime against humanity.[550]

[541] Norway, *Military Penal Code as amended* (1902), § 108(b).
[542] Peru, *Penal Code as amended* (1991), Article 319.
[543] Slovakia, *Criminal Code as amended* (1961), Article 263(a)(1).
[544] Spain, *Penal Code* (1995), Article 611(6).
[545] Tajikistan, *Criminal Code* (1998), Article 403(1).
[546] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[547] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[548] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[549] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).
[550] Bulgaria, Statement before the UN General Assembly, UN Doc. A/34/PV.55, 6 November 1979, § 85.

638. In 1981, during a debate in the UN General Assembly, Kenya recalled that the practice of apartheid was considered a crime against humanity by international law and the international community.[551]
639. In 1973, during a debate in the Third Committee of the UN General Assembly on a draft convention on apartheid, Romania stated that "in light of the references to *apartheid* in the United Nations instruments and resolutions mentioned in the preamble to the draft Convention, it could be said that *apartheid* was already regarded in international law as constituting a crime against humanity".[552]
640. The Report on the Practice of Syria asserts that Syria considers Article 85 AP I to be part of customary international law.[553]
641. In 1973, during a debate in the Third Committee of the UN General Assembly on a draft convention on apartheid, the USSR stated that apartheid was recognised as a crime against humanity in international law and was thus binding on South Africa.[554]
642. In 1980, during a debate in the UN General Assembly, the UAE stated that apartheid was "a crime against the human conscience and a serious violation of the human principles and values on which civilization is based".[555]
643. In 1981, during a debate in the UN General Assembly, Vietnam declared that the practice of apartheid was considered a crime against humanity by international law.[556]

III. Practice of International Organisations and Conferences

United Nations

644. In two resolutions on South Africa adopted in 1976 and 1980, the UN Security Council affirmed that "the policy of apartheid is a crime against the conscience and dignity of mankind".[557]
645. In several resolutions adopted between 1966 and 1979, the UN General Assembly categorised the practice of apartheid, and all forms of racial discrimination, as crimes against humanity. It also condemned the policies of oppression, racial discrimination and segregation in Southern Rhodesia as crimes against

[551] Kenya, Statement before the UN General Assembly, UN Doc. A/35/PV.108, 5 March 1981, § 101.
[552] Romania, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2004, 23 October 1973, § 7.
[553] Report on the Practice of Syria, 1997, Chapter 5.6.
[554] USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2004, 23 October 1973, § 45.
[555] UAE, Statement before the UN General Assembly, UN Doc. A/35/PV.56, 11 November 1980, § 69.
[556] Vietnam, Statement before the UN General Assembly, UN Doc. A/35/PV.106, 4 March 1981, § 29.
[557] UN Security Council, Res. 392, 19 June 1976, § 3; Res. 473, 13 June 1980, § 3.

humanity and referred to apartheid as "a crime against the conscience and dignity of mankind".[558]

646. In resolutions adopted in 1992 and 1993, the UN Commission on Human Rights reaffirmed that apartheid was a crime against humanity.[559]

647. In 1974, the UN Sub-Commission on Human Rights established a Working Group on contemporary forms of slavery to review developments in various fields, including practices of apartheid.[560]

Other International Organisations

648. No practice was found.

International Conferences

649. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . apartheid".[561]

IV. Practice of International Judicial and Quasi-judicial Bodies

650. No practice was found.

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

651. The ICRC 's commentary on Article 85 AP I notes that "the practices concerned were already grave breaches of the Conventions, whatever their motive; this is simply a special mention of reprehensible conduct for which the motive is particularly shocking".[562]

652. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed wilfully and in violation of international humanitarian law, be subject to the jurisdiction of the

[558] UN General Assembly, Res. 2189 (XXI), 13 December 1966, § 6; Res. 2326 (XXII), 16 December 1967, § 5; Res. 2262 (XXII), 3 November 1967, § 2; Res. 33/183 B, 24 January 1979, preamble; Res. 34/93 A, 12 December 1979, preamble.

[559] UN Commission on Human Rights, Res. 1992/19, 21 February 1992, § 1; Res. 1993/11, 26 February 1993, § 1.

[560] UN Sub-Commission on Human Rights, Report of the Working Group on Contemporary Forms of Slavery on its 26th Session, UN Doc. E/CN.4/Sub.2/2001/30, 16 July 2001, § 1.

[561] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

[562] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3515.

Court: "practices of *apartheid*, and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination".[563]

VI. Other Practice

653. No practice was found.

C. Violence to Life

Note: *For practice concerning attacks against civilians, see Chapter 1, section A. For practice concerning attacks on persons* hors de combat, *see Chapter 15, section B.*

I. Treaties and Other Instruments

Treaties

654. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> ...
>
> (b) "War crimes:" namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder ... of civilian population of or in occupied territory, murder ... of prisoners of war or persons on the seas ...
>
> (c) "Crimes against humanity:" namely, murder, extermination ... and other inhumane acts committed against any civilian population, before or during the war.

655. Common Article 3 of the 1949 Geneva Conventions prohibits at any time and in any place whatsoever "violence to life and person, in particular murder of all kinds" with respect to "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause".

656. Article 12, second paragraph, GC I provides, with respect to wounded and sick members of the armed forces in the field, that "any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated".

657. Article 12, second paragraph, GC II provides, with respect to wounded, sick and shipwrecked members of the armed forces at sea, that "any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated".

[563] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(c)(iii).

658. Article 13, first paragraph, GC III provides that "any unlawful act or omission by the Detaining Power causing death . . . of a prisoner of war in its custody is prohibited".
659. Article 42 GC III provides that:

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

660. Article 27, first paragraph, GC IV provides that protected persons shall be "protected especially against all acts of violence".
661. Article 32 GC IV provides that:

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the . . . extermination of protected persons in their hands. This prohibition applies not only to murder . . . but also to any other measures of brutality whether applied by civilian or military agents.

662. According to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, "wilful killing" is a grave breach of these instruments.
663. According to Article 2 of the 1948 Genocide Convention, "killing members of the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".
664. Article 2 of the 1950 ECHR provides that "everyone's right to life shall be protected by law". It also states that "deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary in action lawfully taken for the purpose of quelling a riot or insurrection". Article 15(2) provides that "no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, shall be made under this provision".
665. Paragraph I(3) of the Annex to the 1953 Panmunjon Armistice Agreement (establishing a Neutral Nations Repatriation Commission) provides that "no violence to their persons [of prisoners of war] . . . shall be permitted in any manner for any purpose whatsoever".
666. Article 6(1) of the 1966 ICCPR states that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." This right is non-derogable under Article 4(2) ICCPR.
667. Article 4 of the 1969 ACHR provides that "every person has the right to have his life respected . . . No one shall be arbitrarily deprived of his life." This right is non-derogable under Article 27(2) ACHR.
668. Article 8(a) and (b) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provides that all captured military personnel and

all captured civilian personnel "shall be protected against all violence to life and person, in particular against murder in any form".

669. Article 75(2)(a) AP I provides that "violence to the life . . . of persons", in particular "murder", is prohibited at any time and in any place whatsoever. Article 75 AP I was adopted by consensus.[564]

670. Article 4(2)(a) AP II provides that "violence to the life . . . of persons", in particular "murder", is prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.[565]

671. Article 4 of the 1981 of the 1981 ACHPR provides that "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." The ACHPR does not provide for any derogation in a state of emergency.

672. According to Article 1(1) of the 1995 Agreement on Human Rights annexed to the Dayton Accords, "the Parties shall secure to all persons within their jurisdiction the right to life".

673. Pursuant to Article 6(a) of the 1998 ICC Statute, "killing members of the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

674. Pursuant to Article 7(1)(a) of the 1998 ICC Statute, "murder" constitutes a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

675. Pursuant to Article 8(2)(a)(i) of the 1998 ICC Statute, "wilful killing" constitutes a war crime in international armed conflicts.

676. Pursuant to Article 8(2)(c)(i) of the 1998 ICC Statute, "violence to life and person, in particular murder of all kinds," constitutes a war crime in non-international armed conflicts.

677. Article 3(a) of the 2002 Statute of the Special Court for Sierra Leone provides that:

> The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977, [which include] violence to life . . . in particular murder.

Other Instruments

678. Article 23 of the 1863 Lieber Code provides that "private citizens are no longer murdered".

679. Article 44 of the 1863 Lieber Code provides that "all wanton violence committed against persons in the invaded country . . . all killing of such inhabitants, are prohibited".

[564] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[565] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

680. Article 56 of the 1863 Lieber Code provides that "a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of . . . death, or any other barbarity".
681. Article 61 of the 1863 Lieber Code provides that "troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops".
682. Article 71 of the 1863 Lieber Code provides that:

> Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

683. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including murder, massacres and putting hostages to death.
684. Article II of the 1945 Allied Control Council Law No. 10 provides that:

> 1. Each of the following acts is recognized as a crime:
> . . .
> (b) War crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder . . . of civilian population from occupied territory, murder . . . of prisoners of war or persons on the seas . . .
> (c) Crimes against humanity. Atrocities and offenses, including but not limited to murder, extermination . . . or other inhumane acts committed against any civilian population.

685. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including "murder, extermination . . . and other inhumane acts committed against any civilian population, before or during the war".
686. Article 2 of the 1948 UDHR provides that "everyone has the right to life, liberty and security of person".
687. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that:

> The crimes hereinafter set out are punishable as crimes under international law:
> . . .
> (b) War crimes: Violations of the laws or customs of war include, but are not limited to, murder . . . of civilian population of or in occupied territory, murder . . . of prisoners of war, of persons on the seas . . .
> (c) Crimes against humanity: Murder, extermination . . . and other inhuman acts done against any civilian population.

688. Rule 4 of the 1950 UN Command Rules and Regulations gave to Military Commissions of the UN Command in Korea jurisdiction over various offences, including "murder of civilians or prisoners of war".

689. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that "all forms of repression . . . of women and children, including . . . shooting . . . committed by belligerents in the course of military operations or in occupied territories shall be considered criminal".

690. The 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that:

> 2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.
> . . .
> 4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.
> 5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:
> (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
> (b) Minimize damage and injury, and respect and preserve human life;
> . . .
> 8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

691. Article 2(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that "life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Shari'ah prescribed reason."

692. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, "acts of inhumanity, cruelty or barbarity directed against life . . . in particular wilful killing" are considered as exceptionally serious war crimes and as serious violations of the principles and rules of international law applicable in armed conflict.

693. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
694. Under paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.
695. Under Article 2(a) of the 1993 ICTY Statute, the Tribunal is competent to prosecute wilful killing of persons protected under the provisions of the relevant Geneva Convention. Article 5(a) provides that murder, "when committed in armed conflict, whether international or internal in character, and directed against any civilian population" constitutes a crime against humanity. Article 4(2)(a) provides that killing members of "a national, ethnical, racial or religious group, when committed with intent to destroy it, in whole or in part, as such" constitutes genocide.
696. Article 2(2)(a) of the 1994 ICTR Statute provides that killing members of "a national, ethnical, racial or religious group, when committed with intent to destroy it, in whole or in part, as such" constitutes genocide. Article 3(a) provides that murder, "when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds", constitutes a crime against humanity. Under Article 4(a), the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including "violence to life . . . in particular murder".
697. Article 18(a)–(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind states that "murder" and "extermination" are crimes against humanity. Article 20(a) provides that "wilful killing", committed in an international armed conflict and in violation of international humanitarian law, is a war crime. Under Article 20(f)(i), "violence to the life, health and physical or mental well-being of persons, in particular murder", committed in violation of IHL applicable in armed conflict not of an international character, is a war crime.
698. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right to life, especially against massacres, and the right not to be subject to campaigns of violence against one's person. Article 3(1) of Part IV further provides that violence to life shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*. Article 4(1) of Part IV adds that "persons *hors de combat* . . . are entitled to respect for their lives".
699. According to Section 7.2 of the 1999 UN Secretary-General's Bulletin, "violence to life" or "murder" of persons not, or no longer, taking part in

military operations and persons placed *hors de combat* is prohibited at any time and in any place.

700. Article 1 of the 2000 EU Charter of Fundamental Rights provides that "everyone has the right to life".

701. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(i), "wilful killing" constitutes a war crime in international armed conflicts. According to Section 6(1)(c)(i), "violence to life and person, in particular murder of all kinds," constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

702. Argentina's Law of War Manual (1969) restates the provisions of common Article 3 of the 1949 Geneva Conventions.[566]

703. Argentina's Law of War Manual (1989) provides that "wilful killing" is a war crime and a grave breach of the Geneva Conventions. It also stipulates that "violence to life" is prohibited against persons who are in the power of a party to the conflict and who do not benefit from a more favourable treatment under the Geneva Conventions.[567]

704. Australia's Commanders' Guide states that wilful killing is a war crime which warrants the institution of criminal proceedings.[568]

705. Australia's Defence Force Manual provides that "attempts upon the lives [of the wounded and sick and shipwrecked], and violence against them is prohibited. They shall not be murdered." It further states that "wilful killing" is a grave breach of the Geneva Conventions which warrants institution of criminal proceedings.[569]

706. Belgium's Law of War Manual prohibits, in internal armed conflicts, "attacks on the life and physical integrity" of "persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat* ".[570] It further states that wilful killing is a grave breach of the Geneva Conventions.[571]

707. Benin's Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be entitled to respect for their lives and physical integrity.[572]

[566] Argentina, *Law of War Manual* (1969), § 8.001.
[567] Argentina, *Law of War Manual* (1989), §§ 4.15 and 8.03.
[568] Australia, *Commanders' Guide* (1994), § 1305(a).
[569] Australia, *Defence Force Manual* (1994), §§ 990 and 1315(a) and (n), see also § 945.
[570] Belgium, *Law of War Manual* (1983), pp. 16–17.
[571] Belgium, *Law of War Manual* (1983), p. 55.
[572] Benin, *Military Manual* (1995), Fascicule II, p. 4 and Fascicule III, p. 4.

708. The Instructions to the Muslim Fighter issued by the ARB iH in Bosnia and Herzegovina in 1993 states that:

> Killing of women, children and priests who do not participate at all in the war and who do not directly or indirectly assist the enemy is forbidden . . . These are general rules which are binding for our soldiers. However, if the commanding officer assesses that the situation and the general interest demand a different course of action, then the soldiers are duty-bound to obey their commanding officer . . . It is also left to the military command's discretion to decide whether it is more useful or in the general interest to free, exchange or liquidate enemy prisoners of war.[573]

709. Burkina Faso's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.[574]

710. Cameroon's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.[575]

711. Cameroon's Instructors' Manual states that "an obligation is given to safeguard the life of [prisoners of war]".[576]

712. Canada's LOAC Manual states that "wilful killing" is a grave breach of the Geneva Conventions and provides that the following acts are prohibited: assassination, attempts upon the lives of the wounded, sick and shipwrecked, killing of prisoners of war, and murder of persons protected by GC IV, AP I and AP II.[577] With regard to non-international armed conflicts, the manual restates common Article 3 of the 1949 Geneva Conventions.[578]

713. Colombia's Circular on Fundamental Rules of IHL states that "persons *hors de combat* and who no longer participate directly in hostilities have the right to respect for their lives and physical integrity".[579] It also states that "captured persons and civilian persons who are in the power of the adverse Party have the right to respect for their life".[580]

714. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, the lives of all persons *hors de combat* shall be respected.[581] With regard to internal armed conflict, the manual contains the provisions of common Article 3 of the 1949 Geneva Conventions.[582]

[573] Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.
[574] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[575] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[576] Cameroon, *Instructors' Manual* (1992), § 142.
[577] Canada, *LOAC Manual* (1999), p. 6-3, § 25, p. 9-2, § 18, p. 10-3, § 26, p. 11-4, § 33, p. 11-7, § 63(a), p. 17-3, § 21 and p. 16-2, § 12, see also p. 16-4, § 21(j) (genocide as a violation of the Hague Conventions and customary law).
[578] Canada, *LOAC Manual* (1999), p. 17-2, § 10(a).
[579] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 1.
[580] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.
[581] Colombia, *Basic Military Manual* (1995), pp. 20, 22 and 29.
[582] Colombia, *Basic Military Manual* (1995), p. 42.

715. Colombia's Soldiers' Manual and Instructors' Manual provide that the right to life is a human right which the armed forces must respect.[583]

716. Congo's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.[584]

717. Croatia's LOAC Compendium provides that wilful killing is a grave breach of IHL and a war crime.[585]

718. Croatia's Instructions on Basic Rules of IHL requires that the armed forces protect the lives and physical and mental integrity of persons *hors de combat*, the wounded and sick, who must not be killed or wounded.[586]

719. Ecuador's Naval Manual provides that the "killing without just cause" of prisoners of war, civilian inhabitants of occupied territories, the wounded and sick, enemies *hors de combat* and the shipwrecked is a war crime.[587]

720. In El Salvador's Human Rights Charter of the Armed Forces, one of the ten basic rules is to respect human life. In a chapter devoted to the "right to life", the manual contains the following provisions: "human life is the most sacred thing of any person; nobody can deprive someone arbitrarily of his life".[588]

721. France's Disciplinary Regulations as amended prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.[589]

722. France's LOAC Summary Note provides that all persons *hors de combat* have the right to respect for their lives.[590] It further states that "wilful killing" is a war crime.[591]

723. France's LOAC Teaching Note provides that "it is prohibited to . . . kill or injure an adversary . . . who is *hors de combat*". It further states that "wilful killing" is a grave breach of the law of armed conflict and is a war crime.[592]

724. France's LOAC Manual provides that "attacks upon the life and physical and mental well-being of persons, such as murder" constitute war crimes.[593] The manual also states that wilful killing and attempts on the physical integrity or health of the wounded and sick are war crimes.[594] It further stipulates that one of the three main principles common to IHL and human rights is the principle of inviolability, which guarantees every human being the right to respect for his or her life.[595] It also provides that the execution of hostages is

[583] Colombia, *Soldiers' Manual* (1999), p. 10; *Instructors' Manual* (1999), pp. 8 and 21.
[584] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[585] Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.
[586] Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 1–3.
[587] Ecuador, *Naval Manual* (1989), § 6.2.5.
[588] El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 3 and 6.
[589] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[590] France, *LOAC Summary Note* (1992), § 2.1.
[591] France, *LOAC Summary Note* (1992), § 3.4.
[592] France, *LOAC Teaching Note* (2000), pp. 2 and 7.
[593] France, *LOAC Manual* (2001), p. 45, see also p. 44 (killing as a part of a genocide campaign).
[594] France, *LOAC Manual* (2001), p. 45.
[595] France, *LOAC Manual* (2001), pp. 50–52.

expressly prohibited by the law of armed conflict and has been a war crime since 1949.[596]

725. Germany's Military Manual provides that attempts on the lives of civilians and the wounded, sick and shipwrecked, or violence to their persons, are prohibited.[597] It lists "wilful killing" among the grave breaches of IHL.[598]

726. Germany's Soldiers' Manual provides that any attack on the lives or persons of the wounded, sick and shipwrecked is prohibited".[599]

727. Hungary's Military Manual states that "wilful killing" is a grave breach of the Geneva Conventions and a war crime.[600]

728. Israel's Manual on the Laws of War states that "it is strictly forbidden to cause (by act or omission) the death of a prisoner of war after he has surrendered or to put him in a situation that endangers his health and physical integrity".[601]

729. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subject to brutality and violence against their lives.[602] It also provides that wilful killing and attacks on the physical and mental integrity of any person in the power of a belligerent, genocide and wilful killing of prisoners of war, the wounded and sick are war crimes.[603]

730. Kenya's LOAC Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[604]

731. South Korea's Military Regulation 187 provides that "killing non-combatants" is a war crime.[605]

732. Madagascar's Military Manual states that one of the seven fundamental rules of IHL is that persons *hors de combat* and who do not take a direct part in hostilities are entitled to respect for their lives and their mental and physical integrity.[606]

733. Mali's Army Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.[607]

734. Morocco's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.[608]

735. The Military Manual of the Netherlands provides that "every attempt on the life of the wounded and sick is prohibited. In particular, they may not

[596] France, *LOAC Manual* (2001), p. 101.
[597] Germany, *Military Manual* (1992), §§ 502, 601 and 608.
[598] Germany, *Military Manual* (1992), § 1209.
[599] Germany, *Soldiers' Manual* (1991), p. 5.
[600] Hungary, *Military Manual* (1992), p. 90.
[601] Israel, *Manual on the Laws of War* (1998), p. 51.
[602] Italy, *IHL Manual* (1991), Vol. 1, § 41(e).
[603] Italy, *IHL Manual* (1991), Vol. 1, § 84.
[604] Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5 and 6.
[605] South Korea, *Military Regulation 187* (1991), Article 4.2.
[606] Madagascar, *Military Manual* (1994), p. 22 and p. 91, Rule 1.
[607] Mali, *Army Regulations* (1979), Article 36.
[608] Morocco, *Disciplinary Regulations* (1974), Article 25(2).

be killed or exterminated".[609] It further restates the prohibition of violence directed against a protected person's life, health, physical or psychological well-being, such as murder as found in Article 75 AP I.[610] With respect to non-international armed conflicts, the manual restates the prohibition of violence to life and person, in particular murder, as found in common Article 3 of the 1949 Geneva Conventions and Article 4 AP II.[611]

736. New Zealand's Military Manual prohibits killing and provides that "self-preservation or military necessity can never provide an excuse for the murder of prisoners of war".[612] It further states that "wilful killing" is a grave breach of the Geneva Conventions and their Additional Protocols.[613] With respect to non-international armed conflicts, the manual states that violence to life and person of those protected by common Article 3 of the 1949 Geneva Conventions, in particular murder of all kinds, is prohibited at any time and in any place.[614]

737. Nicaragua's Military Manual states that, in both internal and international armed conflicts as well as in situations of internal troubles, the right to life is inviolable and inherent to the human being.[615]

738. Nigeria's Operational Code of Conduct provides that soldiers who surrender, pregnant women and children must not be killed.[616]

739. Nigeria's Military Manual refers to Article 12 GC I, which "prohibits any attempt upon the lives [of the wounded and sick], or violence to their persons, and in particular to wound or to exterminate them".[617]

740. Nigeria's Manual on the Laws of War provides that attempts on the lives of the wounded and sick and unlawful acts or omissions endangering the lives of POW s are prohibited.[618] It also specifies that wilful killing of all protected persons is a grave breach of the Geneva Conventions and is considered as a serious war crime.[619]

741. Peru's Human Rights Charter of the Security Forces states that one of the 10 basic rules is to respect human life. It adds that "human life is sacred for every person" and that the lives of the wounded or of persons who surrender must be respected. These rules must be respected by the armed and police forces.[620]

609 Netherlands, *Military Manual* (1993), pp. VI-1/VI-2.
610 Netherlands, *Military Manual* (1993), p. VIII-3.
611 Netherlands, *Military Manual* (1993), pp. XI-1 and XI-4.
612 New Zealand, *Military Manual* (1992), § 919(1).
613 New Zealand, *Military Manual* (1992), §§ 1137(1), 1702(1) and 1704(2-c), see also § 1704(5) (genocide as an offence against the law of armed conflict and a war crime).
614 New Zealand, *Military Manual* (1992), § 1807(1).
615 Nicaragua, *Military Manual* (1982), Articles 3, 7.1, 8 and 14(31).
616 Nigeria, *Operational Code of Conduct* (1967), § 4(a), (b) and (c).
617 Nigeria, *Military Manual* (1994), p. 13, § 4.
618 Nigeria, *Manual on the Laws of War* (undated), §§ 35 and 37.
619 Nigeria, *Manual on the Laws of War* (undated), § 6(a), see also § 6(12) and (20) (killing of spies, saboteurs and partisans, and genocide).
620 Peru, *Human Rights Charter of the Security Forces* (1991), p. 3, § 2 and p. 7.

742. Peru's Human Rights Charter of the Armed Forces states that respect for a person's life and mental and physical integrity is one of the three principles common to the 1949 Geneva Conventions, which represent the minimum level of protection to which every human being is entitled.[621]

743. The Rules for Combatants of the Philippines provides that "prisoners must be respected. It is prohibited to . . . kill them."[622]

744. Romania's Soldiers' Manual provides that persons *hors de combat* and who do not take a direct part in hostilities and captured combatants have the right to respect for their lives.[623] It also states that the "killing and injuring of an adversary who surrenders or who is *hors de combat* is prohibited".[624]

745. Russia's Military Manual prohibits violence to the lives and physical integrity, in particular murder of all kinds, of war victims, namely the wounded, sick and shipwrecked, POW s and the civilian population.[625]

746. Senegal's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.[626]

747. Senegal's IHL Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions and prohibits attacks on life.[627]

748. South Africa's LOAC Manual provides that "wilful killing" is a grave breach of the Geneva Conventions.[628]

749. Spain's LOAC Manual provides that a person who has participated in hostilities and who does not benefit from POW status and who does not benefit from a better treatment under GC IV is entitled to a minimum of guarantees, *inter alia*, "the prohibition at all times and in all places of the following acts, whether they are committed by civilians or soldiers: attacks on life, health and physical integrity, in particular homicide".[629] According to the manual, "wilful killing" committed by medical personnel is a war crime.[630] It also states that soldiers must respect the lives of surrendered or captured combatants.[631]

750. Switzerland's Military Manual and Teaching Manual provide that enemy civilians shall not be murdered.[632]

751. Switzerland's Basic Military Manual states that it is prohibited to make an attempt on the lives of the wounded and sick.[633] It further provides that wilful killing of protected persons (wounded and sick, medical personnel, prisoners

621 Peru, *Human Rights Charter of the Armed Forces* (1994), § 24.
622 Philippines, *Rules for Combatants* (1989), § 6(4).
623 Romania, *Soldiers' Manual* (1991), p. 33, § 1.
624 Romania, *Soldiers' Manual* (1991), p. 32, § 2.
625 Russia, *Military Manual* (1990), §§ 7 and 8.
626 Senegal, *Disciplinary Regulations* (1990), Article 34(2).
627 Senegal, *IHL Manual* (1999), pp. 4 and 23.
628 South Africa, *LOAC Manual* (1996), § 40.
629 Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.
630 Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).
631 Spain, *LOAC Manual* (1996), Vol. I, §§ 7.3.a.(7) and 10.8.f.(2).
632 Switzerland, *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43.
633 Switzerland, *Basic Military Manual* (1987), Articles 69 and 147.

of war, inhabitants of occupied territory and enemy civilians on national territory) is a grave breach of the Geneva Conventions. Examples provided include "killing prisoners of war or letting them die of starvation".[634]

752. Togo's Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be entitled to respect for their lives and physical integrity.[635]

753. Uganda's Code of Conduct provides: "Never kill any member of the public or any captured prisoners, as the guns should only be reserved for armed enemies or opponents."[636]

754. Uganda's Operational Code of Conduct states that "the offence of disobeying lawful orders shall include . . . unauthorised killing of prisoners of war".[637] It also stipulates that "the following crimes shall cause an immediate arrest of an officer by any soldier . . . murder".[638]

755. The UK Military Manual provides that "a commander may not put his prisoners of war to death" that "it is unlawful for a commander to kill prisoners of war on grounds of self-preservation" and that "any attempts on [the lives of the wounded and sick] . . . are strictly prohibited".[639] The manual also states that it is prohibited to "take any measure of such a character as to cause . . . extermination of protected persons".[640] It further states that wilful killing of persons protected by the 1949 Geneva Conventions is a grave breach of these instruments.[641]

756. The UK LOAC Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions and provides that "murder or violence to the person are strictly prohibited".[642]

757. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.[643]

758. The US Air Force Pamphlet stipulates that "wilful killing" is a grave breach of the Geneva Conventions.[644]

759. The US Soldier's Manual states that "an order to commit a crime such as murder . . . is in violation of the laws of war".[645]

760. The US Instructor's Guide provides that violating life and person, in particular murder, is a capital offence prohibited at any time and in any place whatsoever. It specifically prohibits murder of prisoners.[646] It also states that "killing, without proper legal trial, spies or other captured persons who have committed hostile acts" is a war crime.[647]

634 Switzerland, *Basic Military Manual* (1987), Article 192.
635 Togo, *Military Manual* (1996), Fascicule II, p. 4 and Fascicule III, p. 4.
636 Uganda, *Code of Conduct* (1986), Rule 4.
637 Uganda, *Operational Code of Conduct* (1986), Rule 17(i).
638 Uganda, *Operational Code of Conduct* (1986), Rule 26(a).
639 UK, *Military Manual* (1958), §§ 137 and 339.
640 UK, *Military Manual* (1958), § 549.
641 UK, *Military Manual* (1958), § 625(a).
642 UK, *LOAC Manual* (1981), Section 6, p. 22, § 2.
643 US, *Field Manual* (1956), § 502.
644 US, *Air Force Pamphlet* (1976), § 15-2(b).
645 US, *Soldier's Manual* (1984), p. 26.
646 US, *Instructor's Guide* (1985), pp. 8 and 9.
647 US, *Instructor's Guide* (1985), p. 14.

761. The US Naval Handbook provides that the "killing without just cause" of prisoners of war, civilian inhabitants of occupied territories, the wounded and sick, enemies *hors de combat* and the shipwrecked is a war crime.[648]

National Legislation

762. Albania's Military Penal Code criminalises killing as a war crime.[649]

763. Argentina's Draft Code of Military Justice provides that acts of "wilful killing" of protected persons is a criminal offence.[650]

764. Under Armenia's Penal Code, "murder" committed during an armed conflict constitutes a crime against the peace and security of mankind.[651]

765. Australia's War Crimes Act provides that "murder and massacres" and "putting hostages to death" are war crimes.[652]

766. Australia's War Crimes Act as amended identifies murder and manslaughter as "serious war crimes".[653]

767. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[654]

768. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute: "genocide by killing"; crimes against humanity, including murder when committed "as part of a widespread or systematic attack directed against a civilian population"; and war crimes, including "wilful killing" of a person protected under the Geneva Conventions or AP I in international armed conflicts, and murder of persons who are *hors de combat* in non-international armed conflicts.[655]

769. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, "violence to life" and "murder" are acts prohibited against civilian persons and prisoners of war.[656]

770. Azerbaijan's Criminal Code provides that "wilful killing" of protected persons is a violation of the laws and customs of war.[657]

771. Bangladesh's International Crimes (Tribunal) Act states that murder of the civilian population, murder of prisoners of war and the killing of detainees is a

[648] US, *Naval Handbook* (1995), § 6.2.5.
[649] Albania, *Military Penal Code* (1995), Articles 73–75.
[650] Argentina, *Draft Code of Military Justice* (1998), Article 289, introducing a new Article 873 in the *Code of Military Justice as amended* (1951).
[651] Armenia, *Penal Code* (2003), Article 390.1(1), see also Article 392 (systematic execution without trial as a crime against humanity) and Article 393 (killing as part of a genocide campaign).
[652] Australia, *War Crimes Act* (1945), Section 3.
[653] Australia, *War Crimes Act as amended* (1945), Sections 6(1) and 7(1).
[654] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[655] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.3, 268.8, 268.24 and 268.70.
[656] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17 and 21.
[657] Azerbaijan, *Criminal Code* (1999), Article 115.4, see also Article 103 (genocide as a crime against peace and the security of humanity).

war crime.[658] It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[659]

772. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[660]

773. The Criminal Code of Belarus provides that "wilful killing" of persons that have laid down their arms or are defenceless, the wounded, sick and shipwrecked, sanitary and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone, or other persons enjoying international protection, is a violation of the laws and customs of war.[661]

774. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "wilful killing" constitutes a crime under international law.[662]

775. The Criminal Code of the Federation of Bosnia and Herzegovina provides that killing of civilians, prisoners of war, the wounded, sick and shipwrecked is a war crime.[663] The Criminal Code of the Republika Srpska contains the same provision.[664]

776. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[665]

777. Bulgaria's Penal Code as amended provides that ordering and committing acts of murder of the wounded, sick, shipwrecked, medical personnel, prisoners of war and the civilian population is a war crime.[666]

778. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "wilful killing" is a war crime in both international and non-international armed conflicts.[667]

779. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects

[658] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d).
[659] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[660] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[661] Belarus, *Criminal Code* (1999), Article 135(3).
[662] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(1), see also Article 1(1)(1) (killing as a part of a genocide campaign) and Article 1(1)(2) (killing as a crime against humanity).
[663] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1), 155 and 156.
[664] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.
[665] Botswana, *Geneva Conventions Act* (1970), Section 3(1).
[666] Bulgaria, *Penal Code as amended* (1968), Articles 410(a), 411(a) and 412(a).
[667] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(a) and (C)(a), see also Article 2(a) (genocide) and Article 3(a) (crimes against humanity).

who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".[668]

780. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".[669]

781. Canada's Crimes against Humanity and War Crimes Act provides that the crimes of genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[670]

782. China's Law Governing the Trial of War Criminals provides that acts of planned slaughter and murder constitute war crimes.[671]

783. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, carries out or orders the carrying out of the killing of a protected person.[672]

784. The DRC Code of Military Justice as amended provides that in times of war, violence to or serious injury of the civilian population is an offence.[673]

785. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, killing members of an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.[674] Moreover, "murder", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.[675] The Act further defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[676]

786. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".[677]

787. Under the Penal Code as amended of Côte d'Ivoire, organising, ordering or carrying out, in time of war or occupation, murder and attacks on the physical integrity of the civilian population constitute a "crime against the civilian population". The same applies in relation to prisoners of war and internees.[678]

668 Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.
669 Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
670 Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
671 China, *Law Governing the Trial of War Criminals* (1946), Article 3, §1.
672 Colombia, *Penal Code* (2000), Article 135.
673 DRC, *Code of Military Justice as amended* (1972), Article 472.
674 Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.
675 Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
676 Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
677 Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
678 Côte d'Ivoire, *Penal Code as amended* (1981), Articles 138(1) and 139(1).

788. Croatia's Criminal Code provides that the killing of the civilian population, the wounded, sick, shipwrecked, medical or religious personnel or prisoners of war is a war crime.[679]

789. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person, in the commission of grave breaches of the Geneva Conventions".[680]

790. Egypt's Penal Code and Military Criminal Code prohibit homicide of the wounded.[681]

791. El Salvador's Penal Code includes murder as part of a genocide campaign in its list of crimes against humanity.[682]

792. Under Estonia's Penal Code, the killing of civilians, prisoners of war and interned civilians is a war crime.[683]

793. Ethiopia's Penal Code provides that in time of war, armed conflict or occupation, the organisation, ordering or killing of civilians, the wounded, sick and shipwrecked or prisoners and interned persons constitutes a war crime.[684]

794. Finland's Revised Penal Code provides for the punishment of acts of killing perpetrated as a part of the crime of genocide.[685]

795. Under France's Penal Code, "killing members of the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[686]

796. Under Georgia's Criminal Code, in international or internal armed conflicts, it is a crime to wilfully kill persons not taking part in hostilities, persons *hors de combat*, the wounded and sick, prisoners of war, civilians and the civilian population in an occupied territory or zone of combat, refugees and stateless persons, as well as other persons enjoying international protection.[687] The Code also states that, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as violence to life of those placed *hors de combat* by detention in non-international armed conflicts, is a war crime.[688]

797. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or

[679] Croatia, *Criminal Code* (1997), Articles 158, 159 and 160.
[680] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).
[681] Egypt, *Penal Code* (1937), Article 251 *bis* ; *Military Criminal Code* (1966), Article 137.
[682] El Salvador, *Penal Code* (1997), Article 361.
[683] Estonia, Penal Code (2001), §§ 97 and 99, see also § 89 (killing as a crime against humanity) and § 90 (killing and physical elimination as part of a genocide campaign).
[684] Ethiopia, *Penal Code* (1957), Articles 282(a), 283(a) and 284(a), see also Article 281 (killing as a part of a genocide campaign).
[685] Finland, *Revised Penal Code* (1995), Chapter 11, Section 6.
[686] France, *Penal Code* (1994), Article 211-1, see also Article 212-1 (massive and summary executions as a crime against humanity).
[687] Georgia, *Criminal Code* (1999), Article 411(2)(a), see also Article 407 (killing as a part of a genocide campaign) and Article 408 (killing as a crime against humanity).
[688] Georgia, *Criminal Code* (1999), Article 413(d).

non-international armed conflict, "kills a person who is to be protected under international humanitarian law".[689]

798. Under Hungary's Criminal Code as amended, the killing of a member of a national, ethnic, racial or religious group, as a part of a genocide campaign, constitutes a "crime against the freedom of peoples".[690]

799. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[691]

800. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.[692] In addition, any "minor breach" of the Geneva Conventions, including violations of common Article 3, of Articles 12 GC I, 12 GC II, 13 GC III, 27 and 32 GC IV, and of AP I, including violations of Article 75(2)(a) AP I, as well as any "contravention" of AP II, including violations of Article 4(2)(a) AP II, are also punishable offences.[693]

801. Israel's Nazis and Nazi Collaborators (Punishment) Law includes in its definition of war crimes the following acts: "murder of [the] civilian population of or in occupied territories; murder of . . . prisoners of war and persons on the seas . . . ".[694]

802. Under Jordan's Draft Military Criminal Code, wilful killing of a protected person is a war crime.[695]

803. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya, commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[696]

804. Kenya's Constitution provides that no person shall be deprived of life intentionally, except as the result of a lawful act of war.[697]

805. Under Latvia's Criminal Code, committing an act of murder constitutes a war crime.[698]

806. Under the Draft Amendments to the Code of Military Justice of Lebanon, "wilful killing" constitutes a war crime.[699]

[689] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(1), see also § 6(1)(1) (killing as a part of a genocide campaign) and § 7(1)(1) (killing as a crime against humanity).
[690] Hungary, *Criminal Code as amended* (1978), Section 155(1)(a).
[691] India, *Geneva Conventions Act* (1960), Section 3(1).
[692] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[693] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[694] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b) (this section also considers killing as a crime of genocide, and murder and extermination as crimes against humanity).
[695] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(1).
[696] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[697] Kenya, *Constitution* (1992), Article 71.
[698] Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (killing as a part of a genocide campaign).
[699] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(1).

807. Under Lithuania's Criminal Code as amended, the killing of the wounded, sick and shipwrecked, prisoners of war, civilians or of other persons in occupied or annexed territories and combat zones is a war crime.[700]
808. Under Luxembourg's Law on the Punishment of Grave Breaches, "wilful killing" is a grave breach of the Geneva Conventions.[701]
809. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi, commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[702]
810. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[703]
811. Under Mali's Penal Code, wilful killing is a war crime.[704]
812. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[705]
813. Mexico's Penal Code as amended provides for the punishment of the killing, as a part of a genocide campaign, of a member of a national, ethnic, racial or religious group.[706]
814. Moldova's Penal Code provides for the punishment of anyone ordering and carrying out the killing of protected persons or executing them without due process.[707]
815. Under Mozambique's Military Criminal Law, killing any member of the civilian population is a criminal offence.[708]
816. Myanmar's Defence Service Act provides that:

> Any person subject to this law who commits an offence of murder against any person not subject to military law, or culpable of homicide not amounting to murder against such a person . . . shall not be deemed to be guilty of an offence against this act and shall not be tried by a court-martial unless he commits any of the said offences . . . while in active service.[709]

817. The Definition of War Crimes Decree of the Netherlands includes "murder and massacres" and "putting hostages to death" in its list of war crimes.[710]

[700] Lithuania, *Criminal Code as amended* (1961), Article 333.
[701] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(1).
[702] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[703] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[704] Mali, *Penal Code* (2001), Article 31(a), see also Article 29(a) (killing and extermination as crimes against humanity) and Article 30(a) (killing as a part of a genocide campaign).
[705] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[706] Mexico, *Penal Code as amended* (1931), Article 149 *bis*.
[707] Moldova, *Penal Code* (2002), Article 137, see also Article 135(a) (killing as a part of a genocide campaign).
[708] Mozambique, *Military Criminal Law* (1987), Article 85(a).
[709] Myanmar, *Defence Services Act* (1959), Section 72.
[710] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

818. Under the International Crimes Act of the Netherlands, it is a crime to commit "in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions", including "intentional killing".[711] Furthermore, it is also a crime to commit, "in the case of an armed conflict not of an international character, a violation of Article 3 common to all of the Geneva Conventions", including "violence to life and person, in particular killing of all kinds" of persons taking no active part in the hostilities.[712]

819. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions ... is guilty of an indictable offence".[713]

820. Under New Zealand's International Crimes and ICC Act, genocide includes the crimes defined in Article 6(a) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(a) of the Statute, and war crimes include the crimes defined in Article 8(2)(a)(i) and (c)(i) of the Statute.[714]

821. Nicaragua's Military Penal Code provides for the punishment of the wilful killing of prisoners of war, the wounded, sick and shipwrecked and civilians.[715]

822. According to Niger's Penal Code as amended, wilful killing of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 is a war crime.[716]

823. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation ... whatever his nationality, commits, or aids, abets or procures any other person to commit, any such grave breach of any of the [Geneva] Conventions".[717]

824. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[718]

825. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[719]

826. Paraguay's Penal Code provides for the punishment for "anyone who, in violation of international law in times of war, armed conflict or military

[711] Netherlands, *International Crimes Act* (2003), Article 5(1)(a), see also Article 3(1)(a) (killing members of a group as part of a genocide campaign) and Article 4(1)(a) and (b) (intentional killing and extermination as crimes against humanity).
[712] Netherlands, *International Crimes Act* (2003), Article 6(1)(a).
[713] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[714] New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).
[715] Nicaragua, *Military Penal Code* (1996), Article 54.
[716] Niger, *Penal Code as amended* (1961), Article 208.3(1), see also Article 208.1 (killing as part of a genocide campaign) and Article 208.2 (summary and systematic executions as crimes against humanity).
[717] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[718] Norway, *Military Penal Code as amended* (1902), § 108.
[719] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

occupation, commits against the civilian population, the wounded and sick, or prisoners of war an act of . . . homicide."[720]

827. Under the War Crimes Trial Executive Order of the Philippines applicable to acts committed during the Second World War, "murder of civilian population of or in occupied territory; murder . . . of prisoners of war or internees or persons on the seas or elsewhere" are violations of the laws and customs of war.[721] It adds that "murder, extermination [of] . . . civilian populations before or during [the Second World War]" constitutes a war crime whether or not in violation of the local laws.[722]

828. Poland's Penal Code provides for the punishment of any person who, in violation of international law, kills persons *hors de combat*, protected persons and persons enjoying international protection.[723]

829. Portugal's Penal Code provides for the punishment of anyone who, in violation of international law, in times of war, armed conflict or occupation, commits wilful killing of the civilian population, the wounded and sick or prisoners of war.[724]

830. Romania's Penal Code provides for the punishment of anyone who kills the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or any person in the hands of the adverse party.[725]

831. Russia's Criminal Code provides for the punishment of the killing or extermination of a national, ethnic, racial or religious group when conducted as a part of a genocide campaign.[726]

832. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who, whether in or outside the Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".[727]

833. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[728]

834. Under Slovenia's Penal Code, the killing of civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel is a war crime.[729]

[720] Paraguay, *Penal Code* (1997), Article 320(1), see also Article 319 (killing as a part of a genocide campaign).
[721] Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(2).
[722] Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).
[723] Poland, *Penal Code* (1997), Article 123(1), see also Article 118(1) (killing as a part of a genocide campaign).
[724] Portugal, *Penal Code* (1996), Article 241(1)(a).
[725] Romania, *Penal Code* (1968), Article 358.
[726] Russia, *Criminal Code* (1996), Article 357.
[727] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[728] Singapore, *Geneva Conventions Act* (1973), Section 3(1).
[729] Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.

835. Spain's Military Criminal Code punishes military personnel for "wilful killing" of the wounded, sick and shipwrecked, prisoners of war or the civilian population.[730]

836. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence".[731]

837. Tajikistan's Criminal Code provides that in international or internal armed conflicts, "wilful killing" of protected persons is a crime.[732]

838. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(a) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(a) of the Statute, and a war crime as defined in Article 8(2)(a)(i) and (c)(i) of the Statute.[733]

839. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda, commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[734]

840. Ukraine's Criminal Code provides for the punishment of the "wilful killing" of civilians or prisoners of war.[735]

841. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".[736]

842. Under the UK War Crimes Act, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the UK irrespective of his or her nationality if that offence, *inter alia*, constituted a violation of the laws and customs of war.[737]

843. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(a) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(a) of the Statute and a war crime as defined in Article 8(2)(a)(i) and (c)(i) of the Statute.[738]

844. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction

730 Spain, *Military Criminal Code* (1985), Article 76.
731 Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).
732 Tajikistan, *Criminal Code* (1998), Article 403(2)(a), see also Article 398 (killing and extermination as a part of a genocide campaign).
733 Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
734 Uganda, *Geneva Conventions Act* (1964), Section 1(1).
735 Ukraine, *Criminal Code* (2001), Article 408, see also Article 442 (killing and extermination as a part of a genocide campaign).
736 UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
737 UK, *War Crimes Act* (1991), Article 1.
738 UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

over offences such as extermination, murder of prisoners of war or persons on the seas, hostages or civilians of or in an occupied territory.[739]

845. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as the murder of the civilian population of or in occupied territory, prisoners of war or internees or persons on the seas or elsewhere.[740]

846. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.[741]

847. Under Uzbekistan's Criminal Code, ordering or carrying out the physical extermination of prisoners of war or the civilian population constitutes a violation of the laws and customs of war.[742]

848. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[743]

849. Vietnam's Penal Code provides for the punishment of anyone who, in time of war, orders or directly commits the killing of civilians, the wounded or prisoners of war.[744]

850. Under Yemen's Military Criminal Code, the killing of prisoners or civilians is a war crime.[745]

851. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of murders" committed war crimes.[746]

852. The Penal Code as amended of the SFRY (FRY) provides that the killing of civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel is a war crime.[747]

853. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".[748]

[739] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.
[740] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).
[741] US, *War Crimes Act as amended* (1996), Section 2441(c).
[742] Uzbekistan, *Criminal Code* (1994), Article 152, see also Article 153 (extermination as a part of a genocide campaign).
[743] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[744] Vietnam, *Penal Code* (1990), Article 279, see also Article 278 (killing as a part of a genocide campaign).
[745] Yemen, *Military Criminal Code* (1998), Article 21(1).
[746] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[747] SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1), 143 and 144, see also Article 141 (killing as a part of a genocide campaign).
[748] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

National Case-law

854. Numerous cases were brought after the Second World War in Australia, China, Israel, Netherlands, Norway and US, in which the defendants were found guilty of having summarily executed or murdered prisoners of war, ordinary civilians, and individuals suspected of espionage.[749]

855. In its judgement in the *Sergeant W. case* in 1966, the Court-Martial of Brussels in Belgium sentenced to imprisonment a sub-officer who wilfully killed a civilian while serving in the Congolese army within the framework of military technical cooperation between Congo and Belgium. The Court held that the act committed was murder under the Belgian and Congolese Penal Codes and also a clear violation of the laws and customs of war and of the laws of humanity.[750]

856. In its judgement in the *Videla case* in 1994, Chile's Appeal Court of Santiago held that the Geneva Conventions "protect the human rights of the contestants in the event of external war or a conflict between organized armed forces within the State, which latter situation effectively prevailed in the country in 1974". The Court stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place violence to life and person". The Court found that the acts charged constituted grave breaches under Article 147 GC IV and that the prison order issued against the defendant should therefore be upheld.[751]

857. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II were consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions.[752]

[749] Australia, Military Court at Rabaul, *Ohashi case*, Judgement, 23 March 1946; Australia, Military Court at Rabaul, *Baba Masao case*, Judgement, 2 June 1947; China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946; Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961; Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962; Netherlands, Temporary Court-Martial at Makassar, *Motomura case*, Judgement, 18 July 1947; Netherlands, Temporary Court-Martial at Makassar, *Notomi Sueo case*, Judgement, 4 January 1947; Netherlands, Temporary Court-Martial at Amboina, *Motosuke case*, Judgement, 28 January 1948; Netherlands, Special Court of Cassation, *Silbertanne murders case*, Judgement, 24 June 1946; Netherlands, Special Court (War Criminals) at Arnhem, *Enkelstroth case*, Judgement, 20 February 1948; Netherlands, Special Court of Cassation, *Burghof case*, Judgement, 17 October 1949; Norway, Court of Appeal, *Bruns case*, Judgement, 20 March 1946; Norway, Court of Appeal, *Hans case*, Judgement, 17 January 1947; UK, Military Court at Almelo, *Sandrock case*, Judgement, 26 November 1945; US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945; US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

[750] Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.

[751] Chile, Appeal Court of Santiago, *Videla case*, Judgement, 26 September 1994, §§ 6-20.

[752] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

858. In its judgement in the *Jaluit Atoll case* in 1945, the US Military Commission in the Far East found five accused guilty of "wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers . . . then . . . captured and unarmed prisoners of war in the custody of the . . . accused".[753]

859. In its judgement in the *Schultz case* in 1969, a US Court of Military Appeal upheld a court-martial conviction of a soldier for killing a person who, the soldier believed, had signalled enemy guerrillas with a light. While the Court recognised that this act could have been considered as an unauthorised communication with the enemy, it held that the victim was entitled to protection against summary execution once he had been taken prisoner. The Court referred to GC IV and identified murder, manslaughter and assaults as "crimes universally recognized as properly punishable under the law of war".[754]

Other National Practice

860. In 1995, during a debate in the UN Security Council on the situation in the former Yugoslavia, Botswana stated that if the information relative to the execution of captives were confirmed, these acts would constitute the most blatant and flagrant violations of IHL and accepted norms of international morality.[755]

861. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Brazil stated that the international community could not "stand still and allow the continuation of mass killings in Rwanda".[756]

862. During the Chinese civil war, the PLA 's policy forbade the killing of prisoners of war.[757]

863. In 1952, during the Korean War, the Chinese government denounced the killing and injuring of prisoners of war by the US army, stating that "it destroyed the principle of humanity and essentially violated the Geneva Conventions".[758]

[753] US, Military Commission in the Far East, *The Jaluit Atoll case*, Judgement, 7–13 December 1945.

[754] US, Court of Military Appeals, *Schultz case*, Judgement, 7 March 1969.

[755] Botswana, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 5.

[756] Brazil, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 4.

[757] China, Political Report on the United Government to the Seventh Plenary Session of National Representatives of the Chinese Communist Party by Mao Zedong, 24 April 1945, *Selected Works of Mao Zedong*, Vol. IV, Foreign Language Press, Beijing, pp. 47–51, p. 1039; Instruction on Implementing the Works of Land Reform and Consolidation of the Party by Deng Xiaoping, 6 June 1948, *Selected Works of Deng Xiaoping*, Vol. 1, The People's Press, Beijing, p. 122.

[758] China, Letter from Foreign Minister Zhou Enlai to the Chairman of the UN General Assembly Protesting the US Criminal Activity of Killing POWs on Fengyan Island, 21 December 1952, *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, pp. 115–116.

864. In a press release issued in 1980, the Colombian Ministry of National Defence denounced the killing of an army officer after he had been taken prisoner by the FARC.[759]

865. The Report on the Practice of Colombia refers to a draft working paper in which the Colombian government stated that it was prohibited in particular to kill persons taking no active part in the hostilities.[760]

866. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Costa Rica stated that:

> The human right to life has found support both within the United Nations Treaties, Declarations and Resolutions as well as in Regional and International Agreements.
> ...
> Through the evolution from the Universal Declaration of Human Rights to the present time, the principles and articles, build upon each other to construct a strong structure where it is conclusive that the use of nuclear weapons violates the international law governing the Human Rights to Life and Health.[761]

867. In 1967, in a note submitted to the ICRC, Egypt qualified the "extermination of great numbers of the wounded" as a "flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949".[762]

868. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, France stated that the right to life was not absolute and that an armed conflict necessarily entailed attempts on life. It added that Article 15(2) of the 1950 ECHR and the *travaux préparatoires* of Article 6 of the 1966 ICCPR recognised this.[763]

869. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that persons not participating in hostilities (particularly the civilian population) have the right to respect for their lives.[764]

870. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Indonesia affirmed that "the right to life is one of the four non–derogable rights

[759] Colombia, Ministry of National Defence, Press Bulletin No. 041, 25 August 1980, reprinted in IACiHR, Report on the Situation of Human Rights in Colombia, Doc. OEA/Ser.L/V/II.53 Doc. 22, 1981, p. 198.

[760] Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillerra Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled "El Derecho Internacional Humanitario", § 2.

[761] Costa Rica, Written statement submitted to the ICJ, *Nuclear Weapons case*, 4 July 1995, pp. 6 and 7.

[762] Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, §§ 1 and 2(c).

[763] France, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 38; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/23, 2 November 1995, § 44.

[764] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.

which constitute the 'irreducible core' of human rights . . . A non–derogable right is one which cannot be suspended by the State even in times of public emergency."[765]

871. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, Israel accused Syria of killing and maltreating Israeli prisoners of war.[766]

872. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Malaysia stated that "the right to life is one of the four non-derogable rights which constitute the 'irreducible core' of human rights".[767]

873. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Mexico stated that both conventional and customary international law guaranteed the right to life.[768]

874. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Nauru indicated that the right to life was non-derogable and thus could not be suspended by the State even in times of public emergency.[769]

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

> The use of nuclear weapons cannot be considered in itself to be a violation of the right to life, as enshrined, *inter alia*, in Article 6 [1966 ICCPR] or in Article 2 [1950 ECHR]. According to the Netherlands Government, these articles do not create an absolute right to life. Thus, the travaux préparatoires of Article 6 [1966 ICCPR] make it clear that instead of listing the circumstances in which the deprivation of life would not be considered contrary to the right to life, the drafters decided to agree on the formulation that "No one shall be arbitrarily deprived of his life" . . . One of the instances mentioned in this connection by drafters as an example of a deprivation of life which is not arbitrary was "the performance of lawful acts of war".[770]

876. In 1968, during the Nigerian civil war, following the killing of an unarmed Biafran soldier, the Nigerian army officer responsible was executed for committing murder and for violating the code of conduct of Nigerian soldiers.[771]

877. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Nigeria noted with great concern the continuation of large-scale killings.[772]

765 Indonesia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 3 November 1995, Verbatim Record CR 95/25, § 51.
766 Israel, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1453, 4 December 1973, p. 316, § 62.
767 Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 14; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 1994, p. 12.
768 Mexico, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, p. 8.
769 Nauru, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 21.
770 Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 27; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 6 June 1994, § 34.
771 *The Times*, Execution of Nigerian Officer Filmed, London, 4 September 1968.
772 Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 5.

878. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Oman expressed regret at "the killing of thousands of innocent civilians in Rwanda".[773]

879. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Qatar stated that:

> The right to life is one of the four non-derogable rights which constitute the "irreducible core" of human rights. This means that the right to life cannot be suspended by a State, even in times of public death. Although it is expected that in times of war human beings might perish, such killings should not exceed the limits of law.[774]

880. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Russia expressed serious concern at "the deliberate mass extermination of innocent people".[775]

881. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Russia affirmed that the existence of the right to life did not mean that it was not possible to deprive a person of life through legitimate use of force, as confirmed, for instance, in Article 2(2) of the 1950 ECHR.[776]

882. In a declaration issued in 1990, the Rwandan Minister of Justice denied the reported allegations of existing threats to physically exterminate certain political prisoners.[777]

883. Rwanda's Ecole Supérieure Militaire teaches its students that the lives of captured enemy combatants shall be safeguarded.[778]

884. In its report on "gross violations of human rights" committed between 1960 and 1993, the South African Truth and Reconciliation Commission stated that:

> Those combatants who were killed or seriously injured while they were unarmed or out of combat, executed after they had been captured, or wounded when they clearly could have been arrested were held to be victims of gross violations of human rights, and those responsible were held accountable.[779]

885. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that it was entirely appropriate that the human rights agreements should, in effect, refer to the law of armed conflict in order to determine whether or not any particular instance of the deprivation of life in wartime was arbitrary.[780]

886. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the

[773] Oman, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 7.
[774] Qatar, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/29, 10 November 1995, § 30.
[775] Russia, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 6.
[776] Russia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 9.
[777] Rwanda, Declaration of the Minister of Justice, Kigali, 29 November 1990.
[778] Rwanda, Ecole Supérieure Militaire, *Cours de tactique*, Leçon No. 22, p. 17.
[779] South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 1, p. 76, § 102.
[780] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 68.

former Yugoslavia, the US described acts of "wilful killing" perpetrated by the parties to the conflict.[781]

887. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense listed Iraqi war crimes, including the murder of civilians.[782] It also noted specific Iraqi war crimes, including wilful killing in violation of Articles 32 and 147 GC IV.[783]

888. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US held that none of the instruments asserting the right to life prohibited, directly or indirectly, the taking of life for legitimate purposes, including in the exercise of the right to self-defence. It added that these provisions were clearly understood by their drafters as to exclude the lawful taking of life.[784]

889. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the beating to death of many US military and civilian prisoners.[785]

890. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II ".[786]

891. According to the Report on the Practice of Zimbabwe, Zimbabwe considers that civilians of any description should be protected from murder.[787]

892. In 1988, in connection with a non-international armed conflict, government officials denied in a meeting with the ICRC that it was the government's policy to execute prisoners. It was, however, admitted that it might have occurred in a few instances.[788]

[781] US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 4–6; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second Submission), annexed to Letter dated 22 October 1992 to the UN Secretary-General, UN Doc. S/24705, 23 October 1992, pp. 4–10; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, pp. 3–11; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, pp. 3–11.

[782] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

[783] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

[784] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 20.

[785] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON.RES. 357, 106th Congress, 2nd Session, 19 June 2000.

[786] Report on US Practice, 1997, Chapter 5.3.

[787] Report on the Practice of Zimbabwe, 1997, Chapter 5.6.

[788] ICRC archive document.

893. In 1989, in connection with a non-international armed conflict, the government of a State denied in a note verbale to the ICRC the allegations that it was its policy to execute prisoners.[789]
894. In 1992, in the context of a non-international armed conflict, a State wrote to the ICRC to denounce the killing of wounded soldiers by the armed forces of an opposition group.[790]

III. Practice of International Organisations and Conferences

United Nations
895. In a number of resolutions on South Africa adopted between 1976 and 1985, the UN Security Council condemned the wanton killing and maiming of defenceless demonstrators.[791]
896. In a resolution adopted in 1993, the UN Security Council expressed "its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings".[792]
897. In a resolution adopted in 1995, the UN Security Council referred to the situation in Bosnia and Herzegovina and expressed its grave concern "at reports ... of grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder".[793]
898. In a resolution adopted in 1996, the UN Security Council expressed deep concern at the deterioration in security and the humanitarian situation in Burundi, including killings and massacres.[794]
899. In 1998, in two statements by its President, the UN Security Council expressed its support for "the steps of the Secretary-General to launch investigations into alleged mass killings of prisoners of war and civilians in Afghanistan, the outcome of which will be submitted to the General Assembly and the7break; Security Council as soon as it becomes available".[795]
900. In 1998, in a statement by its President, the UN Security Council condemned as gross violations of IHL atrocities carried out against the civilian population, including widespread slaughter.[796]

[789] ICRC archive document. [790] ICRC archive document.
[791] UN Security Council, Res. 392, 19 June 1976, preamble and § 1; Res. 417, 31 October 1977, preamble and § 3; Res. 473, 13 June 1980, preamble; Res. 556, 23 October 1984, preamble and § 2; Res. 560, 12 March 1985, § 2; Res. 569, 26 July 1985, preamble and § 2.
[792] UN Security Council, Res. 827, 25 May 1993, preamble.
[793] UN Security Council, Res. 1019, 9 November 1995, preamble.
[794] UN Security Council, Res. 1072, 30 August 1996, preamble.
[795] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998; Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998.
[796] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998.

901. In a resolution on South Africa adopted in 1986, the UN General Assembly strongly condemned the use of capital punishment against freedom fighters and patriots and demanded that death sentences be annulled.[797]

902. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN General Assembly expressed its concern at reports regarding "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder". It expressed "its outrage at the instances of massive and systematic violations of human rights and humanitarian law, including . . . killings".[798]

903. In a resolution adopted in 1980 in the context of the conflict in Kampuchea, the UN Commission on Human Rights urged the parties to "spare the lives of those enemy combatants who surrender or are captured".[799]

904. In several resolutions on Afghanistan adopted between 1989 and 1992, the UN Commission on Human Rights demanded that all parties treat their prisoners according to the recognised principles of IHL and protect them from acts of violence, including executions.[800]

905. In a resolution adopted in 1996, the UN Commission on Human Rights stated that it condemned:

> in the strongest terms all violations of human rights and international humanitarian law during the conflict, in particular in areas which were under the control of the self-proclaimed Bosnian and Croatian Serb authorities, in particular massive and systematic violations, including, *inter alia*, systematic ethnic cleansing.[801]

906. In 1995, in reports to the UN Security Council, the UN Secretary-General concluded that there was significant *prima facie* evidence that violations of IHL had occurred during and after the Bosnian Serb offensive on Srebrenica. The Secretary-General mentioned information presented by UNPROFOR, by the Special Rapporteur of the UN Commission on Human Rights and by the US government on massacres near Nova Kasaba where civilians and captured soldiers were detained.[802]

907. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[803]

797 UN General Assembly, Res. 41/35 A, 10 November 1986, §§ 6–9.
798 UN General Assembly, Res. 50/193, 22 December 1995, p. 4.
799 UN Commission on Human Rights, Res. 29 (XXXVI), 11 March 1980, § 5.
800 UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11; Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.
801 UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.
802 UN Secretary-General, Report submitted pursuant to Security Council Resolution 1010, UN Doc. S/1995/755, 30 August 1995; Report submitted pursuant to Security Council Resolution 1019, UN Doc. S/1995/988, 27 November 1995, § 21.
803 UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

908. In 1992, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported the discovery of mass graves near Vukovar and stated that according to expert forensic opinion, bodies bore signs of trauma sustained around the time of death.[804]

909. In 1992, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that the leader of a party to the conflict in Afghanistan had issued a written order which provided that "no person is allowed to . . . murder a prisoner of war".[805]

910. In 1993, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights called upon the government of Turkey to ensure full respect for the right to life of members of the armed opposition who had been captured or had laid down their arms "in accordance with the international instruments governing the use of force and firearms by law enforcement officials".[806]

911. In 1994, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights pointed out that many of the alleged acts, such as murder, political assassination, execution of hostages and other inhumane acts committed against unarmed soldiers by the armed forces of the two parties constituted war crimes in violation of the 1949 Geneva Conventions and their common Article 3. The Rapporteur also noted that the FPR had told the ICRC that it considered itself bound by the Geneva Conventions and their Additional Protocols.[807]

912. On several occasions, the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions made urgent appeals to the Israeli government to ensure the right to life and physical security of all persons *hors de combat* in Lebanon. The Special Rapporteur also called on all parties to conflicts, whether international or internal, to respect the norms and standards of international human rights and IHL which were enacted to protect the lives of the civilian population and of combatants who were captured or who had laid down their arms.[808]

913. In 1995, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights

[804] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1992/S-1/10, 27 October 1992, Annex II.

[805] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, UN Doc. E/CN.4/1992/33, Report, 17 February 1992, § 51.

[806] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, §§ 595, 604, 610 and 706.

[807] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/7, 28 June 1994, § 54.

[808] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, §§ 394-396; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1996/4, 25 January 1996, § 589; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60, 24 December 1996, § 39.

reported with regard to attacks by Bosnian Serb forces on people fleeing after the fall of Srebrenica that "a number of accounts describe physical assaults on men who had surrendered and thus had the status of prisoners of war. Such assaults sometimes led to their death." The Rapporteur concluded that "prisoners of war were . . . in all likelihood executed in flagrant violation of international humanitarian law".[809]

914. In 1995, in a joint report, the Special Rapporteur of the UN Commission on Human Rights on Torture and the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions reported, under the section "Violations of the right to life", that members of the security forces captured in combat were often executed by Colombian rebel groups.[810]

915. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights noted that "none of the parties involved – the rebels, FAR, the *interahamwe* or the Government – were properly respecting the provisions of Article 3 common to the four Geneva Conventions of 1949, which should unquestionably have governed the situation".[811] In the section relative to violations of common Article 3, the Rapporteur noted killings by Zairean troops and rebel forces of "soldiers who had laid down their arms or were not participating in military operations".[812]

916. Following allegations by both Iran and Iraq of the killing of prisoners of war and the execution of captured soldiers during the Iran–Iraq War, the UN Secretary-General sent a mission of enquiry which reported that Iran had denied allegations that captured combatants had been executed and that Iraq had denied the allegation that orders had been issued by Iraqi authorities to treat "Khomeini Guards" as "war criminals in the battlefield". The mission also informed the UN Security Council that the Iraqi authorities had pointed out that such orders "would contradict humanitarian law and would thus be against Iraqi principles".[813]

917. In its report in 1993, the UN Commission on the Truth for El Salvador found that "the execution of an individual, whether a combatant or a non-combatant, who is in the power of a guerrilla force and who does not put up any resistance is not a combat operation" and that the executions carried out

[809] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1996/9, 22 August 1995, §§ 33 and 53.

[810] UN Commission on Human Rights, Special Rapporteur on Torture and Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Joint report, UN Doc. E/CN.4/1995/111, 16 January 1995, § 33.

[811] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, § 171.

[812] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, §§ 190, 191 and 198.

[813] UN Secretary-General, Prisoners of war in Iran and Iraq: the report of a mission dispatched by the Secretary-General, January 1985, UN Doc. S/16962, 22 February 1985, §§ 72–73.

during the internal conflict in El Salvador were in violation of IHL and human rights law.[814]

Other International Organisations

918. The report of the Political Affairs Committee accompanying a resolution on Afghanistan adopted by the Parliamentary Assembly of the Council of Europe in 1985 expressed alarm at reports of the systematic execution of captured combatants.[815]

919. In a resolution adopted in 2000 on violations of human rights and humanitarian law in Chechnya, the European Parliament called upon the Russian authorities to ensure that the right to life of the Chechen people was protected.[816]

920. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that "acts of brutality [and] murder... represent a total contravention of all the Charters, Laws and Conventions of the International Community of Nations".[817]

921. In a resolution on Tunisia adopted in 1961, the Council of the League of Arab States strongly condemned:

> the tyrannical French aggression against Tunisia... and the genocidal war against the defenceless Tunisian people, including the old, the women and the children, burning villages and houses and killing internees and unarmed civilians in all kinds of ways, which stands in contradiction with France's commitment to the International Conventions and Charters that prohibit genocidal practices, such as the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Times of War, the Declaration of Human Rights and the United Nations Charter.[818]

International Conferences

922. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they refused "to accept that wounded are shown no mercy, children massacred...".[819]

923. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that "strict

[814] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 151.
[815] Council of Europe, Parliamentary Assembly, Political Affairs Committee, Deteriorating situation in Afghanistan, Report, Doc. 5495, 15 November 1985, p. 7.
[816] European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, § 2.
[817] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 6.
[818] League of Arab States, Council, Res. 1778, 20 July 1961, preamble.
[819] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.

orders are given to prevent all serious violations of international humanitarian law, including massacres . . . and threats to carry out such actions".[820]

924. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about "the number and expansion of conflicts in Africa" and alarm at "the spread of violence, in particular in the form of . . . murder . . . which seriously violate[s] the rules of International Humanitarian Law".[821]

IV. Practice of International Judicial and Quasi-judicial Bodies

925. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[822]

926. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that:

> In principle, the right not arbitrarily to be deprived of one's life [contained in Article 6 of the 1966 ICCPR] applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the ICCPR, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[823]

927. In the *Ntakirutimana and Others case* before the ICTR in 2000, a Rwandan prefect was indicted for, *inter alia*, failure to prevent massacres from taking place and for failure subsequently to punish those responsible.[824]

928. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY Appeals Chamber referred to a Nigerian newspaper article in which it was reported that "on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba".[825] The Appeals Chamber stated that Article 3 of the

[820] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

[821] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

[822] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

[823] ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 25.

[824] ICTR, *Ntakirutimana and Others case*, Amended Indictment, 20 October 2000, § 5.

[825] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 106, referring to *New Nigerian*, 28 June 1968, p. 1.

ICTY Statute also covered violations of common Article 3 of the 1949 Geneva Conventions.[826]

929. In the second amended indictment in the *Tadić case* in 1995, the Prosecutor of the ICTY charged the accused with grave breaches of the Geneva Conventions (wilful killing) and violations of the laws or customs of war (murder).[827]

930. In its judgement in the *Tadić case* in 1997, the ICTY stated that:

> The customary international humanitarian law regime governing conflicts not of an international character extends protection, from acts of murder, torture and other acts proscribed by Common Article 3 [of the 1949 Geneva Conventions], to . . . persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.[828]

931. In the *Mrkšić case* before the ICTY in 1995, the accused was charged with grave breaches under Article 2(a) of the Statute of the Tribunal (wilful killing), violations of the laws or customs of war under Article 3 of the Statute (murder) and crimes against humanity under Article 5(a) (killing of civilians and wounded soldiers who had been removed by the accused from Vukovar hospital).[829]

932. In the *Erdemović case* in 1995, the accused pleaded guilty to a crime against humanity (the massacre of hundreds of Muslims at the Branjevo farm at Pilica). In its sentencing judgement in 1996, the ICTY Trial Chamber convicted Dražen Erdemović of the violation of the laws and customs of war.[830]

933. In its judgement in the *Delalić case* in 1998, the ICTY held that:

> There can be no line drawn between "wilful killing" [wording of the grave breaches provisions of the Geneva Conventions] and "murder" [wording of common Article 3 of the 1949 Geneva Conventions] which affects their content . . . Thus, as it is prohibited to kill protected persons during an international armed conflict, so it is prohibited to kill those taking no active part in hostilities which constitute an internal armed conflict.

The Tribunal found some of the accused guilty of grave breaches of GC IV (wilful killing) and violations of the laws and customs of war (murder).[831]

934. In its judgement in the *Jelisić case* in 1999, the ICTY held that "the charges for murder and cruel treatment are based on Article 3 common to the [1949] Geneva Conventions whose customary character has been noted on several occasions by this Tribunal and the Criminal Tribunal for Rwanda". The Court

[826] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 89, 134 and 136.
[827] ICTY, *Tadić case*, Second Amended Indictment, 14 December 1995, §§ 6, 11 and 12.
[828] ICTY, *Tadić case*, Judgement, 7 May 1997, § 615.
[829] ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 26; see also *Mrkšić case*, Review of the Indictment, 3 April 1996, Disposition.
[830] ICTY, *Erdemović case*, Sentencing Judgement, 29 November 1996, Part IV; *Erdemović case*, Judgement on Appeal, 7 October 1997, § 20; *Erdemović case*, Sentencing Judgement *bis*, 5 March 1998, § 23.
[831] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 422–423, 452 and 454 and Part IV.

found Goran Jelisić guilty of murders as violations of the laws and customs of war, as well as crimes against humanity.[832]

935. In its judgment in the *Kupreškić case* in 2000, the ICTY found Drago Josipović and Vladimir Šantić "guilty of a crime against humanity (murder)".[833]

936. In its judgement in the *Blaškić case* in 2000, the ICTY found the accused guilty of violations of the laws and customs of war and held that the offence of violence to life and person

> appears in Article 3(1)(a) common to the Geneva Conventions. It is a broad offence which, at first glance, encompasses murder and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing) of the [ICTY] Statute.[834]

937. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with "murder" as a crime against humanity and violation of laws or customs of war and "wilful killing" (as recognised by Articles 2(a), 7(1) and 7(3) of the Statute of the Tribunal).[835] In its judgement in 2001, the Tribunal found the accused guilty of "murder" as a crime against humanity, and "wilful killing" as a grave breach of the Geneva Conventions.[836]

938. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that:

> 2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year . . . The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life . . .
> 3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.
> 4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate

[832] ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 41 and 138.
[833] ICTY, *Kupreškić case*, Judgement, 14 January 2000, Disposition, §§ 5 and 6.
[834] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 182 and Part VI.
[835] ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, Counts 1–2, 7–9 and 14–16.
[836] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Section V, Disposition, Counts 7–8 and 14–15.

thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[837]

939. In *Camargo v. Colombia* in 1982, the HRC held that:

The requirements that the right [to life] shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

. . .

In the present case it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant.

. . .

For these reasons it is the Committee's view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6(1) of the International Covenant on Civil and Political Rights.[838]

940. In 1995, in its decision in *Civil Liberties Organisation v. Chad (74/92)*, the ACiHPR stated that:

In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the [ACHPR].[839]

941. In its admissibility decision in the *Dujardin and Others v. France case* in 1991, concerning the killing of four disarmed gendarmes by about 50 assailants (two were executed after having been wounded), the ECiHR held that the proclamation of a general amnesty law was not contrary to the right to life as protected under the Convention, as long as "a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law".[840]

[837] HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, §§ 2–4.
[838] HRC, *Camargo v. Colombia*, 31 March 1982, Views, §§ 13.1–13.3.
[839] ACiHPR, *Civil Liberties Organisation v. Chad (74/92)*, Decision, 11 October 1995, § 22.
[840] ECiHR, *Dujardin and Others v. France*, Admissibility Decision, 2 September 1991, p. 9.

942. In its judgement in *McCann and Others v. UK* in 1995, the ECtHR found that, in relation to the conduct and planning of an operation which resulted in the killing of three IRA suspects, it had to examine not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence, but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The Court found that the failure to make allowances for erroneous intelligence assessments and the automatic recourse to lethal force constituted a use of force that exceeded the level that was absolutely necessary in defence of persons from unlawful violence and therefore amounted to a violation of Article 2 of the 1950 ECHR.[841]

943. In three separate judgements in 1998, the ECtHR held that the responsibility of a State could be engaged where agents of the State failed to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.[842]

944. In its judgement in *Kurt v. Turkey* in 1998, the ECtHR asserted that presumptions deduced from the circumstances of detention, combined with allegations of an officially tolerated practice of disappearance, were not in themselves sufficient to establish that the disappeared person had died in custody and did not therefore support a finding of violation of the right to life.[843]

945. In *Kaya v. Turkey* in 2000, the ECtHR stated that:

> 91. . . . The authorities were aware, or ought to have been aware, of the possibility that this risk [of falling victim to an unlawful attack] derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. A 1993 report by a Parliamentary Investigation Commission . . . stated that it had received information that a Hizbullah training camp was receiving aid and training from the security forces and concluded that some officials might be implicated in the 908 unsolved killings in the south-east region. The Susurluk report, published in January 1998, informed the Prime Minister's Office that the authorities were aware of killings being carried out to eliminate alleged supporters of the PKK . . . The Government insisted that this report did not have any judicial or evidential value. However, even the Government described the report as providing information on the basis of which the Prime Minister was to take further appropriate measures. It may therefore be regarded as a significant document.
> . . .
> 108. The Court is not satisfied that the investigation carried out into the killing of Hasan Kaya and Metin Can was adequate or effective. It failed to establish significant elements of the incident or clarify what happened to the two men and has not been conducted with the diligence and determination necessary for there to be any realistic prospect of identifying and apprehending the perpetrators. It has

[841] ECtHR, *McCann and Others v. UK*, Judgement, 27 September 1995, §§ 194 and 210–214.
[842] ECtHR, *Ergi v. Turkey*, Judgement, 28 July 1998, §§ 79, 81 and 85; *Yasa v. Turkey*, Judgement, 2 September 1998, § 104.
[843] ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 107–108.

remained from the early stages within the jurisdiction of the National Security Court prosecutors, who investigate primarily terrorist or separatist offences.
109. The Court concludes that there has been in this respect a violation of Article 2 of the [ECHR].[844]

946. In *Avsar v. Turkey* in 2001, the ECtHR stated that:

394. For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events . . . The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances . . . and to the identification and punishment of those responsible . . . This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death . . . Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.
. . .
408. The Court concludes that the investigation by the gendarmes, public prosecutor and before the criminal court did not provide a prompt or adequate investigation of the circumstances surrounding the killing of Mehmet Serif Avsar and therefore was in breach of the State's procedural obligation to protect the right to life. This rendered recourse to civil remedies equally ineffective in the circumstances. It accordingly dismisses the criminal and civil proceedings limb of the Government's preliminary objection . . . and holds that there has been a violation of Article 2 [of the 1950 ECHR] in this respect.[845]

947. In its judgement in *K.-H. W. v. Germany* in 2001, the ECtHR took the view that "even a private soldier could not show total, blind obedience to orders which flagrantly infringed" GDR legal principles and international human rights, particularly the right to life, which the Court found to be "the supreme value in the hierarchy of human rights".[846]
948. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:

. . .

e. When it does not in any manner presuppose the suspension of the right to life.[847]

[844] ECtHR, *Kaya v. Turkey*, Judgement, 28 March 2000, §§ 91 and 108–109.
[845] ECtHR, *Avsar v. Turkey*, Judgement, 10 July 2001, §§ 394 and 408.
[846] ECtHR, *K.-H. W. v. Germany*, Judgement, 22 March 2001, § 75.
[847] IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59–61.

949. The IACiHR has repeatedly stated that the right to life may never be suspended and that governments may not use, under any circumstances, illegal or summary execution to restore public order. It has also made clear that States are under an obligation to investigate alleged cases of summary or extrajudicial executions.[848]

950. In reviewing individual cases brought against El Salvador between 1985 and 1992, the IACiHR noted a number of them concerning the killing of persons detained or in the custody of the armed forces and declared that "such acts constituted serious violations of the right to life (Article 4 ACHR)".[849]

951. In a case brought before the IACiHR in 1992 concerning the killing of 74 persons by members of the Salvadoran security forces, the petitioners argued that the application of an amnesty decree constituted a clear violation of the obligation of the Salvadoran government to investigate and punish the violation of the victim's rights, and more particularly a violation of Article 27 of the 1969 ACHR, which prohibited the suspension of the guarantees indispensable to the protection of non-derogable rights such as the right to life protected under Article 4. The Commission declared that the government of El Salvador had failed to comply with the obligation to guarantee the free and full exercise of human rights and fundamental guarantees of all persons subject to its jurisdiction. The Commission also recommended that the government of El Salvador submit those responsible to justice in order to establish their responsibility so that they might receive the sanctions demanded by such serious actions.[850]

952. In 1993, in a report on the situation of human rights in Peru, the IACiHR reminded Peru that the summary execution of persons by the forces of order cannot be justified in any context. It also recommended that Peru, in the context of a prison to which members of the Tupac Amaru Revolutionary Movement were transferred, separate members of rival armed groups so as to avoid violence threatening the safety or lives of the inmates.[851]

953. In 1997, in a report concerning a case in Argentina, the IACiHR stated that:

> 157. Before addressing petitioner's specific claims, the Commission thinks it useful to clarify the reasons why it has deemed it necessary at times to apply directly rules of international humanitarian law or to inform its interpretations of relevant provisions of the [ACHR] by reference to these rules. A basic understanding of the interrelationship of these two branches of international law – human rights and humanitarian law – is instructive in this regard.
>
> . . .

[848] IACiHR, *Annual Report 1980–1981*, Doc. OEA. Ser.L/V/II.54, 16 October 1981, p. 112; *Case 10.559 (Peru)*, Report, 1 March 1996, Section V(2).

[849] IACiHR, *Case 6724 (El Salvador)*, Resolution, 5 March 1985, §§ 1–2; *Case 10.190 (El Salvador)*, Resolution, 4 February 1992, preamble and § 1; *Case 10.284 (El Salvador)*, Resolution, 4 February 1992, § 1.

[850] IACiHR, *Case 10.287 (El Salvador)*, Report, 24 September 1992, Sections I(5), VI(4) and VI(5)(a).

[851] IACiHR, Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II. 83 Doc. 31, 1993, pp. 29 and 38.

327. As for the facts linked directly to the attack on the La Tablada barracks and its recapture, the Commission concludes that those events constituted a non-international armed conflict . . . As such, the conduct during the hostilities is governed by the rules on internal armed conflicts, which the Commission is competent to apply . . .
328. Based on its application of said norms of humanitarian law, the Commission found that there was not sufficient evidence to determine that the State used illegal methods and means of combat to retake the barracks at La Tablada in January 1989. It also determined that the civilians who took up arms and attacked those barracks became military targets for such time as they actively participated in the conflict. Therefore, the deaths of and wounds inflicted on the attackers, while they were active participants in the conflict, were legitimately related to the combat, and do not constitute violations of the [ACHR] or of the applicable provisions of humanitarian law.[852]

954. In 2001, in the *Case of the Ríofrío massacre (Colombia)*, the IACiHR stated that:

Article 4 of the [ACHR] establishes that every person has the right to have his life respected and no one shall be arbitrarily deprived of his life. It is also important to note that intentional mistreatment, and particularly extrajudicial execution of civilians under the control of one of the parties in any kind of armed conflict is absolutely prohibited in all circumstances in light of the basic considerations of humanity reflected in common Article 3 of the Geneva Conventions.[853]

955. In 1988, in the *Velásquez Rodríguez case*, the IACtHR stated that:

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.[854]

956. In its judgement in the *Neira Alegría and Others case* in 1995, involving the disappearance of three prisoners following a riot in which control and jurisdiction of the prison was handed over to the army, the IACtHR held that:

60. In the terms of Article 5(2) of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.
. . .
76. Given the circumstances that surrounded the crushing of the riot at the San Juan Bautista Prison; the fact that eight years after the riot occurred there is still no knowledge of the whereabouts of the three persons to whom this

[852] IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 157 and 327–328.
[853] IACiHR, *Case of the Ríofrío massacre (Colombia)*, Report, 6 April 2001, § 54.
[854] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.

> case refers, as was acknowledged by the Minister of Foreign Affairs stating that the victims were not among the survivors and that "*three of the* [non-identified bodies] *undoubtedly correspond to those three persons*"; and the disproportionate use of force; it may be reasonably concluded that they were arbitrarily deprived of their lives by the Peruvian forces in violation of Article 4(1) of the [of the 1969 ACHR].[855]

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

957. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "violence to life . . . of persons in general is prohibited", that "murder is prohibited" and that "wilful killing" is a grave breach of the law of war.[856]

958. On 18 September 1982, the ICRC addressed an appeal to the international community in which it condemned the fact that, according to reports from its delegates in Beirut:

> hundreds of women, children, adolescents and elderly persons have been killed in Beirut in the district of Chatila, the streets of which are strewn with their bodies. The ICRC is also aware that wounded persons have been killed in hospital beds and that others, including doctors, have been abducted . . . The ICRC solemnly appeals to the international community to intervene to put an immediate stop to the intolerable massacre perpetrated on whole groups of people and to ensure that . . . the basic right to life is observed.[857]

959. In an appeal launched in 1983 in the context of the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including "summary execution of captive soldiers".[858]

960. In an interview in 1989, a representative of the Executive Committee of the Union of the Red Cross and Red Crescent Societies of the USSR denounced as a "monstrous crime in terms of international law" the plan of an Afghan faction to execute several Soviet prisoners and to show their corpses as proof of the USSR 's interference in the conflict in Afghanistan.[859]

961. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "civilians and all non-combatants must be respected and protected, and violence to life and person . . . [is] specifically prohibited".[860]

[855] IACtHR, *Neira Alegría and Others case*, Judgement, 19 January 1995, §§60 and 76.
[856] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 190, 191 and 776(a).
[857] ICRC, *Annual Report 1982*, Geneva, 1983, p. 57.
[858] ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.
[859] Executive Committee of the Union of the Red Cross and Red Crescent Societies of the USSR, "Plan to Murder Soviet POWs Denounced", Interview with Komsomolskaya Pravda Correspondent, Bulletin ISL of the USSR Embassy in Afghanistan, 2 April 1989.
[860] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

962. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC enjoined the military and civilian authorities of the parties involved to take all the necessary steps "to spare the lives of those who surrender".[861]

963. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that "persons *hors de combat* and those who do not take a direct part in hostilities have the right to respect for their lives".[862]

964. In a communication to the press issued in 1994 in the context of the conflict in Rwanda, the ICRC stated that:

> Armed militiamen shot to death, in the presence of members of the armed forces, six wounded people who were being taken by Rwandese Red Cross volunteers to a field hospital set up ... by the [ICRC]. This outrageous act has compelled the ICRC and the Rwandese Red Cross to suspend the collection of casualties in the capital, where the most elementary rules of humanity are being flouted.
>
> The ICRC and the Rwandan Red Cross called on all combatants and the militia to stop the massacres.[863]

965. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "attacks on civilians' life" are prohibited and that killing captured combatants and persons who have laid down their arms "constitutes a crime and is absolutely forbidden".[864]

966. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "violence to [the] lives of [civilian persons who refrain from acts of hostility]" is prohibited and that "combatants and other persons who are captured, and those who have laid down their arms ... shall not, in particular, be killed".[865]

967. In 1996, in a note on respect for IHL in an internal armed conflict, the ICRC stated that the authorities must "make sure that the lives of those detained are protected".[866]

968. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of wilful killing, when committed in an international armed conflict, be subject to the jurisdiction of the Court. It also proposed

[861] ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.
[862] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de enero de 1994, 3 January 1994, § 2(A), see also § 2(D).
[863] ICRC, Communication to the Press No. 94/16, Rwanda: six wounded killed in a Red Cross ambulance, 14 April 1994.
[864] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.
[865] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.
[866] ICRC archive document.

that "violence to the life, health and physical or mental well-being of persons, in particular murder", as a serious violation of IHL applicable in non-international conflicts, be subject to the jurisdiction of the Court.[867]

969. In a communication to the press issued in 2001, the ICRC reminded the parties to the conflict in Afghanistan that "persons not taking part in hostilities must be . . . spared the effects of the violence . . . Threats to their lives . . . are prohibited."[868]

VI. Other Practice

970. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and to respect the lives of civilians.[869]

971. In a special communiqué issued in 1980, UNITA denounced the death sentences imposed on captured persons as violations of human rights. The communiqué also referred to the international law of armed conflicts.[870]

972. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "persons *hors de* combat and those who do not take part in hostilities are entitled to respect for their lives and their moral and physical integrity" and that "captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives".[871]

973. In 1983, when ICRC delegates inquired about the execution of four prisoners detained by an armed opposition group, the group's representative stated that "in war time, such behaviour is normal and engenders no consequences". The ICRC delegates replied that such practices are against IHL and are of serious concern.[872]

974. In 1984, in a letter to the ICRC, an armed opposition group denounced the practice of the forces of the regime in place which "always tried to arrest our partisans and after torturing and getting their confessions by force martyred them".[873]

975. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, . . . (c) the murder . . . of individuals".[874]

[867] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(i) and 3(i).
[868] ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.
[869] ICRC archive document.
[870] UNITA, Special Communiqué No. 12/80: UNITA draws international attention to violations of human rights and appeals to humanitarian organisations, 4 August 1980.
[871] ICRC archive document. [872] ICRC archive document. [873] ICRC archive document.
[874] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(a) and (c).

976. In 1986, various opposing factions in an internal conflict acknowledged that captured combatants were executed.[875]
977. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "violence to life . . . in particular murder" shall remain prohibited. It further states that "every human being has the inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of his or her life."[876]
978. In a widely circulated communiqué in 1994, the general staff of an armed opposition group called for the extermination of another group by any available means. The events in that State were universally condemned.[877]
979. The SPLM Human Rights Charter provides that "persons taking no active part in fighting, whether civilians or sick, wounded or captured soldiers, shall be protected from execution or other abuses, including during combat".[878]

D. Torture and Cruel, Inhuman or Degrading Treatment

General

I. Treaties and Other Instruments

Treaties
980. Article 28 of the 1906 GC provides that "in the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of . . . ill treatment of the sick and wounded of the armies".
981. Article 5 of the 1929 Geneva POW Convention provides that "no pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever."
982. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
> . . .
> (b) "War crimes:" namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, . . . ill-treatment . . . of civilian population of or in occupied territory, . . . ill-treatment of prisoners of war or persons on the seas . . .

[875] ICRC archive document.
[876] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 3(1) and 8(1), *IRRC*, No. 282, 1991, pp. 331 and 333.
[877] ICRC archive document.
[878] SPLM, Human Rights Charter, May 1996, § 4.2.

(c) "Crimes against humanity:" namely . . . inhumane acts committed against any civilian population, before or during the war.

983. According to Article 2 of the 1948 Genocide Convention, "causing serious bodily or mental harm to members of the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".
984. Common Article 3 of the 1949 Geneva Conventions explicitly prohibits "violence to life and person, in particular . . . cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment" with respect to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.
985. Article 12, second paragraph, GC I provides that violence to wounded and sick members of the armed forces in the field shall be strictly prohibited, in particular torture.
986. Article 12, second paragraph, GC II provides that violence to wounded, sick and shipwrecked members of the armed forces at sea shall be strictly prohibited, in particular torture.
987. Article 17, fourth paragraph, GC III provides that:

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

988. Article 87, third paragraph, GC III provides that "any form of torture or cruelty is forbidden".
989. Article 89 GC III provides that "in no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war".
990. Article 32 GC IV provides that:

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering . . . of protected persons in their hands. This prohibition applies not only to . . . torture . . . but also to any other measures of brutality whether applied by civilian or military agents.

991. According to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" are grave breaches of these instruments.
992. Article 3 of the 1950 ECHR provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 15(2) adds that Article 3 is non-derogable "in time of war or other public emergency threatening the life of the nation".

993. Article 7 of the 1966 ICCPR provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 4(2) states that there can be no derogation from Article 7.
994. Article 5(2) of the 1969 ACHR provides that "no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment". Article 27(2) "does not authorize any suspension" of Article 5(2).
995. Article 8(a) and (b) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provides that all captured military personnel, captured foreign civilians and captured civilian personnel "shall be protected against . . . torture and cruel treatment, and outrages upon personal dignity".
996. Article 75(2) AP I prohibits "torture of all kinds, whether physical or mental", "outrages upon personal dignity, in particular humiliating and degrading treatment". Article 75 AP I was adopted by consensus.[879]
997. Article 4(2) AP II prohibits "cruel treatment such as torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment". Article 4 AP II was adopted by consensus.[880]
998. Article 5 of the 1981 ACHPR provides that "torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".
999. Article 2(2) of the 1984 Convention against Torture states, after having regard to Article 7 of the 1966 ICCPR, that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".
1000. The 1985 Inter-American Convention against Torture, after recalling the prohibition of torture contained in Article 5 of the 1969 ACHR, states in Article 1 that State parties undertake to prevent and punish torture. Article 5 further stipulates that:

> The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

1001. The preamble to the 1987 European Convention for the Prevention of Torture refers to Article 3 of the 1950 ECHR which provides for the absolute prohibition of torture.
1002. Article 37(a) of the 1989 Convention on the Rights of the Child provides that States Parties shall ensure that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment".

[879] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[880] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

1003. According to Article 1(2) of the 1995 Agreement on Human Rights annexed to the Dayton Accords, the parties shall secure to all persons within their jurisdiction the right not to be subjected to torture.
1004. Pursuant to Article 6(b) of the 1998 ICC Statute, "causing serious bodily or mental harm to members of the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".
1005. Pursuant to Article 7(1)(f) of the 1998 ICC Statute, torture constitutes a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".
1006. Pursuant to Article 8(2)(a)(ii) and (iii) of the 1998 ICC Statute, "torture or inhuman treatment" and "wilfully causing great suffering, or serious injury to body or health" constitute war crimes in international armed conflicts.
1007. Pursuant to Article 8(2)(c)(i) of the 1998 ICC Statute, "cruel treatment and torture" constitute war crimes in non-international armed conflicts.
1008. Pursuant to Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute, "committing outrages upon personal dignity, in particular humiliating and degrading treatment" constitutes a war crime in both international and non-international armed conflicts.
1009. According to Article 3(a) and (e) of the 2002 Statute of the Special Court for Sierra Leone, the Tribunal has jurisdiction over violations of common Article 3 of the 1949 Geneva Conventions and of AP II, including "violence to life, health and physical or mental well-being of persons, in particular . . . cruel treatment such as torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment".

Other Instruments
1010. Article 16 of the 1863 Lieber Code states that military necessity does not admit "torture to extort confessions".
1011. Article 56 of the 1863 Lieber Code provides that "a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment . . . or any other barbarity".
1012. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including torture of civilians, ill-treatment of prisoners of war and internment of civilians under inhuman conditions.
1013. Article II(1) of the 1945 Allied Control Council Law No. 10, provides that "ill treatment . . . of civilian population from occupied territory" is a war crime and that "torture . . . or other inhumane acts committed against any civilian population" is a crime against humanity.

1014. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including "inhumane acts committed against any civilian population, before or during the war".
1015. Article 5 of the 1948 UDHR provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".
1016. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that:

> The crimes hereinafter set out are punishable as crimes under international law:
> ...
> (b) War crimes: Violations of the laws or customs of war include, but are not be limited to, ... ill-treatment ... of civilian population of or in occupied territory, ... ill-treatment of prisoners of war, of persons on the seas ...
> (c) Crimes against humanity: ... inhuman acts done against any civilian population.

1017. Rule 4 of the 1950 UN Command Rules and Regulations gave Military Commissions of the UN Command in Korea jurisdiction over offences such as ill-treatment of civilians or prisoners of war.
1018. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that "all forms of repression and cruel and inhuman treatment of women and children, including ... torture ... committed by belligerents in the course of military operations or in occupied territories shall be considered criminal".
1019. Article 2 of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

1020. Article 5 of the 1979 Code of Conduct for Law Enforcement Officials provides that "no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment".
1021. Principle 6 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

> No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

1022. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, "acts of inhumanity, cruelty or barbarity directed against life ... in particular ... torture" are considered as an exceptionally

serious war crime and as a serious violation of the principles and rules of international law applicable in armed conflict.

1023. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

1024. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

1025. Under Article 2(b) of the 1993 ICTY Statute, the Tribunal is competent to prosecute torture of persons protected under the provisions of the relevant Geneva Convention.

1026. Article 5(f) of the 1993 ICTY Statute provides that torture constitutes a crime against humanity when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

1027. According to Article 3(f) of the 1994 ICTR Statute, torture constitutes a crime against humanity, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

1028. Under Article 4(a) and (e) of the 1994 ICTR Statute, the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including "cruel treatment such as torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment".

1029. Article 18(c) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "torture" is a crime against humanity.

1030. Article 20(a)(ii)–(iii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" are crimes against the peace and security of mankind.

1031. Article 20(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment" are war crimes.

1032. Article 20(f)(i) and (v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind stipulates that "cruel treatment such as torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" constitute war crimes in armed conflicts not of an international character.

1033. Article 2(7) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the Agreement seeks to confront, remedy and prevent the most serious human rights violations, including "the right not to be subjected to physical or mental torture, solitary

confinement . . . and other inhuman, cruel or degrading treatment, detention and punishment".

1034. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines further provides that physical or mental torture and cruel or degrading treatment shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

1035. According to Section 7(2) of the 1999 UN Secretary-General's Bulletin, cruel treatment such as torture of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.

1036. Section 8(d) of the 1999 UN Secretary-General's Bulletin provides that detained persons "shall under no circumstances be subjected to any form of torture or ill-treatment".

1037. Article 4 of the 2000 EU Charter of Fundamental Rights provides that "no one shall be subject to torture or to inhuman or degrading treatment or punishment".

1038. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(ii), "torture or inhuman treatment" constitutes a war crime in international armed conflicts. According to Section 6(1)(c)(i), "cruel treatment and torture" constitute war crimes in non-international armed conflicts. According to Section 6(1)(b)(xxi) and (c)(ii), "committing outrages upon personal dignity, in particular humiliating and degrading treatment", constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

1039. Argentina's Law of War Manual (1969) provides that "you cannot exercise on prisoners physical or mental torture nor any form of coercion to obtain any type of information".[881] It further states that "it is especially prohibited to submit [the wounded and sick] to torture".[882] This prohibition also applies to civilians in occupied territories.[883] The manual restates common Article 3 of the 1949 Geneva Conventions.[884]

1040. Argentina's Law of War Manual (1989) provides that mental and physical torture against all protected persons is prohibited in international as well as non-international armed conflicts.[885] It stipulates that torture and inhuman

[881] Argentina, *Law of War Manual* (1969), § 2.016.
[882] Argentina, *Law of War Manual* (1969), § 3.001.
[883] Argentina, *Law of War Manual* (1969), § 4.012.
[884] Argentina, *Law of War Manual* (1969), § 8.001.
[885] Argentina, *Law of War Manual* (1989), §§ 3.10, 3.25, 4.15, 4.29 and 7.04.

treatment and wilful causing of grievous suffering or serious injury to the body or health of protected persons are grave breaches of the Geneva Conventions and AP I.[886]

1041. Australia's Commanders' Guide states that civilians shall "not be subjected to harsh, cruel or degrading treatment". It also states that after the capture of a combatant, "no physical or mental pressure may be exerted in order to extract further information". With regard to POWs, the manual provides that "no torture or other forms of physical or mental coercion may be employed". It also states that crimes of torture or inhuman treatment of protected persons warrant the institution of criminal proceedings.[887]

1042. Australia's Defence Force Manual prohibits physical and mental torture, inhuman treatment or brutality and states that "torturing or inhumanely treating protected persons", "wilfully causing great suffering or serious injury to body or health of protected persons" and "mistreating PW . . . torturing, subjecting them to inhuman treatment" are grave breaches which warrant the institution of criminal proceedings.[888]

1043. Belgium's Manual for Soldiers states that POWs and enemy soldiers who are no longer able to fight shall not be subjected to mental or physical torture. The manual considers this prohibition to be a general principle and specifies that it also applies to prisoners of war.[889]

1044. According to Belgium's Law of War Manual, "the Detaining Power cannot exercise mental or physical torture on prisoners".[890] It adds that torture and inhuman treatment are grave breaches of the Geneva Conventions.[891]

1045. Benin's Military Manual provides that "nobody shall be subjected to physical or mental torture . . . nor to inhuman or degrading treatment".[892]

1046. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 state that "Islam likewise forbids the torture and brutalisation of prisoners of war".[893]

1047. Burkina Faso's Disciplinary Regulations provides that soldiers are prohibited to submit the wounded, sick and shipwrecked, prisoners and civilians to "inhuman treatment or torture of any kind".[894] It also provides that "prisoners must be protected against any act of violence, insults and public curiosity".[895]

1048. Canada's LOAC Manual provides that "no physical or mental torture, or any other form of coercion, shall be inflicted on PWs or detainees to force them

[886] Argentina, *Law of War Manual* (1989), § 8.03.
[887] Australia, *Commanders' Guide* (1994), §§ 603, 709, 713 and 1305(a).
[888] Australia, *Defence Force Manual* (1994), §§ 945, 953, 1022, 1219, 1221 and 1315(a)–(b) and (n).
[889] Belgium, *Manual for Soldiers* (undated), pp. 7, 10 and 62, slide 5/1.
[890] Belgium, *Law of War Manual* (1983), pp. 46 and 55.
[891] Belgium, *Law of War Manual* (1983), p. 55.
[892] Benin, *Military Manual* (1995), Fascicule II, p. 5 and Fascicule III, p. 4.
[893] Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.
[894] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[895] Burkina Faso, *Disciplinary Regulations* (1994), Article 36(1).

to provide information of any kind".[896] It stipulates that "any form of torture or cruelty, are forbidden".[897] It also states that belligerents are forbidden to use physical or moral coercion against protected persons.[898] It further states that "the following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents . . . torture of all kinds, whether physical or mental".[899] The manual adds that torture is an act against humanity and that "torture and inhumane treatment along with wilfully causing great suffering or serious injury to the wounded, sick and shipwrecked" is a grave breach of GC I, GC II and AP I.[900] With regard to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions. It adds that AP II contains a "statement of fundamental guarantees prohibiting at any time and anywhere . . . cruel treatment, such as torture".[901]

1049. Canada's Code of Conduct states as a general rule the prohibition of "any form of abuse, including torture".[902] Regarding the 1984 Convention against Torture, the manual explains that "it is a service and a criminal offence to torture a PW or detained person. Any form of physical or psychological abuse is prohibited."[903] It further states that "where interrogation or debriefing is conducted by qualified and authorized personnel, no physical or mental torture, or any other form of coercion, shall be inflicted on PWs or detainees to force them to provide information of any kind".[904] The manual also provides a list of 11 fundamental rules, among which is "any form of abuse, including torture, is prohibited".[905]

1050. China's PLA Rules of Discipline which regulated the behaviour of the Red Army during the Chinese civil war, and were later used by the PLA, provided that prisoners of war were not to be maltreated.[906]

1051. Colombia's Circular on Fundamental Rules of IHL provides that "nobody shall be subjected to mental or physical torture . . . cruel or degrading treatment".[907]

1052. Colombia's Basic Military Manual provides that persons *hors de combat*, the wounded and sick and detained persons shall not be subjected to torture or cruel or humiliating treatment.[908] It adds that the civilian population shall not

[896] Canada, *LOAC Manual* (1999), p. 10-3, § 24.
[897] Canada, *LOAC Manual* (1999), p. 10-7, § 61.
[898] Canada, *LOAC Manual* (1999), p. 11-4, §§ 32–33.
[899] Canada, *LOAC Manual* (1999), pp. 11-7/11-8, § 63.
[900] Canada, *LOAC Manual* (1999), p. 16-1, § 4, p. 16-2, § 12 and p. 16-3, § 17.
[901] Canada, *LOAC Manual* (1999), p. 17-2, § 10 and p. 17-3, § 21.
[902] Canada, *Code of Conduct* (2001), Rule 6.
[903] Canada, *Code of Conduct* (2001), Rule 6, § 6.
[904] Canada, *Code of Conduct* (2001), Rule 6, § 11.
[905] Canada, *Code of Conduct* (2001), Chapter 3, § 6.
[906] China, *PLA Rules of Discipline* (1947), Point 8.
[907] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.
[908] Colombia, *Basic Military Manual* (1995), p. 29

be tortured.[909] The manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[910]

1053. Congo's Disciplinary Regulations prohibits torture and inhuman treatment of the wounded and sick, shipwrecked, prisoners of war and civilians.[911]

1054. Croatia's LOAC Compendium provides that "torture, inhumane treatment, acts causing great suffering or serious injury and degrading and inhumane practices" are grave breaches of IHL and war crimes.[912]

1055. According to Croatia's Instructions on Basic Rules of IHL, detainees must be protected against all acts of violence, including physical or mental torture and cruel or humiliating treatment.[913]

1056. The Military Manual of the Dominican Republic prohibits torture, threats or other forms of coercion of detained persons to obtain military information. It further states that "inhuman treatment of civilians is a violation of the law of war".[914]

1057. Ecuador's Naval Handbook provides with regard to prisoners of war and civilians that "torture or inhumane treatment, subjection to public insult or curiosity" are representative war crimes.[915]

1058. El Salvador's Soldiers' Manual provides that physical or mental torture is prohibited.[916]

1059. El Salvador's Human Rights Charter of the Armed Forces lists respect for the integrity of persons and their human dignity and the prohibition of torture among the ten basic rules. It also states that torture is a violation of human rights.[917]

1060. France's Disciplinary Regulations as amended prohibits any kind of cruel treatment and torture of the wounded, sick and shipwrecked, prisoners and civilians.[918]

1061. France's LOAC Summary Note provides that "no one shall be subject to physical or psychological torture . . . nor cruel or degrading treatment".[919] The manual lists torture, inhuman treatment and inhuman and degrading practices among war crimes.[920]

1062. France's LOAC Teaching Note includes torture among prohibited criminal acts and behaviour which are criminally prosecuted. It provides that "every

[909] Colombia, *Basic Military Manual* (1995), p. 30.
[910] Colombia, *Basic Military Manual* (1995), p. 42.
[911] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[912] Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.
[913] Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 4–5.
[914] Dominican Republic, *Military Manual* (1980), pp. 8 and 9.
[915] Ecuador, *Naval Manual* (1989), § 6.2.5(1)–(2).
[916] El Salvador, *Soldiers' Manual* (undated), p. 10.
[917] El Salvador, *Human Rights Charter of the Armed Forces* (undated), Rules 3 and 7, pp. 3, 14 and 18.
[918] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[919] France, *LOAC Summary Note* (1992), § 3.2.
[920] France, *LOAC Summary Note* (1992), § 3.4.

captured combatant shall be protected from torture".[921] It further stipulates that "torture, . . . inhuman and degrading treatment, attacks on physical integrity or on health" are grave breaches and war crimes under the law of armed conflict.[922]

1063. France's LOAC Manual provides that the "authorities are responsible for the . . . physical integrity of persons in their power".[923] The manual refers to Article 7 of the 1998 ICC statute and stipulates that torture and inhuman and degrading treatment are crimes against humanity.[924] It further provides that torture is prohibited by the law of armed conflict and in particular by the 1984 Convention against Torture.[925] It also states that one of the three main principles common to IHL and human rights law is the principle of inviolability, which guarantees every human being the right to respect for his or her physical and mental integrity.[926]

1064. Germany's Military Manual provides that one of the fundamental rules governing the treatment of POWs is the prohibition on treating them inhumanely or dishonourably.[927] It adds that when questioned, "no physical or mental torture, nor any form of coercion, may be inflicted on prisoners of war".[928] It further states that "torture and inhumane treatment . . . [and] wilfully causing great suffering, serious injury to body or health" are grave breaches of IHL.[929]

1065. Hungary's Military Manual provides that "torture, inhumane treatment, acts causing great suffering or serious injury and degrading and inhumane practices" are grave breaches of the Geneva Conventions and war crimes.[930]

1066. India's Army Training Note prohibits ill-treatment, harassment of civilians and torture.[931]

1067. Indonesia's Directive on Human Rights in Trikora states that "respect for personal and human dignity consists of no acts of torture, no acts of cruelty, ill-treatment or inhuman punishment".[932]

1068. Indonesia's Field Manual specifies that although the government has the right to use legitimate force against rebels, the fundamental principles of the Geneva Conventions still apply and the Indonesian armed forces have to ensure that the personal dignity of POWs is respected in all circumstances.[933]

1069. Israel's Manual on the Laws of War states that "the rationale behind the law of war is that even in the midst of the inferno, there are grave deeds that

[921] France, *LOAC Teaching Note* (2000), pp. 2 and 3.
[922] France, *LOAC Teaching Note* (2000), p. 7.
[923] France, *LOAC Manual* (2001), p. 32.
[924] France, *LOAC Manual* (2001), p. 45.
[925] France, *LOAC Manual* (2001), pp. 51 and 52.
[926] France, *LOAC Manual* (2001), p. 122.
[927] Germany, *Military Manual* (1992), § 704.
[928] Germany, *Military Manual* (1992), § 713.
[929] Germany, *Military Manual* (1992), § 1209.
[930] Hungary, *Military Manual* (1992), p. 90.
[931] India, *Army Training Note* (1995), p. 4/23, §§ 10–12.
[932] Indonesia, *Directive on Human Rights in Trikora* (1995), § 4(a).
[933] Indonesia, *Field Manual* (1979), Section 1, § 4 and Section 3, § 5.

must not be committed . . . torture of prisoners".[934] The manual specifies that a combatant *hors de combat* is entitled to special rights, i.e. protection against physical and mental harm and that "torture and imprisonment under inhuman conditions are absolutely forbidden".[935]

1070. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subject to brutality and torture. It also stipulates that the ill-treatment of prisoners of war is a war crime.[936]

1071. Kenya's LOAC Manual provides that "no physical or mental torture, nor any form of coercion may be used to obtain [information]". It stipulates that "no physical or mental torture of prisoners is permitted". The manual restates common Article 3 of the 1949 Geneva Conventions.[937]

1072. Madagascar's Military Manual provides that "no mental or physical torture of prisoners of war is allowed". It also states that one of the seven fundamental rules of IHL is that nobody shall be subject to mental or physical torture or to humiliating or degrading treatment.[938]

1073. Mali's Army Regulations provides that attacks on the physical integrity, in particular torture, of the wounded, sick and shipwrecked, prisoners and civilians are a grave breach of the laws and customs of war. It adds that from the moment of their capture, "prisoners of war must be treated humanely. They must be protected against all acts of violence, against insults and public curiosity. They have the right of respect for their honour."[939]

1074. Morocco's Disciplinary Regulations prohibits the torture and cruel treatment of the sick, wounded and shipwrecked, prisoners and civilians.[940]

1075. The Military Manual of the Netherlands restates the prohibition of torture contained in common Article 3 of the 1949 Geneva Conventions, Article 17 GC III, Article 75 AP I and Article 4 AP II.[941]

1076. New Zealand's Military Manual provides, regarding the punishment of POWs, that "cruelty and torture are forbidden".[942] It further provides with regard to internees that "in no case shall disciplinary penalties be inhuman, brutal . . .".[943] The manual restates Article 75(2) AP I.[944] It further stipulates, regarding civilians, that GC IV prohibits the parties from "taking any measure of such character as to cause the physical suffering . . . of protected persons in their hands", including torture.[945] According to the manual, "torture

[934] Israel, *Manual on the Laws of War* (1998), p. 4.
[935] Israel, *Manual on the Laws of War* (1998), pp. 46 and 53.
[936] Italy, *IHL Manual* (1991), Vol. I, §§ 41(e) and 84.
[937] Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6, and Précis No. 3, pp. 8 and 14.
[938] Madagascar, *Military Manual* (1994), Fiche No. 5-T, § 7, and p. 91, Rule 5.
[939] Mali, *Army Regulations* (1979), Article 36.
[940] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[941] Netherlands, *Military Manual* (1993), pp. VII-4, VIII-3, XI-1 and XI-4.
[942] New Zealand, *Military Manual* (1992), § 931.2.
[943] New Zealand, *Military Manual* (1992), § 1129.2.
[944] New Zealand, *Military Manual* (1992), § 1137.2.
[945] New Zealand, *Military Manual* (1992), § 1321.4.

or inhuman treatment of protected persons" is a grave breach of GC I and GC II.[946] With regard to non-international armed conflicts, the manual restates the prohibition of torture and cruel treatment contained in common Article 3 of the 1949 Geneva Conventions.[947]

1077. Nicaragua's Military Manual prohibits torture and cruel treatment.[948] It also states that prisoners have the right to be protected against all forms of violence, in both internal and international armed conflicts.[949]

1078. Nigeria's Manual on the Laws of War provides that it is particularly prohibited to torture the wounded and sick.[950] It specifies that torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health are grave breaches of the Geneva Conventions and serious war crimes.[951]

1079. Nigeria's Military Manual recalls the content of Article 12 GC I and prohibits subjecting the wounded and sick to torture. It adds that military forces "are not allowed to make recourse to physical or mental torture or any form of coercion".[952]

1080. Peru's Human Rights Charter of the Security Forces lists the prohibition of torture as one of the ten basic rules. The manual also prohibits the ill-treatment of unresisting wounded persons.[953]

1081. The Rules for Combatants of the Philippines provides that "prisoners must be respected" and that "it is forbidden to . . . torture or mistreat them".[954]

1082. The Soldier's Rules of the Philippines instructs soldiers that "no physical or mental torture of prisoners of war is permitted".[955]

1083. Romania's Soldiers' Manual provides that captured combatants and civilians "shall not be subjected to physical or mental torture . . . or cruel, inhuman or degrading treatment".[956]

1084. Russia's Military Manual states that prohibited methods of warfare include "torture aimed at obtaining information of any kind".[957] It further prohibits the torture and cruel treatment of victims of war, namely the wounded, sick and shipwrecked, POWs and the civilian population.[958]

1085. Senegal's Disciplinary Regulations provides that it is prohibited for soldiers in combat to make an attack on the integrity or dignity of the wounded, sick, shipwrecked, prisoners and civilians, including cruel treatment or any type of torture.[959]

[946] New Zealand, *Military Manual* (1992), § 1702.1.
[947] New Zealand, *Military Manual* (1992), § 1807.1, see also § 1812.1.
[948] Nicaragua, *Military Manual* (1996), Articles 7(1) and 14(31).
[949] Nicaragua, *Military Manual* (1996), Articles 6 and 14(18).
[950] Nigeria, *Manual on the Laws of War* (undated), § 35.
[951] Nigeria, *Manual on the Laws of War* (undated), § 6(a).
[952] Nigeria, *Military Manual* (1994), Chapter 2, §§ 4 and 9.
[953] Peru, *Human Rights Charter of the Security Forces* (1991), Rule 7 and pp. 7–9.
[954] Philippines, *Rules for Combatants* (1989), § 4(a).
[955] Philippines, *Soldier's Rules* (1989), § 7.
[956] Romania, *Soldiers' Manual* (1991), p. 34, § 2.
[957] Russia, *Military Manual* (1990), § 5(b).
[958] Russia, *Military Manual* (1990), § 8(a).
[959] Senegal, *Disciplinary Regulations* (1990), § 2.

1086. Senegal's IHL Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions. It points out that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of torture and humiliating, cruel and degrading treatment.[960]

1087. South Africa's LOAC Manual provides that "inhuman and degrading practices are grave breaches of AP I".[961] It further states that "torture or inhuman treatment and . . . wilfully causing great suffering or serious injury to body or health" are grave breaches of the Geneva Conventions.[962] Regarding the treatment of prisoners of war, the manual states that "it is forbidden to obtain further information through . . . physical or mental torture or coercion".[963]

1088. Spain's LOAC Manual lists the obligations of the detaining power, *inter alia*, that "it is prohibited to use physical or mental torture to obtain information" from prisoners of war.[964] According to the manual, POWs have the right "not to be subjected to any form of pressure or torture".[965] It adds that it is prohibited at all times and in all places to subject POWs to torture, whether physical or mental, whether committed by military or civilian agents.[966] Regarding the penal and disciplinary regime for POWs, the manual states that "it is prohibited . . . generally speaking, all forms of torture and cruelty".[967] The manual contains the provisions of Article 75 AP I.[968] Under the manual, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health and any deliberate act or omission endangering the health or physical and mental integrity committed by medical personnel are war crimes.[969]

1089. Sweden's Military Manual provides that military persons and civilians in the power of a party to the conflict shall not be tortured or mistreated.[970]

1090. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.[971] It provides that "torture or inhuman treatment" is a grave breach of the Geneva Conventions.[972] The manual also states that "protected persons may not be exposed to any form of physical or mental coercion".[973]

1091. Switzerland's military manuals provide that enemy civilians shall have their human dignity and honour respected and not be tortured or subjected to inhuman treatment or mental and physical cruelty.[974] The Basic Military

[960] Senegal, *IHL Manual* (1999), pp. 3, 4 and 23.
[961] South Africa, *LOAC Manual* (1996), § 38(b).
[962] South Africa, *LOAC Manual* (1996), § 40.
[963] South Africa, *LOAC Manual* (1996), § 62.
[964] Spain, *LOAC Manual* (1996), Vol. I, § 6.4.h.(1), see also § 8.3.b.(2).
[965] Spain, *LOAC Manual* (1996), Vol. I, § 6.4.h.(2).
[966] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.
[967] Spain, *LOAC Manual* (1996), Vol. I, § 8.7.b.
[968] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.
[969] Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).
[970] Sweden, *Military Manual* (1976), p. 28.
[971] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[972] Sweden, *IHL Manual* (1991), Section 4.2, p. 93.
[973] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[974] Switzerland, *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43; *Basic Military Manual* (1987), Articles 106, 147–147.

Manual provides that "torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health" are grave breaches of the Geneva Conventions.[975] It also provides for the punishment of the ill-treatment of enemy combatants who surrender.[976]

1092. Togo's Military Manual provides that "nobody will be subjected to physical or mental torture . . . nor to inhuman or degrading treatment".[977]

1093. Uganda's Code of Conduct requires members of the armed forces not to abuse, insult, shout at or beat any member of the public.[978]

1094. The UK Military Manual prohibits measures against protected persons (POWs, civilians) which would cause physical suffering, including torture and brutal treatment.[979] The manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[980] It provides that "torture or inhuman treatment" of prisoners of war is a grave breach of the Geneva Conventions.[981]

1095. The UK LOAC Manual provides that the "wounded and sick of the opposing forces must not be tortured".[982] With respect to prisoners of war, the Manual states that "a PW is not required to provide any further information and no physical or mental torture nor any form of coercion may be used to obtain it" and adds that "in no case, may disciplinary punishments be inhumane, brutal or dangerous to health".[983] With regard to non-international armed conflicts, the manual restates common Article 3 of the 1949 Geneva Conventions.[984]

1096. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.[985] The manual provides that "in no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees".[986] The manual specifies that "torture or inhuman treatment" is a war crime under the Geneva Conventions.[987]

1097. The US Air Force Pamphlet states that both human rights law and IHL "safeguard such fundamental rights as freedom from torture or cruel and inhuman punishment". It further refers to Article 12 GC II, which provides that sick and wounded members of the opposing forces shall not be subjected to torture.[988]

1098. The US Air Force Commander's Handbook prohibits "torture, threats, or other coercion against prisoners of war to obtain further information".[989]

[975] Switzerland, *Basic Military Manual* (1987), Article 192(a).
[976] Switzerland, *Basic Military Manual* (1987), Article 194.
[977] Togo, *Military Manual* (1996), Fascicule I, p. 11, Fascicule II, p. 5 and Fascicule III, p. 4.
[978] Uganda, *Code of Conduct* (1986), Rule 1.
[979] UK, *Military Manual* (1958), §§ 42, 205, 282 and 549.
[980] UK, *Military Manual* (1958), § 131. [981] UK, *Military Manual* (1958), § 625(a).
[982] UK, *LOAC Manual* (1981), Section 6, p. 22, § 2.
[983] UK, *LOAC Manual* (1981), Section 8, p. 29, § 9 and p. 32, § 19(d), see also Annex A, p. 48, § 18(f) and p. 49, § 19(e).
[984] UK, *LOAC Manual* (1981), Section 12, p. 42, § 2. [985] US, *Field Manual* (1956), § 11.
[986] US, *Field Manual* (1956), §§ 93, 163, 215, 271 and 326. [987] US, *Field Manual* (1956), § 502.
[988] US, *Air Force Pamphlet* (1976), §§ 11-5 and 12-2(a).
[989] US, *Air Force Commander's Handbook* (1980), § 4-2(a).

1099. The US Soldier's Manual and Instructor's Guide provide that no physical or mental torture, nor any other form of coercion, may be inflicted on detainees.[990] The Soldier's Manual provides that inhumane treatment of civilians is a violation of the law of war for which every soldier can be prosecuted and that "inhumane treatment of any person is a capital offence prohibited at any time and in any place whatsoever".[991]

1100. The US Naval Handbook provides with regard to prisoners of war and civilians that "torture or inhumane treatment, subjection to public insult or curiosity" are representative war crimes.[992]

National Legislation

1101. Albania's Military Penal Code criminalises mistreatment of protected persons as a war crime.[993]

1102. Argentina's Code of Military Justice as amended provides that the ill-treatment of prisoners of war is an offence.[994]

1103. Argentina's Draft Code of Military Justice punishes any soldier who "mistreats or puts in serious danger the health or physical or mental integrity of any protected person, [or] subjects them to torture or inhuman treatment".[995] It also provides for the punishment of members of the armed forces who subject detainees to humiliating or degrading treatment.[996]

1104. Under Armenia's Penal Code, "torture and inhuman treatment", and "wilfully causing great suffering or other actions threatening physical or mental health", during an armed conflict, constitute crimes against the peace and security of mankind.[997]

1105. Australia's War Crimes Act provides that the following are war crimes:

> (iv) Torture of civilians,
> . . .
> (ix) internment of civilians under inhuman conditions
> . . .
> (xxx) Ill-treatment of wounded and prisoners of war, including –
>
> (a) transportation of wounded and prisoners of war under improper conditions;
> (b) public exhibition or ridicule of prisoners of war.[998]

[990] US, *Soldiers' Manual* (1984), p. 5; *Instructor's Guide* (1985), p. 10.
[991] US, *Soldiers' Manual* (1984), pp. 16 and 20.
[992] US, *Naval Handbook* (1995), § 6.2.5.1.
[993] Albania, *Military Penal Code* (1995), Articles 73–75.
[994] Argentina, *Code of Military Justice as amended* (1951), Article 746.
[995] Argentina, *Draft Code of Military Justice* (1998), Article 289, introducing a new Article 873 in the *Code of Military Justice as amended* (1951).
[996] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[997] Armenia, *Penal Code* (2003), Article 390.1(2)–(3) and Article 390.2(1), see also Article 392 (torture or cruel treatment of civilians as crimes against humanity) and Article 393 (inflicting severe damage to health as part of a genocide campaign).
[998] Australia, *War Crimes Act* (1945), Section 3.

1106. Australia's War Crimes Act as amended identifies "causing grievous bodily harm" and "wounding" as serious war crimes.[999]

1107. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[1000]

1108. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute: "genocide by causing serious bodily or mental harm", including torture; crimes against humanity, including torture; and war crimes, including torture and inhumane treatment in international armed conflicts, cruel treatment and torture in non-international armed conflicts, and outrages upon personal dignity in both international and non-international armed conflicts.[1001]

1109. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, all kinds of torture and outrages upon personal dignity, in particular humiliating and degrading treatment, carried out against civilians are prohibited. It also prohibits cruel treatment and torture, as well as attacks upon personal dignity, including humiliating and degrading treatment of prisoners of war.[1002]

1110. Azerbaijan's Criminal Code punishes anyone who inflicts "severe pain or suffering, whether physical or mental, upon a person detained or whose liberty was restricted in any other way".[1003]

1111. Bangladesh's International Crimes (Tribunal) Act mentions torture in the list of crimes against humanity. It also provides that ill-treatment of civilians and of prisoners of war is a war crime.[1004] In addition, it states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[1005]

1112. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[1006]

1113. The Criminal Code of Belarus provides that wilfully causing grievous bodily harm to, or inhumane treatment of, persons who have laid down their arms or are defenceless, of the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied

[999] Australia, *War Crimes Act as amended* (1945), Sections 6(1) and 7(1).
[1000] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[1001] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.4, 268.13, 268.25, 268.26, 268.58, 268.72, 268.73 and 268.74.
[1002] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17(2) and 21(1)–(2).
[1003] Azerbaijan, *Criminal Code* (1999), Article 113.
[1004] Bangladesh, *International Crimes (Tribunal) Act* (1973), Article 3(2)(a) and (d).
[1005] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[1006] Barbados, *Geneva Conventions Act* (1980), Section 3(2).

territory or in the conflict zone or other persons enjoying international protection is a violation of the laws and customs of war.[1007]

1114. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that torture or other inhuman treatment and wilfully causing great suffering or serious damage to physical integrity or health constitute crimes under international law.[1008]

1115. The Criminal Code of the Federation of Bosnia and Herzegovina provides that subjecting civilians, prisoners of war, the wounded, sick and shipwrecked to torture or inhuman treatment and causing great suffering to physical and mental health is a war crime.[1009] The Criminal Code of the Republika Srpska contains the same provision.[1010]

1116. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[1011]

1117. Bulgaria's Penal Code as amended provides that ordering and committing acts of torture and inhuman treatment, causing great suffering or other injuries to the body and health of the wounded, sick, shipwrecked, medical personnel, prisoners of war and the civilian population, is a war crime.[1012]

1118. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that torture or inhuman treatment, wilfully causing great suffering or injuries to physical and mental health, is a war crime in both international and non-international armed conflicts.[1013]

1119. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".[1014]

1120. Cameroon's Penal Code as amended states that torture may not be justified in any circumstance, including a state of war or internal political instability.[1015]

[1007] Belarus, *Criminal Code* (1999), Article 135(1).
[1008] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(2), see also Article 1(1)(2)–(3) (genocide).
[1009] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1), 155 and 156.
[1010] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.
[1011] Botswana, *Geneva Conventions Act* (1970), Section 3(1).
[1012] Bulgaria, *Penal Code as amended* (1968), Articles 410(a), 411(a) and 412(a).
[1013] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(b)–(c), (B)(t) and (C)(a)–(b), see also Article 2(b) (genocide) and Article 3(f) (crimes against humanity).
[1014] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.
[1015] Cameroon, *Penal Code as amended* (1967), Article 132 *bis*.

1121. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".[1016]

1122. Canada's Crimes against Humanity and War Crimes Act provides that genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[1017]

1123. Under Chile's Code of Military Justice, seriously injuring prisoners of war and committing acts of serious violence against civilians, the wounded, sick and POWs are considered an "offence against international law".[1018]

1124. China's Law Governing the Trial of War Criminals provides that "torturing of non-combatants . . . inflicting on them inhuman treatment [and] ill-treating prisoners of war or wounded persons" constitute war crimes.[1019]

1125. Under China's Criminal Code as amended, it is a criminal offence to cruelly injure innocent civilians and ill-treat prisoners of war during armed conflict and in areas of military operations.[1020]

1126. Colombia's Penal Code punishes anyone who, during an armed conflict, carries out or orders the carrying out of acts of torture, serious wounding of protected persons or inhuman and degrading treatment.[1021]

1127. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "causing serious bodily or mental harm" to the members of an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.[1022] Moreover, "torture", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.[1023] The Act further defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[1024]

1128. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".[1025]

1129. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, acts of torture or inhuman treatment of the civilian population constitutes a "crime against the civilian population".[1026] It adds that torture or inhuman treatment or causing great

[1016] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[1017] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[1018] Chile, *Code of Military Justice* (1925), Articles 261(1) and 262.
[1019] China, *Law Governing the Trial of War Criminals* (1946), Article 3(16), (19) and (29).
[1020] China, *Criminal Code as amended* (1997), Articles 446 and 448.
[1021] Colombia, *Penal Code* (2000), Articles 136, 173 and 146.
[1022] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.
[1023] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
[1024] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[1025] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[1026] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(1).

injuries and suffering to prisoners of war and internees is a "crime against prisoners of war".[1027]

1130. Croatia's Criminal Code provides that it is a war crime to subject the civilian population, the wounded, sick and shipwrecked, prisoners of war and medical or religious personnel to acts of torture, inhuman treatment or causing great suffering or serious injury to body or health.[1028]

1131. Cuba's Military Criminal Code punishes anyone who severely ill-treats a wounded or sick prisoner.[1029]

1132. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".[1030]

1133. The Czech Republic's Criminal Code as amended provides that "a person who violates the provisions . . . of international law by inhumanly maltreating . . . members of the enemy's armed forces who have laid down their weapons" commits a crime.[1031]

1134. The Code of Military Justice of the Dominican Republic punishes any member of the armed forces who mistreats prisoners of war or causes them severe injuries.[1032]

1135. El Salvador's Code of Military Justice punishes any soldier who maltreats prisoners of war.[1033]

1136. Under El Salvador's Penal Code, "anyone who, during an international or a civil war, . . . causes damage to physical or mental health . . . of the civilian population . . . [or] maltreats prisoners of war" commits a crime.[1034]

1137. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of anyone who "in a situation of international or internal armed conflict, subjects another person to any type of torture or causes physical and mental suffering".[1035]

1138. Under Estonia's Penal Code, acts of torture, mistreatment, inhumane treatment or serious attacks on the physical and mental integrity of combatants who have laid down their arms, civilians, prisoners of war and interned civilians constitute war crimes.[1036]

1139. Ethiopia's Penal Code provides that in time of war, armed conflict or occupation, the organisation, ordering or carrying out of "torture or inhuman

[1027] Côte d'Ivoire, *Penal Code as amended* (1981), Article 139(1).
[1028] Croatia, *Criminal Code* (1997), Articles 158, 159, 160 and 176.
[1029] Cuba, *Military Criminal Code* (1979), Article 42(1)–(2).
[1030] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).
[1031] Czech Republic, *Criminal Code as amended* (1961), Articles 259(a)(1) and 263(1).
[1032] Dominican Republic, *Code of Military Justice* (1953), Article 201(1).
[1033] El Salvador, *Code of Military Justice* (1934), Article 69(1).
[1034] El Salvador, *Penal Code* (1997), Article 362, see also Article 361 (causing physical or psychological damages as part of a genocide campaign).
[1035] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Tortura en conflicto armado".
[1036] Estonia, *Penal Code* (2001), §§ 97, 98 and 101, see also § 89 (torture as a crime against humanity) and § 90 (torture as part of a genocide campaign).

treatment or other acts entailing dire suffering or physical or mental injury" to civilians, the wounded, sick and shipwrecked or prisoners and interned persons constitutes a war crime.[1037]

1140. Under France's Penal Code, "causing serious bodily or mental harm" to members of a group constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[1038]

1141. Under Georgia's Criminal Code, in international or internal armed conflicts, it is a crime to torture or treat inhumanely or to cause great suffering or injuries that threaten the physical and mental health of a person.[1039]

1142. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict,

> treats a person who is to be protected under international humanitarian law cruelly or inhumanely by causing him or her substantial physical or mental harm or suffering, especially by torturing ... that person, [or] ... treats a person who is to be protected under international humanitarian law in a gravely humiliating and degrading manner.[1040]

1143. Greece's Military Penal Code contains penalties for members of the Greek armed forces who insult, threaten or commit violent or inhumane acts against POWs.[1041]

1144. Under Hungary's Criminal Code as amended, inflicting "serious bodily or mental injury to the members of a [national, ethnic, racial or religious group]", as part of a genocide campaign, constitutes a "crime against the freedom of peoples".[1042]

1145. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[1043]

1146. Iraq's Military Penal Code states that causing suffering to wounded persons is an offence.[1044]

1147. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.[1045] In addition,

[1037] Ethiopia, *Penal Code* (1957), Articles 282(a), 283(a) and 284(a), see also Article 281 (torture as part of a genocide campaign).
[1038] France, *Penal Code* (1994), Article 211-1, see also Article 212-1 (torture and inhuman treatment as crimes against humanity).
[1039] Georgia, *Criminal Code* (1999), Article 411(2)(b)–(c), see also Article 407 (torture as part of a genocide campaign).
[1040] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(3) and (9), see also § 6(1)(2) (torture as part of a genocide campaign) and § 7(1)(5) and (8) (torture as a crime against humanity).
[1041] Greece, *Military Penal Code* (1995), Articles 160–163.
[1042] Hungary, *Criminal Code as amended* (1978), Section 155(1)(b).
[1043] India, *Geneva Conventions Act* (1960), Section 3(1).
[1044] Iraq, *Military Penal Code* (1940), Article 115(c).
[1045] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

any "minor breach" of the Geneva Conventions, including violations of common Article 3, of Articles 12 GC I, 12 GC II, 17, 87 and 89 GC III, and 32 GC IV, and of AP I, including violations of Article 75(2) AP I, as well as any "contravention" of AP II, including violations of Article 4(2) AP II, are punishable offences.[1046]

1148. Israel's Nazis and Nazi Collaborators (Punishment) Law includes the ill-treatment of the civilian population, of prisoners of war and of persons on the seas in its definition of war crimes.[1047]

1149. Italy's Wartime Military Penal Code provides for the punishment of any member of the military who tortures or ill-treats prisoners of war while escorting, guarding or holding them in custody. It also punishes acts of violence or threats of injuries to prisoners of war, as well as forcing them to provide information which would compromise the interests of their country.[1048]

1150. Under Jordan's Draft Military Criminal Code, torture and inhuman treatment, wilfully causing great suffering, and attempts on physical and mental health are war crimes.[1049]

1151. Kazakhstan's Penal Code provides that inhuman treatment of prisoners of war or the civilian population is a punishable offence.[1050]

1152. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[1051]

1153. Kenya's Constitution provides that no person shall be subjected to torture or inhuman or degrading punishment or other treatment.[1052]

1154. Kuwait's Constitution states that fundamental rights, including the prohibition on torture or humiliating treatment, apply equally in war time.[1053]

1155. Under Latvia's Criminal Code, acts of torture constitute a war crime.[1054]

1156. Under the Draft Amendments to the Code of Military Justice of Lebanon, torture or inhuman treatment, wilfully causing great suffering or inflicting grave injures to the physical and mental integrity or health of protected persons, constitute war crimes.[1055]

1157. Under Lithuania's Criminal Code as amended, torture and inhumane treatment of protected persons is a war crime.[1056]

[1046] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[1047] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b) (this section also includes causing serious bodily or mental harm as a crime of genocide).
[1048] Italy, *Wartime Military Penal Code* (1941), Articles 209, 211 and 212(1).
[1049] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(2)–(4).
[1050] Kazakhstan, *Penal Code* (1997), Article 159.
[1051] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[1052] Kenya, *Constitution* (1992), Article 74(1).
[1053] Kuwait, *Constitution* (1962), Article 31.
[1054] Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (torture as part of a genocide campaign).
[1055] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(2)–(4).
[1056] Lithuania, *Criminal Code as amended* (1961), Article 335.

1158. Under Luxembourg's Law on the Repression of War Crimes, "acts of violence and cruelty committed against prisoners of war, detainees, deportees, accused, witnesses or persons compelled to work" constitute war crimes.[1057]

1159. Luxembourg's Law on the Punishment of Grave Breaches provides that torture or inhuman treatment, wilfully causing great suffering or injuries to the physical and mental integrity or health of protected persons, constitute grave breaches of the Geneva Conventions.[1058]

1160. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[1059]

1161. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[1060]

1162. Under Mali's Penal Code, torture and inhuman treatment, wilfully causing great suffering or injuries to the physical and mental integrity or health of protected persons is a war crime.[1061]

1163. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[1062]

1164. Mexico's Penal Code as amended provides for the punishment of acts of torture and causing suffering to a member of a national, ethnic, racial or religious group, as part of a genocide campaign.[1063] It adds that "compelling the accused to confess by [using] *incommunicado*, intimidation or torture" is a crime committed against the administration of justice.[1064]

1165. Mexico's Code of Military Justice as amended provides penalties for persons who mistreat or otherwise cause physical or mental injuries to prisoners and detainees.[1065]

1166. Moldova's Penal Code punishes the ordering or commission of acts of torture and inhuman treatment of the wounded, sick, prisoners, civilians, civilian medical personnel or members of the Red Cross and other similar organisations.[1066]

1167. Mozambique's Military Criminal Law provides that cruel acts against the civilian population, the wounded and sick or prisoners is a criminal offence.[1067]

[1057] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(3).
[1058] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(1)–(2).
[1059] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[1060] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[1061] Mali, *Penal Code* (2001), Articles 31(b)–(c) and 31(i)(21), see also Article 29(f) and (k) (torture and inhuman treatment as crimes against humanity).
[1062] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[1063] Mexico, *Penal Code as amended* (1931), Article 149 *bis*.
[1064] Mexico, *Penal Code as amended* (1931), Article 225(XII).
[1065] Mexico, *Code of Military Justice as amended* (1933), Article 324.
[1066] Moldova, *Penal Code* (2002), Article 137.
[1067] Mozambique, *Military Criminal Law* (1987), Article 83(b).

1168. Myanmar's Defence Service Act provides for the punishment of "any person subject to this law who . . . is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind".[1068]

1169. The Definition of War Crimes Decree of the Netherlands includes "torture of civilians" "internment of civilians under inhuman conditions" and "ill-treatment of . . . prisoners of war" in its list of war crimes.[1069]

1170. Under the International Crimes Act of the Netherlands, it is a crime to commit "in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions", including "torture . . . or inhuman treatment [and] intentionally causing great suffering or serious injury to body or health".[1070] Furthermore, it is also a crime to commit, "in the case of an armed conflict not of an international character, a violation of Article 3 common to all of the Geneva Conventions", including "cruel treatment and torture" of persons taking no active part in the hostilities.[1071]

1171. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[1072]

1172. Under New Zealand's International Crimes and ICC Act, genocide includes the crimes defined in Article 6(b) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(f) of the Statute and war crimes include the crimes defined in Article 8(2)(a)(ii), (b)(xxi) and (c)(i) and (ii) of the Statute.[1073]

1173. Nicaragua's Military Penal Law provides for the punishment of persons found guilty of seriously mistreating prisoners.[1074]

1174. Nicaragua's Military Penal Code provides for the punishment of acts of torture, inhuman and degrading treatment and causing grave injuries and suffering to prisoners of war, the wounded, sick and shipwrecked and civilians.[1075]

1175. Nicaragua's Draft Penal Code provides for the punishment of anyone who "tortures, causes grave physical and mental suffering, . . . degrades the personality of the victim or diminishes the victim's physical or mental capacity, as well as causes physical pain or psychological damage". It also provides a sanction

[1068] Myanmar, *Defence Services Act* (1959), Section 45(a).
[1069] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.
[1070] Netherlands, *International Crimes Act* (2003), Article 5(1)(b) and (c), see also Article 3(1)(b) (causing serious bodily or mental harm to members of a group as part of a genocide campaign), Article 4(1)(f) and (k) (torture and inhumane acts which intentionally cause great suffering or serious injury to body or to mental or physical health as crimes against humanity) and Article 8 (torture committed by a public servant or other person working in the service of the authorities in the course of his duties).
[1071] Netherlands, *International Crimes Act* (2003), Article 6(1)(a).
[1072] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[1073] New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).
[1074] Nicaragua, *Military Penal Law* (1980), Article 80.
[1075] Nicaragua, *Military Penal Code* (1996), Articles 54 and 55(3).

for the civilian not subject to military jurisdiction who "before, during or after hostilities, inhumanely treats the civilian population".[1076]

1176. According to Niger's Penal Code as amended, "torture or other inhuman treatment" and "wilfully causing great suffering or injury to the physical integrity or health" of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, constitute war crimes.[1077]

1177. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, ... whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".[1078]

1178. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[1079]

1179. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[1080]

1180. Paraguay's Penal Code provides for the punishment of anyone who, in violation of the international laws of war, armed conflict or military occupation, subjects civilians, prisoners of war and the wounded and sick to inhumane treatment.[1081]

1181. Under Peru's Code of Military Justice, the ill-treatment of prisoners of war or of unresisting wounded persons is a violation of the law of nations.[1082]

1182. Peru's Penal Code as amended provides for the punishment of acts of torture.[1083]

1183. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, "ill-treatment of ... the civilian population of or in occupied territory" or "ill-treatment of prisoners of war or internees or persons on the seas or elsewhere; improper treatment of hostages" are violations of the laws and customs of war.[1084] It adds that "inhumane acts committed against civilian populations before or during ... [the Second World War]" also constitute war crimes whether or not in violation of the local laws.[1085]

[1076] Nicaragua, *Draft Penal Code* (1999), Articles 445 and 456.
[1077] Niger, *Penal Code as amended* (1961), Article 208.3(2)–(3), see also Article 208.1 (wilfully causing great injury to the physical integrity as part of a genocide campaign) and Article 208.2 (torture or inhuman acts as crimes against humanity).
[1078] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[1079] Norway, *Military Penal Code as amended* (1902), § 108.
[1080] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).
[1081] Paraguay, *Penal Code* (1997), Article 320(2), see also Article 309 (torture by a public official) and 319(2) (inhuman treatment as part of a genocide campaign).
[1082] Peru, *Code of Military Justice* (1980), Articles 94 and 95(1).
[1083] Peru, *Penal Code as amended* (1991), Article 321.
[1084] Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(2).
[1085] Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).

1184. Poland's Penal Code provides for the punishment of any person who, in violation of international law, causes "serious harm to [the] health [of persons *hors de combat*, protected persons and persons enjoying international protection], subjects them to torture or cruel or inhumane treatment".[1086]
1185. Portugal's Penal Code provides for the punishment of anyone who, in times of war, armed conflict or occupation, commits torture or cruel, degrading or inhumane treatment or injures the physical or mental integrity of the civilian population, the wounded and sick or prisoners of war.[1087]
1186. Romania's Law on the Punishment of War Criminals provides that "criminals of war" are persons who:

> inhumanely treated prisoners and hostages of war, . . . ordered or committed acts of cruelty with regard to the population of the territory affected by war, . . . [treated inhumanely the supervised] prisoners [in camps], including those interned, deported, imprisoned for political purposes, or who have been convicted and are doing forced labour.[1088]

1187. Romania's Penal Code provides for the punishment of inhuman treatment or torture of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or of all persons in the hands of the adverse party.[1089]
1188. Under Russia's Criminal Code, the cruel treatment of civilians or prisoners of war is a "crime against the peace and security of mankind".[1090]
1189. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".[1091]
1190. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[1092]
1191. Slovakia's Criminal Code as amended provides that "a person who, during the war, violates the provisions . . . of international law by inhumanly maltreating . . . members of the enemy's armed forces who have laid down their weapons" commits a crime.[1093]
1192. Under Slovenia's Penal Code, subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to acts of

[1086] Poland, *Penal Code* (1997), Article 123(2), see also Article 118(1) (causing serious harm to health as part of a genocide campaign).
[1087] Portugal, *Penal Code* (1996), Article 241(1)(b)–(c).
[1088] Romania, *Law on the Punishment of War Criminals* (1945), Article I(a)–(b) and (e).
[1089] Romania, *Penal Code* (1968), Article 358.
[1090] Russia, *Criminal Code* (1996), Article 356(1), see also Article 357 (causing injuries as part of a genocide campaign).
[1091] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[1092] Singapore, *Geneva Conventions Act* (1973), Section 3(1).
[1093] Slovakia, *Criminal Code as amended* (1961), Articles 259(a)(1) and 263(1).

torture and inhuman treatment or the infliction of great suffering and injury to their physical and mental health is a war crime.[1094]

1193. Spain's Military Criminal Code punishes military personnel who ill-treat or wilfully torture surrendered or helpless enemy combatants. It also punishes the soldier who treats inhumanely or causes serious injury to the wounded, sick and shipwrecked, prisoners of war or the civilian population.[1095]

1194. Spain's Penal Code punishes anyone who, during an armed conflict, commits the following acts against a protected person: ill-treatment, torture, inhuman treatment or causing great suffering.[1096]

1195. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence".[1097]

1196. Sweden's Penal Code as amended provides that causing severe suffering to persons enjoying special protection under international law is a crime against international law.[1098]

1197. Tajikistan's Criminal Code provides for the punishment of anyone who commits acts of torture, inhuman treatment, causes great suffering or threatens the physical or mental state of protected persons.[1099]

1198. Thailand's Prisoners of War Act provides for the punishment of "whoever threatens, insults or subjects a prisoner of war to humiliating or degrading treatment" or "whoever inflicts physical or mental torture or any other form of coercion on prisoners of war to secure information of any kind whatsoever, or threatens, insults, or exposes a prisoner of war who refuses to answer to any unpleasant or disadvantageous treatment of any kind". This prohibition also extends to persons protected by common Article 3 of the 1949 Geneva Conventions.[1100]

1199. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(b) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(f) of the Statute, and a war crime as defined in Article 8(2)(a)(ii), (b)(xxi) and (c)(i) and (ii) of the Statute.[1101]

1200. Ukraine's Criminal Code provides for the punishment of cruel treatment and ill-treatment of prisoners of war or civilians.[1102]

[1094] Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.
[1095] Spain, *Military Criminal Code* (1985), Articles 69, 76 and 77(5).
[1096] Spain, *Penal Code* (1995), Articles 609 and 612(3).
[1097] Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).
[1098] Sweden, *Penal Code as amended* (1962), Article 22(6).
[1099] Tajikistan, *Criminal Code* (1998), Article 403(2)(b)–(c), see also Article 398 (causing harm to health as part of a genocide campaign).
[1100] Thailand, *Prisoners of War Act* (1955), Sections 13–14 (prisoners of war) and Section 18 (persons protected by common Article 3).
[1101] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[1102] Ukraine, *Criminal Code* (2001), Articles 434 and 438(1), see also Article 442 (causing grave injuries as part of a genocide campaign).

1201. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[1103]

1202. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".[1104]

1203. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(b) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(f) of the Statute, and a war crime as defined in Article 8(2)(a)(ii), (b)(xxi) and (c)(i) and (ii) of the Statute.[1105]

1204. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as torture and ill-treatment of prisoners of war or persons on the seas, ill-treatment of hostages or civilians of or in an occupied territory.[1106]

1205. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as ill-treatment of the civilian population of or in occupied territory, prisoners of war or internees or persons on the seas or elsewhere or improper treatment of hostages.[1107]

1206. In 1961, the US Congress adopted an act on foreign assistance to other nations in which it defined torture, cruel, inhuman or degrading treatment or punishment as "gross violations of internationally recognized human rights" that would call into question whether or not a country should receive military aid.[1108]

1207. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.[1109]

1208. Under Uzbekistan's Criminal Code, ordering or carrying out acts of torture constitutes a violation of the laws and customs of war.[1110]

1209. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an

[1103] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[1104] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[1105] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[1106] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.
[1107] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).
[1108] US, *Foreign Assistance Act as amended* (1961), Sections 116 and 502 B.
[1109] US, *War Crimes Act as amended* (1996), Section 2441(c).
[1110] Uzbekistan, *Criminal Code* (1994), Article 152.

offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[1111]

1210. Venezuela's Code of Military Justice as amended provides for the punishment of anyone who commits grave attempts against persons who surrender or against women, the elderly or children in the territories occupied by national forces ... and other acts of cruelty".[1112]

1211. Vietnam's Penal Code provides for the punishment of "anyone who maltreats prisoners of war or soldiers".[1113]

1212. Under Yemen's Military Criminal Code, the following acts constitute war crimes: "torture or maltreatment of prisoners or causing them intentionally great suffering" or "committing grave attempts to the physical and mental integrity and health of prisoners of war and civilians".[1114]

1213. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of ... torture" committed a war crime.[1115]

1214. Under the Penal Code of the SFRY (FRY), subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to acts of torture, inhuman treatment, infliction of great suffering and injury to their physical and mental health is a war crime.[1116]

1215. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".[1117]

National Case-law

1216. Numerous cases were brought after the Second World War in Australia, China, Israel, Netherlands, Norway and US, in which the defendants were found guilty of having tortured or ill-treated prisoners of war and civilians.[1118]

1217. In the *Tanaka Chuichi case* before an Australian military court in 1946, the accused had ill-treated Sikh prisoners of war, had cut their hair and beards and had forced some of them to smoke a cigarette, acts contrary to their culture

[1111] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[1112] Venezuela, *Code of Military Justice as amended* (1998), Article 474(2).
[1113] Vietnam, *Penal Code* (1990), Article 275.
[1114] Yemen, *Military Criminal Code* (1998), Article 21(2)–(3).
[1115] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[1116] SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1), 143, 144 and 150, see also Article 141 (causing grave injuries as part of a genocide campaign).
[1117] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).
[1118] Australia, Military Court at Rabaul, *Baba Masao case*, Judgement, 2 June 1947; China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946; Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961; Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962; Netherlands, Temporary Court-Martial at Makassar, *Motomura case*, Judgement, 18 July 1947; Netherlands, Temporary Court-Martial at Makassar, *Notomi Sueo case*, Judgement, 4 January 1947; Norway, Court of Appeal, *Bruns case*, Judgement, 20 March 1946; US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

and religion. The Court found the accused guilty of violations of, *inter alia*, the 1929 Geneva POW Convention.[1119]

1218. In the *Drago case* in 1997, the Cantonal Court in Tuzla in Bosnia and Herzegovina convicted a person of causing serious bodily harm, ill-treatment and inhuman acts against detained civilians and military personnel. In its judgement, the Court referred to the Geneva Conventions and AP I and to the protection afforded to certain categories of persons in international armed conflicts.[1120]

1219. In the *Brocklebank case* in 1996, the Court Martial Appeal Court of Canada acquitted a Canadian soldier accused of torture and negligent performance of a military duty in respect of acts committed while serving as a member of the peacekeeping mission in Somalia.[1121]

1220. In its judgement in the *Benado Medwinsky case* in 1980, Chile's Appeal Court of Santiago in denounced the torture inflicted on the plaintiff. It held that the state of emergency could not justify the torture in question, which was an assault on the life and physical integrity of the person.[1122]

1221. In its judgement in the *Videla case* in 1994 concerning the abduction, torture and murder of Lumi Videla in 1974, Chile's Appeal Court of Santiago stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place . . . cruel treatment and torture, humiliating and degrading treatment". The Court found that the acts charged constituted grave breaches under Article 147 GC IV and that the prison order issued against the defendant should therefore be upheld.[1123]

1222. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II coincided with the protection of human dignity and life and the prohibition of cruel, inhuman and degrading treatment established by Articles 11 and 12 of the Constitution.[1124]

1223. In its judgement in the *Eichmann case* in 1961, the District Court of Jerusalem held that the following behaviour caused serious bodily or mental harm and, therefore, amounted to a violation of Israel's Nazis and Nazi Collaborators (Punishment) Law: "detention [of Jews] in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture".[1125]

[1119] Australia, Military Court at Rabaul, *Tanaka Chuichi case*, Judgement, 12 July 1946.
[1120] Bosnia and Herzegovina, Cantonal Court in Tuzla, *Drago case*, Judgement, 13 October 1997.
[1121] Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.
[1122] Chile, Appeal Court of Santiago, *Benado Medwinsky case*, Judgement, 29 July 1980.
[1123] Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.
[1124] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.
[1125] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

1224. In its judgement in the *General Security Service case* in 1999 dealing with the interrogation methods of the General Security Service, Israel's High Court held that:

> A reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever... There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation... This conclusion is in perfect accord with (various) International Law treaties – to which Israel is a signatory – which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment"... These prohibitions are "absolute". There are no exceptions to them and there is no room for balancing.[1126]

1225. In its judgement in the *Heering case* in 1946, the UK Military Court at Hanover found that acts of "ill-treatment of prisoners of war in violation of the laws and usages of war causing their death, for example by forced marches with insufficient food or medical supplies," amounted to war crimes.[1127]

1226. In the *Filartiga case* in 1984, a civil lawsuit filed in a US court against an official from Paraguay who had allegedly tortured the applicant – a national of Paraguay – in Paraguay, the US government, acting as *amicus curiae*, submitted that the practice of official torture amounted to a violation of customary international law.[1128]

Other National Practice

1227. In 1990, it was reported that the government in Afghanistan had admitted that it practised torture and that it needed to reform its policy.[1129]

1228. In 1993, Azerbaijan's Ministry of the Interior ordered that troops "in zones of combat, during military operations... must not subject an enemy taken prisoner to acts of violence or torture".[1130]

1229. During the Chinese civil war, the PLA's policy forbade the killing, torture and insulting of prisoners of war.[1131] The same policy was adopted in the context of the conflict between China and Japan.[1132] In an interview conducted by a British journalist in 1937, the Chairman of the Chinese Communist Party stated that "we still leniently treat the captured ordinary Japanese soldiers and those lower ranking officers who were forced to fight, they shall not be insulted

[1126] Israel, High Court, *General Security Service case*, Joint Judgement, 6 September 1999, § 23.
[1127] UK, Military Court at Hanover, *Heering case*, Judgement, 25–26 January 1946.
[1128] US, District Court of the Eastern District of New York, *Filartiga case*, Judgement, 10 January 1984.
[1129] AFP, Communiqué, 28 June 1990.
[1130] Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 2.
[1131] China, Political Report on the United Government to the 7th Plenary Session of National Representatives of the Chinese Communist Party by Mao Zedong, 24 April 1945, *Selected Works of Mao Zedong*, Vol. 4, The People's Press, Beijing, p. 1039.
[1132] China, Instruction on Implementing the Works of Land Reform and Consolidation of the Party by Deng Xiaoping, 6 June 1948, *Selected Works of Deng Xiaoping*, Vol. 1, The People's Press, Beijing, p. 122.

or condemned and would be set free after being informed of the consistency of the interests of the Japanese and the Chinese people".[1133]

1230. In a note submitted to the ICRC in 1967, Egypt qualified "torture of captives, wounded and civilians by barbaric means" as a "flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949".[1134]

1231. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "captured combatants and civilians in the hands of the enemy, as well as inhabitants of occupied territory, shall be subject neither to torture (physical or mental), nor to cruel or degrading treatment".[1135]

1232. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[1136]

1233. According to the Explanatory Memorandum to the Act Implementing the 1984 Convention against Torture presented to the parliament of the Netherlands, torture is an "offence under civil criminal law, but, if committed in times of armed conflict, it is considered a violation of the international law of armed conflict and therefore an offence under section 8 of the Criminal Law in Wartime Act".[1137]

1234. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

> We support the principle that [all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions] not be subjected to violence to life, health, or physical or mental well-being . . . The basic core of Protocol II is, of course, reflected in common article 3 of the 1949 [Geneva] Conventions and therefore is, and should be, a part of generally accepted customary law: This specifically includes its prohibitions [of] . . . degrading treatment.[1138]

1235. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that:

[1133] China, Mao Zedong Talking with British Journalist Bertram on 25 October 1937, *Selected Works of Mao Zedong*, Vol. II, Foreign Language Press, Beijing, 1967, pp. 47–59.

[1134] Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, p. 3, §§ 1 and 1(B).

[1135] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 63.

[1136] Report on the Practice of Jordan, 1997, Chapter 5.

[1137] Netherlands, Lower House of Parliament, Explanatory Memorandum to the Act Implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1986–1987 Session, Doc. 20 042, No. 3, pp. 3–4.

[1138] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427 and 430–431.

Iraqi prisoners of war will not be mistreated and will be provided humane and safe detention.
...
The Government of Iraq appears to have subjected [captured American and coalition military personnel] to unlawful treatment for propaganda purposes and coercion – both physical and mental – in order to secure information and statements from them. If these broadcasts are authentic, Iraq has committed serious violations of the Third Geneva Convention.
...
The Government of the United States protests the apparently unlawful coercion and misuse of prisoners of war for propaganda purposes, the failure to respect their honor and well-being, and the subjection of such individuals to public humiliation.
...
The mistreatment of prisoners of war is a war crime, and the inhumane treatment of prisoners of war is a grave breach of the Convention.
...
The Government of the United States again reminds the Government of Iraq that prisoners of war must at all times be humanely treated.[1139]

1236. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that "the Government of the United States reminds the Government of Iraq that Iraqi individuals who are guilty of ... other war crimes such as the exposure of POWs to mistreatment, coerced statements, public curiosity and insult, are personally liable".[1140]

1237. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "all US POWs suffered physical abuse at the hands of their Iraqi captors, in violation of Articles 13, 14 and 17 GPW. Most POWs were tortured, a grave breach, in violation of Article 130 GPW". The report further dealt with specific crimes, including "inhumane treatment of Kuwaiti and third country civilians ... in violation of Articles 27, 32 and 147 GC [IV]", and mentioned "torture and other inhumane treatment of POWs, in violation of Articles 13, 17, 22, 25, 26, 27, and 130 GC [III]".[1141]

1238. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of "torture of prisoners" perpetrated by the parties to the conflict.[1142]

[1139] US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, p. 4.

[1140] US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 4.

[1141] US, Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 630, 632, 634 and 635.

[1142] US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 6–7; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second

1239. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[1143]

1240. According to the Report on US Practice, it is the *opinio juris* of the US that military necessity will not justify derogation of the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.[1144]

1241. Order No. 579 issued in 1991 by the YPA Chief of Staff of the SFR (FRY) provides that YPA units shall:

> apply all means to prevent any attempt of . . . mistreatment of the civilian population and all persons who are not taking part in armed conflict, persons who surrender or hoist the white flag in order to surrender, the wounded and sick, religious and medical personnel and all other protected persons.[1145]

1242. The Report on the Practice of Zimbabwe states that Zimbabwe believes that civilians of any description should be protected from torture or other forms of inhumane treatment.[1146]

1243. In 1988, in connection with a non-international armed conflict, government officials of a State denied that it was the government's policy to torture prisoners. They did, however, admit that it might have occurred in a few instances.[1147]

1244. In 1989, the government of a State denied allegations that it had a policy of torturing prisoners. It also denounced, with reference to humanitarian principles and the Geneva Conventions, the intention of an armed opposition group to cut off one leg of all of its prisoners.[1148]

1245. In 1990, in a report on the activities of the governmental army in the context of a non-international armed conflict, the ICRC concluded that the army had behaved in an alarming way towards its detainees, by indulging in ill-treatment.[1149]

1246. In 1994, a State denied allegations concerning its practice of torturing detainees and insisted that torture of prisoners was a crime and that perpetrators should be punished.[1150]

Submission), annexed to Letter dated 22 October 1992 to the UN Secretary-General, UN Doc. S/24705, 23 October 1992, p. 10; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, pp. 11–16; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, pp. 12–13.

[1143] Report on US Practice, 1997, Chapter 5.3.

[1144] Report on US Practice, 1997, Chapter 5.3 and 5.7.

[1145] SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

[1146] Report on the Practice of Zimbabwe, 1998, Chapter 5.6.

[1147] ICRC archive document.

[1148] ICRC archive document.

[1149] ICRC archive document.

[1150] ICRC archive document.

1247. In 1994, in the context of a non-international armed conflict, a State denied accusations of torture by a separatist entity and issued specific orders forbidding the torture of captured enemy combatants.[1151]

III. Practice of International Organisations and Conferences

United Nations

1248. In a resolution adopted in 1990 in the context of the Iraqi invasion of Kuwait, the UN Security Council condemned the mistreatment and oppression of Kuwaiti and third-State nationals.[1152]

1249. In a resolution adopted in 1992, the UN Security Council demanded that all detainees in camps, prisons and detention centres in Bosnia and Herzegovina receive humane treatment.[1153]

1250. In a resolution adopted in 1992, the UN Security Council expressed grave alarm at the widespread violations of IHL occurring within the territory of the former Yugoslavia, especially in Bosnia and Herzegovina, including abuse of civilians in detention centres, and demanded that all parties and others concerned immediately cease such actions.[1154]

1251. In a resolution adopted in 1996, the UN Security Council expressed deep concern at the deterioration in security and in the humanitarian situation, including torture, in Burundi.[1155]

1252. In 1993, in a statement by its President regarding the treatment of Bosnian Muslims in detention camps by Bosnian Croats, the UN Security Council emphasised that "inhuman treatment and abuses in detention centres violates international humanitarian law".[1156]

1253. In numerous resolutions, the UN General Assembly has condemned the inhuman and degrading treatment of political prisoners, detainees and captured combatants in South Africa, declaring that they should be treated as POWs under international law and accorded the protections laid down in GC III.[1157]

1254. In a resolution adopted in 1974 on the protection of women and children in emergency and armed conflict, the UN General Assembly stated that "all the necessary steps shall be taken to ensure the prohibition of measures such as . . . torture, degrading treatment and violence particularly against the part of the civilian population that consists of women and children". It added that "all forms of . . . cruel and inhuman treatment of women and children, including . . . torture . . . shall be considered criminal".[1158]

[1151] ICRC archive document.
[1152] UN Security Council, Res. 674, 29 October 1990, preamble and § 5.
[1153] UN Security Council, Res. 770, 13 August 1992, § 3.
[1154] UN Security Council, Res. 771, 13 August 1992, preamble and § 3.
[1155] UN Security Council, Res. 1072, 30 August 1996, preamble.
[1156] UN Security Council, Statement by the President, UN Doc. S/26437, 14 September 1993.
[1157] UN General Assembly, Res. 2547 (XXIV), 11 December 1969, §§ 2–3 and 7; Res. 3103 (XXVIII), 12 November 1974, § 4; Res. 34/93 H, 12 December 1979, §§ 1 and 4; Res. 41/35, 10 November 1986, §§ 6–9 and 13.
[1158] UN General Assembly, Res. 3318 (XXIX), 14 December 1974, §§ 4 and 5.

1255. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN General Assembly expressed "its outrage at the instances of massive and systematic violations of human rights and humanitarian law, including . . . torture".[1159]

1256. In a resolution adopted in 1998, the UN General Assembly strongly condemned the overwhelming number of human rights violations committed by the authorities of the FRY, the police and the military authorities in Kosovo, including torture and other cruel, inhuman or degrading treatment, in breach of IHL, including common Article 3 of the 1949 Geneva Conventions and AP II.[1160]

1257. In resolutions on Afghanistan adopted between 1989 and 1992, the UN Commission on Human Rights demanded that all parties treat their prisoners according to the recognised principles of IHL and protect them from acts of violence, including torture.[1161]

1258. In resolutions adopted in 1991 and 1992, the UN Commission on Human Rights strongly condemned Iraq for not treating prisoners of war and detained civilians according to recognised IHL principles and insisted that it abstain from acts of violence against them, including torture.[1162]

1259. In a resolution adopted in 1994, the UN Commission on Human Rights demanded immediate, firm and resolute action by the international community to stop all human rights violations during the conflict in the former Yugoslavia, including torture.[1163]

1260. In a resolution adopted in 1996, the UN Commission on Human Rights condemned in the strongest terms all violations of human rights and IHL during the conflict in the former Yugoslavia and, in particular, massive and systematic violations, including beatings and torture.[1164]

1261. In a resolution adopted in 1996, the UN Commission on Human Rights called upon all parties to the hostilities in Sudan to protect all civilians from violations of human rights and humanitarian law, including ill-treatment and torture.[1165]

1262. In resolutions adopted in 1988 and 1989 on the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights, after reaffirming that GC IV was applicable to the situation, stated that the torture and inhuman treatment of detainees was a war crime under international law.[1166]

[1159] UN General Assembly, Res. 50/193, 22 December 1995, pp. 4–5.
[1160] UN General Assembly, Res. 53/164, 9 December 1998, § 8.
[1161] UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11; Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.
[1162] UN Commission on Human Rights, Res. 1991/67, 6 March 1991, § 5; Res. 1992/60, 3 March 1992, § 3.
[1163] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 5.
[1164] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.
[1165] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.
[1166] UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.

1263. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[1167]

1264. In 1992, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that the leader of a party to the conflict in Afghanistan had issued a written order which provided that "no person is allowed to insult, threaten, harass . . .[a] prisoner of war".[1168]

1265. In 1996, in a report on the situation of human rights in Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that he had received eye-witness accounts and reports indicating that "if a prisoner is captured and he refuses to change sides, he is cruelly tortured and executed".[1169]

Other International Organisations

1266. In 1993, in a report to EC foreign ministers, the EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia stated that "the mission believes there is now a strong case for clearly identifying [torture and degrading and humiliating treatment] as war crimes, irrespective of whether they occur in national or international conflicts".[1170]

1267. In a resolution adopted in 1985, the Council of the League of Arab States condemned Israel for indulging "in all kinds of violence, persecution and torture against the civilian population" and decided to "call upon the international community to exercise pressure on Israel to stop these practices immediately, in accordance with the provisions of the Fourth Geneva Convention of 1949".[1171]

1268. In a resolution adopted in 1992, the Council of the League of Arab States decided "to strongly condemn Israel for . . . its inhuman practices against the peaceful inhabitants".[1172]

1269. In a resolution adopted in 1993, the Council of the League of Arab States decided "to strongly condemn Israel for . . . its inhuman practices against the peaceful people".[1173]

[1167] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[1168] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1992/33, 17 February 1992, § 51.
[1169] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 9.
[1170] EC, Report of the investigative mission into the treatment of Muslim women in the former Yugoslavia, annexed to Letter dated 2 February 1993 from Denmark to the UN Secretary-General, UN Doc. S/25240, 3 February 1993, Annex I, § 42.
[1171] League of Arab States, Council, Res. 4430, 28 March 1985, § 2.
[1172] League of Arab States, Council, Res. 5169, 29 April 1992, § 2.
[1173] League of Arab States, Council, Res. 5324, 21 September 1993, § 2.

International Conferences

1270. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that irrespective of GC III, "the international community has consistently demanded humane treatment for prisoners of war, including . . . protection at all times from physical and mental torture [and] abuse".[1174]

1271. The 23rd International Conference of the Red Cross in 1977 adopted a resolution on torture in which it reaffirmed that "torture is contrary to the fundamental principles of the Red Cross" and underlined the need to "make known and ensure respect for those provisions in the Geneva Conventions and Protocols which prohibit torture and those resolutions of the International Conference of the Red Cross and Red Crescent which condemn inhuman and degrading treatment". The Conference therefore condemned "all forms of torture" and urged governments and appropriate international organisations "to ensure application of the international instruments and laws forbidding torture and to do their utmost to eliminate its practice".[1175]

1272. The 24th International Conference of the Red Cross in 1981 adopted a resolution on torture in which it noted that "torture is condemned and forbidden by international humanitarian law, international instruments relating to human rights and the general principles of international law", but that "despite such prohibition torture is practised to an alarming extent in many countries". The Conference therefore urged governments and international organisations concerned to "make greater efforts to ensure universal respect for these prohibitions" and requested that the UN "expedite the adoption of an international convention against torture and other cruel, inhuman or degrading treatment or punishment, and including provision for the effective supervision and enforcement of its application".[1176]

1273. The 25th International Conference of the Red Cross in 1986 adopted a resolution on torture in which it welcomed with satisfaction "the adoption by the General Assembly of the United Nations, on 10 December 1984, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment" and invited "States to ratify it". The Conference also encouraged States and regional organisations to draft "regional conventions against torture and other cruel, inhuman or degrading treatment or punishment, providing efficient supervisory mechanisms".[1177]

1274. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that

[1174] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.
[1175] 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. XIV, preamble and §§ 1 and 2.
[1176] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIV, preamble and §§ 1 and 2.
[1177] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. X, §§ 1 and 2.

"gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . torture and cruel, inhuman and degrading treatment or punishment".[1178]

1275. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they "refuse to accept that . . . prisoners [are] tortured".[1179]

1276. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including . . . torture . . . and threats to carry out such actions".[1180]

1277. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about "the number and expansion of conflicts in Africa" and alarm at "the spread of violence, in particular in the form of . . . torture . . . which seriously violate[s] the rules of International Humanitarian Law".[1181]

IV. Practice of International Judicial and Quasi-judicial Bodies

1278. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[1182]

1279. In the *Tadić case* before the ICTY in 1995, the accused was charged with grave breaches of the Geneva Conventions (torture, inhuman treatment and wilfully causing great suffering or serious injury to body or health), crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment).[1183] In its judgement in 1997, the Tribunal found the accused guilty of crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment).[1184]

1280. In the *Mrkšić case* before the ICTY in 1995, the accused was charged with grave breaches of the Geneva Conventions (wilfully causing great suffering),

[1178] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).
[1179] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.
[1180] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).
[1181] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.
[1182] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.
[1183] ICTY, *Tadić case*, Second Amended Indictment, 14 December 1995, §§ 6, 11 and 12.
[1184] ICTY, *Tadić case*, Judgement, 7 May 1997, p. 300.

violations of the laws and customs of war (cruel treatment) and crimes against humanity (inhumane acts).[1185]

1281. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that the prohibition of torture was absolute and non-derogable in any circumstances.[1186] It found the accused guilty of grave breaches of GC IV (wilfully causing great suffering or serious injury to body or health, torture and inhuman treatment) and violations of the laws and customs of war (cruel treatment and torture).[1187]

1282. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber stated that, in any case, the proposition was warranted that a general prohibition against torture had evolved in customary international law. It added that:

> This prohibition has gradually crystallised from the Lieber Code and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, read in conjunction with the "Martens clause" laid down in the preamble to the same Convention. Torture was not specifically mentioned in the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg, but it was one of the acts expressly classified as a crime against humanity under article II (1)(c) of Allied Control Council Law No. 10. As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture.
>
> . . .
>
> That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the Nicaragua case it held that common article 3 of the 1949 Geneva Conventions, which inter alia prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts.
>
> . . .
>
> It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be

[1185] ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 26.
[1186] ICTY, *Delalić case*, Judgement, 16 November 1998, § 454.
[1187] ICTY, *Delalić case*, Judgement, 16 November 1998, Part IV.

applied both as part of international customary law and – if the requisite conditions are met – as treaty law, the content of the prohibition being the same.[1188]

The Tribunal further stated that no loopholes had been left in international human rights law with respect to the prohibition of torture. It also held that the prohibition even covered potential breaches, that it imposed an obligation *erga omnes* and that it had acquired the status of *jus cogens*. The Tribunal found Anto Furundžija guilty of a violation of the laws and customs of war (torture).[1189]

1283. In its judgement in the *Jelisić case* in 1999, the ICTY Trial Chamber found Goran Jelisić guilty of causing bodily harm, a violation of the laws and customs of war (cruel treatment) and a crime against humanity (inhumane acts).[1190]

1284. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber, after considering charges of crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment), found the accused guilty of committing a crime against humanity pursuant to Article 5(i) of the 1993 ICTY Statute.[1191]

1285. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber found the accused guilty of committing grave breaches of the Geneva Conventions (wilfully causing great suffering or serious injury to body or health, inhuman treatment and cruel treatment), crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment).[1192]

1286. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber held that "torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus cogens*." The Tribunal found Dragoljub Kunarac and Zoran Vuković guilty of crimes against humanity (torture) and violations of the laws and customs of war (torture).[1193]

1287. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber found Dario Kordić and Mario Čerkez guilty of crimes against humanity (inhumane acts) and grave breaches of the Geneva Conventions (inhumane treatment).[1194]

1288. In 1993, the CAT recalled in the context of Afghanistan that no exceptional circumstances could be invoked as a justification of torture.[1195]

1289. In its Annual Report 1980–81, the IACiHR reminded Peru that torture of persons by the forces of order cannot be justified.[1196]

[1188] ICTY, *Furundžija case*, Judgement, 10 December 1998, §§ 137–139.
[1189] ICTY, *Furundžija case*, Judgement, 10 December 1998, Part IX.
[1190] ICTY, *Jelisić case*, Judgement, 14 December 1999, § 138.
[1191] ICTY, *Kupreškić case*, Judgement, 14 January 2000, §§ 822 and 832.
[1192] ICTY, *Blaškić case*, Judgement, 3 March 2000, Part VI, Disposition.
[1193] ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 466, 883, 886 and 888.
[1194] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V.
[1195] CAT, Report to the UN General Assembly, UN Doc. A/48/44, 24 June 1993, §§ 50–62.
[1196] IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, p. 112.

1290. In a case concerning Argentina in 1997, the IACiHR considered that the intentional mistreatment of wounded persons would constitute a particularly serious violation of common Article 3 of the 1949 Geneva Conventions.[1197]

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

1291. The ICRC Commentary on the Third Geneva Convention states, with reference to Article 17, that:

> The Detaining Power may not . . . exert any pressure on prisoners, and this prohibition even refers to the information specified in the first paragraph of the Article. The holding of prisoners *incommunicado*, which was practised by certain Detaining Powers in "interrogation camps" during the last war, is also implicitly forbidden by this paragraph, but even more so by Article 126 [GC III].[1198]

1292. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "torture of all kinds, whether physical or mental" and "humiliating and degrading treatment (e.g. enforced prostitution, any form of indecent assault or other outrages upon personal dignity)" are prohibited. It adds that the following acts constitute grave breaches of the law of war "torture or inhuman treatment, causing great suffering or serious injury to body or health, [and] inhuman and degrading practices involving outrages upon personal dignity".[1199]

1293. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "civilians and all non-combatants must be respected and protected, and violence to life and person . . . [and] outrages upon personal dignity . . . are specifically prohibited".[1200]

1294. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to respect the physical and moral integrity of non-combatants and persons *hors de combat*. It also stated that combatants and civilians have the right to the protection of their dignity. The statement recalled the Geneva Conventions and AP I.[1201]

1295. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that attacks on the "physical integrity or personal dignity" of civilians were prohibited. It added, with respect to captured combatants and persons who have laid down their arms, that "subjecting them

[1197] IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 189.
[1198] Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, p. 163.
[1199] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 192, 195 and 776(a)–(c).
[1200] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.
[1201] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de Enero de 1994, 3 January 1994.

or threatening to subject them to ill-treatment" was a violation of IHL at all times. It further stated that "persons deprived of their freedom, both civilians and military personnel, must always be treated humanely and shall never be tortured".[1202]

1296. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that, with respect to civilian persons who refrain from acts of hostility, that "violence to their lives and person [and] outrages upon their personal dignity" are prohibited. It added that, with respect to combatants and other persons who are captured, and those who have laid down their arms, that they shall not, in particular, be "ill-treated". It furthermore stated, with respect to detained combatants and civilian persons that "any form of torture or ill-treatment is strictly prohibited".[1203]

1297. In a note on respect for IHL issued in 1996 in the context of an internal armed conflict, the ICRC stated that "officers must be instructed that, whatever the circumstances, any form of ill-treatment is illegal and prohibited".[1204]

1298. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of "torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health" be subject to the jurisdiction of the Court with respect to international armed conflicts. It also proposed that the war crime of "violence to health and physical or mental well-being of persons, in particular cruel treatment such as torture" be subject to the jurisdiction of the Court with respect to non-international armed conflicts.[1205]

1299. In 1998, in a letter to the League of Red Cross and Red Crescent Societies, the Afghan Red Crescent Society noted that the Constitution of Afghanistan, following its adoption of the 1984 Convention against Torture, contained legal provisions outlawing the practice of torture.[1206]

1300. In a communication to the press in 2001, the ICRC reminded the parties to the conflict in Afghanistan that the physical integrity and dignity of persons not taking part in hostilities must not be threatened.[1207]

[1202] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

[1203] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

[1204] ICRC archive document.

[1205] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(ii)–(iii) and 3(i).

[1206] Afghan Red Crescent Society, Letter to the League of Red Cross and Red Crescent Societies, 14 June 1998, § 202(2).

[1207] ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

VI. Other Practice

1301. In 1979, in a meeting with the ICRC, the leader of an armed opposition group noted that he considered it legitimate to torture prisoners in order to obtain information.[1208]

1302. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "no one shall be subjected to physical or mental torture . . . or cruel or degrading treatment".[1209]

1303. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (d) torture or other cruel, inhuman, or degrading treatment or punishment".[1210]

1304. In 1987, in a meeting with the ICRC, the leader of an armed opposition group criticised the inhuman treatment of prisoners by other parties to the conflict and insisted that their own commanders had been instructed to treat captured combatants humanely.[1211]

1305. In 1990, an armed opposition group undertook to refrain from torturing its prisoners and insisted that commanders responsible for such actions had been sanctioned.[1212]

1306. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "torture . . . as well as cruel, inhuman and degrading treatment or punishment and other outrages upon personal dignity" shall remain prohibited.[1213]

Definitions

I. Treaties and Other Instruments

Treaties

1307. Article 1 of the 1984 Convention against Torture defines torture as follows:

"Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from

[1208] ICRC archive document. [1209] ICRC archive document.
[1210] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(d).
[1211] ICRC archive document. [1212] ICRC archive document.
[1213] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(a), *IRRC*, No. 282, 1991, p. 331.

him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

1308. Article 2 of the 1985 Inter-American Convention against Torture defines torture as:

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

1309. Article 7(2)(e) of the 1998 ICC Statute defines torture, when a crime against humanity, as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

Other Instruments

1310. Article 1(1) of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include suffering arising only from, inherent in, or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

1311. Principle 6 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

. . .

* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his

natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

1312. The 2000 ICC Elements of Crimes defines torture, when a war crime, in part as follows:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

1313. The 2000 ICC Elements of Crimes defines inhuman treatment, when a war crime, in part as follows: "The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons".

1314. The 2000 ICC Elements of Crimes defines outrages upon personal dignity, when a war crime, in part as follows:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

The Elements of Crimes further specifies, in footnote 49, that:

For this crime, "persons" can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

1315. Section 5(2)(d) of the 2000 UNTAET Regulation 2000/15 defines torture, when a crime against humanity, as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

II. National Practice

Military Manuals

1316. Australia's Defence Force Manual defines torture as including "any measures of such character as to cause the physical suffering or extermination of protected persons".[1214]

1317. Canada's LOAC Manual provides that:

Torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as:

[1214] Australia, *Defence Force Manual* (1994), § 1219.

a. obtaining from that person or a third person information or confession;
b. punishing that person or a third person for an act he or a third person has committed or is suspected of having committed;
c. intimidating or coercing that person or a third person; or
d. for any reason based on discrimination of any kind;

when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[1215]

1318. France's LOAC Manual refers to the 1984 Convention against Torture and defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.[1216]

1319. The US Field Manual restates Article 32 GC IV, which provides that States have agreed not to take any "measures of such character as to cause the physical suffering . . . of protected persons in their hands".[1217]

1320. According to the US Instructor's Guide, "beating a prisoner or applying electric shocks, dunking his head into a barrel of water, and putting a plastic bag over his head to make him talk" are acts of torture and inhumane treatment.[1218]

National Legislation

1321. The US Torture Victim Protection Act defines torture as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual".[1219]

National Case-law

1322. No practice was found.

Other National Practice

1323. In 1994, an official of a State, discussing that State's ratification of the 1984 Convention against Torture, considered that the limit between torture and (deserved) ill-treatment was that which was accepted by the public.[1220]

[1215] Canada, *LOAC Manual* (1999), Glossary, p. 18.
[1216] France, *LOAC Manual* (2001), p. 122.
[1217] US, *Field Manual* (1956), § 271.
[1218] US, *Instructor's Guide* (1985), p. 10.
[1219] US, *Torture Victim Protection Act* (1991), Section 3.
[1220] ICRC archive document.

III. Practice of International Organisations and Conferences

United Nations

1324. In 1998, in a report on systematic rape, sexual slavery and slavery-like practices during wartime, the Special Rapporteur of the UN Commission on Human Rights stated that:

> As prohibited by customary norms, the crime of torture requires the intentional infliction of severe mental or physical pain or suffering, and a nexus to government action or inaction. In most, if not all cases described in this report, rape and serious sexual violence during armed conflict may also be prosecuted as torture.[1221]

Other International Organisations

1325. No practice was found.

International Conferences

1326. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1327. In its judgement in the *Akayesu case* in 1998, the ICTR Trial Chamber defined the essential elements of torture as:

(i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:
  (a) to obtain information or a confession from the victim or a third person;
  (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
  (c) for the purpose of intimidating or coercing the victim or the third person;
  (d) for any reason based on discrimination of any kind.
(ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.[1222]

1328. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber compared the three existing definitions of torture, that is, under the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1(1) of the 1984 Convention against Torture, and the 1985 Inter-American Convention on Torture. It concluded that "the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus

[1221] UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 53 and 55.

[1222] ICTR, *Akayesu case*, Judgement, 2 September 1998, § 594.

which the Trial Chamber considers to be representative of customary international law".[1223] The Trial Chamber also stated that "whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria".[1224] It further concluded that:

> The Trial Chamber thus finds that the offence of wilfully causing great suffering or serious injury to body or health constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence[.]
> ...
> In sum, the Trial Chamber finds that inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The plain, ordinary meaning of the term inhuman treatment in the context of the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.
> ...
> In this framework of offences, all acts found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment. However, this third category of offence is not limited to those acts already incorporated into the other two and extends further to other acts which violate the basic principle of humane treatment, particularly the respect for human dignity. Ultimately, the question of whether any particular act which does not fall within the categories of the core group is inconsistent with the principle of humane treatment, and thus constitutes inhuman(e) treatment, is a question of fact to be judged in all the circumstances of the particular case.
> ...
> In light of the foregoing, the Trial Chamber finds that cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the [1949] Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment.[1225]

1329. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber spelled out some specific elements that pertained to torture as "considered

[1223] ICTY, *Delalić case*, Judgement, 16 November 1998, § 459.
[1224] ICTY, *Delalić case*, Judgement, 16 November 1998, § 496.
[1225] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 511, 543–544 and 552.

from the specific viewpoint of international criminal law relating to armed conflicts". Thus, the Trial Chamber considered that the elements of torture in an armed conflict required that torture:

(i) consists of the infliction by act or omission of severe pain or suffering, whether physical or mental; in addition
(ii) this act or omission must be intentional;
(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person; or at discriminating, on any ground, against the victim or a third person;
(iv) it must be linked to an armed conflict;
(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.

As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim.[1226]

This finding was confirmed in the same case by the Appeals Chamber in 2000.[1227]

1330. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber found that:

The crime of wilfully causing great suffering or serious injury to body or health constitutes an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven. This crime is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual's human dignity are not included within this offence.[1228]

The Trial Chamber also confirmed the definition of inhumane treatment and cruel treatment as set out in the *Delalić case*.[1229] In relation to "other inhumane acts", it held that:

It is not controversial that the category "other inhumane acts" provided for in Article 5 is a residual category, which encompasses acts not specifically enumerated. Trial Chambers have considered the threshold to be reached by these other acts in order to be incorporated in this category, reaching similar conclusions as to the serious nature of these acts. The Tadić Trial Chamber found that "inhumane acts" are acts "similar in gravity to those listed in the preceding subparagraphs". In the words of the Kupreškić Trial Chamber, in order to be characterised as inhumane, acts "must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5." The Tadić Trial Chamber, in relation to the requisite

[1226] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 162.
[1227] ICTY, *Furundžija case*, Judgement on Appeal, 21 July 2000, § 111.
[1228] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 245.
[1229] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 256.

nature of "other inhumane acts", held that they "must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity."[1230]

1331. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber stated that it was "of the view that treatment may be cruel whatever the status of the person concerned".[1231]

1332. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber departed from the findings on the definition of torture confirmed in the *Furundžija case*. In general terms it held that:

> The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.[1232]

More specifically with regard to torture, the Trial Chamber stated that:

> Three elements of the definition of torture contained in the Torture Convention are, however, uncontentious and are accepted as representing the status of customary international law on the subject:
>
> (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
> (ii) This act or omission must be intentional.
> (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal . . .
>
> . . . On the other hand, [the following] elements remain contentious:
>
> (i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.
>
> . . .
>
> (iii) The requirement, if any, that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law. The issue does not need to be resolved here, because the conduct of the accused is appropriately subsumable under the above-mentioned purposes . . .
>
> . . .
>
> The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person

[1230] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 269.
[1231] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 186.
[1232] ICTY, *Kunarac case*, Judgement, 22 February 2001, § 471.

in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law . . .

. . . On the basis of what has been said, the Trial Chamber holds that, in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:

(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
(ii) The act or omission must be intentional.
(iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[1233]

1333. In its General Comment on Article 7 of the 1966 ICCPR in 1992, the HRC stated that the prohibition of torture or cruel, inhuman or degrading treatment "relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim". It also noted that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7".[1234] On the basis of these considerations, the HRC has found a breach of Article 7 ICCPR on numerous occasions.[1235]

1334. In *Améndola Massiotti and Baritussio v. Uruguay* in 1982, the HRC held that the following conditions of imprisonment amounted, as inhuman treatment, to a violation of Article 7 of the 1966 ICCPR:

During the rainy period the water was 5 to 10 cm deep on the floor of the cells. In three of the cells, each measuring 4m by 5m, 35 prisoners were kept. The prison had no open courtyard and the prisoners were kept indoors under artificial light all day. On 1 August 1977 Carmen Améndola Massiotti was transferred to Punta Rieles prison. There she was kept in a hut measuring 5m by 10m. The place was overcrowded with 100 prisoners and the sanitary conditions were insufficient. She was subjected to hard labour and the food was very poor.[1236]

1335. In *Deidrick v. Jamaica* in 1998, the HRC held that:

With regard to the deplorable conditions of detention at St. Catherine's District Prison, the Committee notes that author's counsel has made precise allegations, related thereto, i.e that the author is locked-up in his cell 23 hours a day, no mattress or bedding are provided, that there is lack of artificial light and no integral sanitation, inadequate medical services, deplorable food and no recreational facilities etc. All of this has not been contested by the State party, except in a general manner saying that these conditions affect all prisoners. In the Committee's opinion, the conditions described above, which affect the author directly are such as to violate

[1233] ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 483–484 and 496–497.
[1234] HRC, General Comment No. 20 (Article 7 ICCPR), 10 April 1992, §§ 5–6.
[1235] See, e.g., HRC, *Marais v. Madagascar*, Views, 24 March 1983, § 17(4) (three years in a cell measuring 1m by 2m); *Larrosa Bequio v. Uruguay*, Views, 29 March 1983, § 10(3) (one visitor in seven months); *Gómez de Voituret v. Uruguay*, Views, 10 April 1984, § 12(2) (solitary confinement for several months); *Espinoza de Polay v. Peru*, Views, 6 November 1997, § 8(6) (total isolation for a year).
[1236] HRC, *Améndola Massiotti and Baritussio v. Uruguay*, Views, 26 July 1982, §§ 10–13.

his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to the [1966 ICCPR]. It finds that holding a prisoner in such conditions of detention constitutes inhuman treatment in violation of article 10, paragraph 1, and of article 7.[1237]

1336. In its decision in *Krishna Achutan v. Malawi* in 1994, the ACiHPR held that:

The conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened [Article 5 of the 1981 ACHPR]. Aspects of the treatment . . . such as excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care, were also in contravention of this article.[1238]

1337. In its decision in *International Pen and Others v. Nigeria* in 1998 concerning the trial and execution of Ken Saro-Wiwa and other co-defendants, the ACiHPR found a violation of Article 5 of the 1981 ACHPR. It held that the detention of Mr Saro-Wiwa in leg irons and handcuffs with no evidence of attempts to escape constituted actions which humiliated the individual or forced him to act against his will or conscience.[1239]

1338. In its decision in *Civil Liberties Organisations v. Nigeria* in 1999, the ACiHPR dealt with the allegation that the conditions of detention of persons convicted Nigeria constituted inhuman and degrading treatment. The Commission stated that "deprivation of light, insufficient food and lack of access to medicine or medical care can . . . constitute violations of Article 5" of the ACHPR.[1240]

1339. In its report in the *Greek case* in 1969, the ECiHR stated that the notion of inhuman treatment:

covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment may be said to be degrading if it grossly humiliates the victim before others or drives the detainee to act against his/her will or conscience.[1241]

The ECiHR also concluded that the conditions of detention in several camps amounted to breaches of Article 3 of the 1950 ECHR, notably the combination of "complete absence of heating in winter, . . . lack of hot water, . . . poor lavatory

[1237] HRC, *Deidrick v. Jamaica*, Views, 9 April 1998, § 9.3.
[1238] ACiHPR, *Krishna Achutan v. Malawi*, Decision, 25 October–30 November 1994; see also *AI v. Malawi*, Decision, 13–22 March 1995.
[1239] ACiHPR, *International Pen and Others v. Nigeria*, Decision, 22–31 October 1998.
[1240] ACiHPR, *Civil Liberties Organisations v. Nigeria (151/96)*, Decision, 15 November 1999, §§ 25–26.
[1241] ECiHR, *Greek case*, Report, 5 November 1969, § 186.

facilities, [and] unsatisfactory dental treatment", as well as "the conditions of gross overcrowding and its consequences".[1242]

1340. In its admissibility decisions in two cases in 1978 and 1980, the ECiHR found that solitary confinement did not, in itself, constitute a form of inhuman treatment. Although prolonged periods of solitary confinement were undesirable, regard had to be had to the particular situation, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.[1243]

1341. In *Kröcher and Möller v. Switzerland* in 1982, the ECiHR stated that "complete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason". The ECiHR considered, however, that there was "a distinction between this and removal from association with other prisoners for security, disciplinary or protective reasons" which would not constitute inhuman treatment or degrading treatment or punishment.[1244]

1342. In its judgement in *Selçuk and Asker v. Turkey* in 1996, the ECiHR stated that the burning of the applicants' homes in their presence and the deliberate destruction of their belongings which caused them a great deal of anguish and suffering, particularly in view of the fact that one of the applicants was both elderly and infirm, constituted inhuman and degrading treatment.[1245] The ECtHR upheld this finding in 1998, adding that even if it had been found that the acts in question were carried out without any intention of punishing the applicants, but only to prevent their homes being used by terrorists, this would not provide a justification for the ill-treatment.[1246]

1343. In its judgement in the *Campbell and Cosans case* in 1982, the ECtHR considered the issue of corporal punishment against schoolchildren and stated that "provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 (art. 3) may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment'."[1247]

1344. In its judgement in *Aydin v. Turkey* in 1997, the ECtHR held that:

> Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. The Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected

[1242] ECiHR, *Greek case*, Report, 5 November 1969, Part B, Chapter IV(B)(VI), Section A, § 34, Section C, §§ 16–17 and Section D, § 21.
[1243] ECiHR, *Ensslin, Baader and Raspe v. FRG*, Admissibility Decision, 8 July 1978, pp. 109–110; *X v. UK*, Admissibility Decision, 10 July 1980, pp. 99–100.
[1244] ECiHR, *Kröcher and Möller v. Switzerland*, Report, 16 December 1982, § 62.
[1245] ECiHR, *Selçuk and Asker v. Turkey*, Report, 28 November 1996, §§ 171–178.
[1246] ECtHR, *Selçuk and Asker v. Turkey*, Judgement, 24 April 1998, §§ 78–80.
[1247] ECtHR, *Campbell and Cosans case*, Judgement, 25 February 1982, § 26.

amounted to torture, indeed the Court would have reached that conclusion on either of these grounds taken separately.[1248]

1345. In its judgement in the *Cyprus case* in 2001, the ECtHR found that, in relation to the living conditions of Greek Cypriots in the Karpas region of northern Cyprus, there had been a violation of Article 3 of the 1950 ECHR in that the Greek Cypriots had been subjected to discrimination amounting to degrading treatment.[1249]

1346. In its Second General Report in 1992, the European Committee for the Prevention of Torture stated that:

> The principle of proportionality requires that a balance be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.[1250]

1347. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR stated that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being".[1251]

1348. In a case concerning El Salvador in 1989, the IACiHR found that the mutilation of suspected guerrillas amounted to inhumane treatment and therefore constituted a violation of Article 5 of the 1969 ACHR.[1252]

1349. In a case concerning Peru in 1996, the IACiHR found that rape perpetrated by a public official constituted torture under Article 5 of the 1969 ACHR.[1253]

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

1350. No practice was found.

1351. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR found that the victims were held incommunicado for 36, respectively 37 days. The Court referred to the *Velásquez Rodríguez case* and repeated that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being". It concluded by saying

[1248] ECtHR, *Aydin v. Turkey*, Judgement, 25 September 1997, §§ 83–86.
[1249] ECtHR, *Cyprus case*, Judgement, 10 May 2001, § 311.
[1250] European Committee for the Prevention of Torture, Second General Report, Doc. CPT/Inf. (92)3, 13 April 1992, § 56.
[1251] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 156, see also § 187.
[1252] IACiHR, *Case 10.179 (El Salvador)*, Resolution, 28 September 1989, § 8.
[1253] IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, Section V(A)(3)(a).

that "the terms of confinement that the military tribunals imposed upon the victims . . . constituted cruel, inhuman and degrading forms of punishment that violated Article 5 of the [1969 ACHR]".[1254]

VI. Other Practice

1352. No practice was found.

E. Corporal Punishment

I. Treaties and Other Instruments

Treaties

1353. Article 87, third paragraph, GC III provides that corporal punishment is forbidden.

1354. Under Article 32 GC IV, corporal punishment is prohibited.

1355. Article 100, first paragraph, GC IV provides that "the disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization". The second paragraph provides that punishment drill is prohibited.

1356. Under Article 75(2)(iii) AP I, corporal punishment is prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents. Article 75 AP I was adopted by consensus.[1255]

1357. Under Article 4(2)(a) AP II, any form of corporal punishment is prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.[1256]

1358. Article 3 of the 2002 Statute of the Special Court for Sierra Leone provides that the Court is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions and AP II, which include "any form of corporal punishment".

Other Instruments

1359. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

1360. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

1361. According to Article 4(a) of the 1994 ICTR Statute, the Tribunal has jurisdiction over violations of common Article 3 of the 1949 Geneva

[1254] IACtHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, § 194 and 198.
[1255] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[1256] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

Conventions and of AP II, including "violence to life, health and physical or mental well-being of persons, in particular . . . any form of corporal punishment".

1362. Article 20(f)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "any form of corporal punishment" committed in violation of international humanitarian law applicable in armed conflict not of an international character is a war crime.

1363. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides, *inter alia*, that corporal punishment shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

1364. According to Section 7.2 of the 1999 UN Secretary-General's Bulletin, any form of corporal punishment, against persons not, or no longer, taking part in military operations and persons placed *hors de combat* are prohibited at any time and in any place.

II. National Practice

Military Manuals

1365. Argentina's Law of War Manual provides that corporal punishment of prisoners of war and civilians is prohibited, in both international and internal armed conflicts.[1257]

1366. Australia's Defence Force Manual states, with regard to inhabitants of occupied territory, that corporal punishment is prohibited.[1258]

1367. Benin's Military Manual states that "no one shall be subjected . . . to corporal punishment".[1259]

1368. Canada's LOAC Manual prohibits corporal punishment of POWs, civilians and protected persons in international and non-international armed conflicts.[1260]

1369. Colombia's Circular on Fundamental Rules of IHL provides that "nobody shall be subjected to corporal punishment".[1261]

1370. According to Croatia's Instructions on Basic Rules of IHL, detainees must be protected against all acts of violence, including corporal punishment.[1262]

1371. France's LOAC Summary Note provides that no one shall be subjected to corporal punishment.[1263]

1372. France's LOAC Manual refers to Article 75 AP I and provides that corporal punishment is a war crime.[1264]

[1257] Argentina, *Law of War Manual* (1989), §§ 3.25, 4.15 and 7.04.
[1258] Australia, *Defence Force Manual* (1994), § 1219.
[1259] Benin, *Military Manual* (1995), Fascicule II, p. 5 and Fascicule III, p. 4.
[1260] Canada, *LOAC Manual* (1999), p. 10-7, § 61, p. 11-4, § 33, p. 11-8, § 63-a(iii) and p. 17-3, § 21.
[1261] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.
[1262] Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 4–5.
[1263] France, *LOAC Summary Note* (1992), § 3.2.
[1264] France, *LOAC Manual* (2001), p. 45.

1373. Israel's Manual on the Laws of War refers to GC III and provides that corporal punishment of POWs is prohibited.[1265]
1374. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subject to corporal punishment.[1266]
1375. According to Madagascar's Military Manual, one of the seven fundamental rules of IHL is that nobody shall be subjected to corporal punishment.[1267]
1376. The Military Manual of the Netherlands restates the prohibition of corporal punishment contained in Article 75 AP I and Article 4 AP II.[1268]
1377. New Zealand's Military Manual provides that "corporal punishments [of POWs] ... are forbidden".[1269] It restates Article 75(2) AP I, according to which "corporal punishment" is prohibited "at any time and in any place whatsoever, whether committed by civilian or by military agents".[1270] Regarding civilians, the manual stipulates that GC IV prohibits the parties from "taking any measure of such character as to cause the physical suffering ... of protected persons in their hands", including corporal punishment.[1271] In the case of non-international armed conflict, the manual prohibits at any time and anywhere "any form of corporal punishment".[1272]
1378. Nicaragua's Military Manual states that the prohibition of corporal punishment is a fundamental guarantee.[1273]
1379. Romania's Soldiers' Manual provides that captured combatants and civilians "shall not be subjected to ... corporal punishments".[1274]
1380. Spain's LOAC Manual states that corporal punishment of prisoners of war or persons protected by GC IV is prohibited at any time and in any place, whether carried out by military or by civilian agents.[1275]
1381. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.[1276]
1382. Switzerland's military manuals provide that enemy civilians shall not be subjected to corporal punishment.[1277]
1383. Togo's Military Manual provides that "no one shall be subjected ... to corporal punishment".[1278]

[1265] Israel, *Manual on the Laws of War* (1998), p. 53.
[1266] Italy, *IHL Manual* (1991), Vol. I, § 41(e).
[1267] Madagascar, *Military Manual* (1994), p. 91, Rule 5.
[1268] Netherlands, *Military Manual* (1993), pp. VIII-3 and XI-4.
[1269] New Zealand, *Military Manual* (1992), § 931.2.
[1270] New Zealand, *Military Manual* (1992), § 1137.2.
[1271] New Zealand, *Military Manual* (1992), § 1321.4.
[1272] New Zealand, *Military Manual* (1992), § 1812.1.
[1273] Nicaragua, *Military Manual* (1996), Article 14(31).
[1274] Romania, *Soldiers' Manual* (1991), p. 34, § 2.
[1275] Spain, *LOAC Manual* (1996), Vol. I, §§ 8.2.c and 8.7.b.
[1276] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[1277] Switzerland, *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43; *Basic Military Manual* (1987), Article 147.
[1278] Togo, *Military Manual* (1996), Fascicule II, p. 5 and Fascicule III, p. 4.

1384. The UK Military Manual prohibits measures against protected persons which will cause physical suffering and states that "this prohibition applies . . . to corporal punishments".[1279] It further states that "corporal punishments . . . are forbidden".[1280] The manual states that, in occupied territories, the prohibition of measures of such character as to cause the physical suffering or extermination of protected persons in the hands of the occupant "applies . . . to corporal punishment".[1281] It recalls that "corporal punishment is excluded" with regard to the punishment of war criminals.[1282]

1385. The UK LOAC Manual forbids corporal punishment.[1283]

1386. The US Field Manual forbids corporal punishment of POWs and civilians.[1284]

National Legislation

1387. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, it is prohibited to carry out corporal punishment against civilian persons and prisoners of war.[1285]

1388. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[1286]

1389. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 87 GC III and 32 and 100 GC IV, and of AP I, including violations of Article 75(2)(iii) AP I, as well as any "contravention" of AP II, including violations of Article 4(2)(a) AP II, are punishable offences.[1287]

1390. Mozambique's Military Criminal Law provides that carrying out corporal punishments is a criminal offence.[1288]

1391. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[1289]

[1279] UK, *Military Manual* (1958), § 42.
[1280] UK, *Military Manual* (1958), § 205.
[1281] UK, *Military Manual* (1958), § 549.
[1282] UK, *Military Manual* (1958), § 638.
[1283] UK, *LOAC Manual* (1981), Section 9, p. 35, § 9.
[1284] US, *Field Manual* (1956), §§ 163 and 271.
[1285] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17(1) and 21(1).
[1286] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[1287] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[1288] Mozambique, *Military Criminal Law* (1987), Article 85(a).
[1289] Norway, *Military Penal Code as amended* (1902), § 108.

1392. Poland's Penal Code provides for the punishment of any person who, in violation of international law, subjects to corporal punishment persons *hors de combat*, protected persons and person enjoying international protection.[1290]

National Case-law

1393. In 1995, Colombia's Constitutional Court held that prohibitions contained in Article 4(2) AP II were consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions.[1291]

Other National Practice

1394. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[1292]

1395. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[1293]

III. Practice of International Organisations and Conferences

United Nations

1396. In 1997, in a report on torture, the Special Rapporteur of the UN Commission on Human Rights took the view that:

> Corporal punishment [a variety of methods of punishment, including flagellation, stoning, amputation of ears, fingers, toes or limbs, and branding or tattooing] is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the [1948 UDHR, 1966 ICCPR], the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[1294]

Other International Organisations

1397. No practice was found.

[1290] Poland, *Penal Code* (1997), Article 124.
[1291] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.
[1292] Report on the Practice of Jordan, 1997, Chapter 5.
[1293] Report on US Practice, 1997, Chapter 5.3.
[1294] UN Commission on Human Rights, Special Rapporteur on Torture, Report, UN Doc. E/CN.4/1997/7, 10 January 1997, §§ 5–6.

International Conferences

1398. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1399. In the *Semanza case* before the ICTR in 1997, the accused was charged with causing corporal punishment in a situation of non-international armed conflict in violation of Article 4(2)(a) AP II and Articles 22 and 23 of the ICTR Statute.[1295]

1400. In its General Comment on Article 7 of the 1966 ICCPR in 1992, the HRC stated that the prohibition of torture and cruel, inhuman or degrading treatment or punishment "must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure".[1296]

1401. In its judgement in the *Tyrer case* in 1978 dealing with judicial corporal punishment, the ECtHR held that in that context, the offender was placed in a position where his dignity and physical integrity were compromised and that "the judicial corporal punishment inflicted on Mr. Tyrer amounted to degrading punishment within the meaning of Article 3 [of the 1950 ECHR]".[1297]

1402. In its judgement in the *A. v. UK case* in 1998, the ECtHR considered the corporal punishment carried by a stepfather (and not by a public official) and held that it could amount to inhumane treatment. The ECtHR stated that:

> Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim . . . The Court considers that treatment of this kind reaches the level of severity prohibited by Article 3.[1298]

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

1403. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "corporal punishment is prohibited".[1299]

1404. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that corporal punishment, as a serious violation of international

[1295] ICTR, *Semanza case*, Indictment, 21 October 1997, Count 7.
[1296] HRC, General Comment No. 20 (Article 7 ICCPR), 10 April 1992, § 5.
[1297] ECtHR, *Tyrer case*, Judgement, 25 April 1978, § 2 (decision).
[1298] ECtHR, *A. v. UK*, Judgement, 23 September 1998, §§ 20–21.
[1299] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 193.

humanitarian law applicable in non-international armed conflicts, be subject to the jurisdiction of the Court.[1300]

VI. Other Practice

1405. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "no one shall be subjected to . . . corporal punishment".[1301]
1406. In 1985, Amnesty International reported that the People's Assembly of the People's Republic of Mozambique reintroduced corporal punishment for a number of offences, including for persons found to be members of RENAMO.[1302]

F. Mutilation and Medical, Scientific or Biological Experiments

I. Treaties and Other Instruments

Treaties
1407. Common Article 3(1)(a) of the 1949 Geneva Conventions provides that mutilation of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause is prohibited at any time and in any place whatsoever.
1408. Article 12 GC I provides that wounded and sick members of the armed forces in the field shall not be subjected to biological experiments. According to Article 50, conducting biological experiments on the wounded and sick is a grave breach of GC I.
1409. Article 12 GC II provides that wounded, sick and shipwrecked members of the armed forces at sea shall not be subjected to biological experiments. According to Article 51, conducting biological experiments on the wounded, sick and shipwrecked is a grave breach of GC II.
1410. Article 13 GC III provides that "no prisoner of war may be subject to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest". According to Article 130, conducting biological experiments on prisoners of war is a grave breach of GC III.
1411. Under Article 32 GC IV, "mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person" are

[1300] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 3(i).
[1301] ICRC archive document.
[1302] Amnesty International, Reports of the use of torture in the People's Republic of Mozambique, AI Index: AFR 41/102/85, April 1985, pp. 6–8.

prohibited. According to Article 147, conducting biological experiments on protected persons is a grave breach of GC IV.

1412. Article 7 of the 1966 ICCPR provides that "no one shall be subjected without his free consent to medical or scientific experimentation".

1413. Article 11 AP I provides that:

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
2. It is, in particular, prohibited to carry out on such persons, even with their consent:
   (a) physical mutilations;
   (b) medical or scientific experiments;
   (c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.
3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.
5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.
6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Article 11 AP I was adopted by consensus.[1303]

1414. Article 75(2) AP I prohibits, *inter alia*, acts of mutilation. Article 75 AP I was adopted by consensus.[1304]

[1303] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.
[1304] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

1415. According to Article 85 AP I, conducting biological experiments on protected persons is a grave breach of this instrument. Article 85 AP I was adopted by consensus.[1305]

1416. Upon ratification of AP I, Canada stated that:

> The Government of Canada does not intend to be bound by the prohibitions contained in Article 11, sub-paragraph 2 (c), with respect to Canadian nationals or other persons ordinarily resident in Canada who may be interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1, so long as the removal of tissue or organs for transplantation is in accordance with Canadian laws and applicable to the population generally and the operation is carried out in accordance with normal Canadian medical practices, standards or ethics.[1306]

1417. Upon ratification of AP I, Ireland stated that:

> For the purposes of investigating any breach of the Geneva Conventions of 1949 or of the Protocols Additional to the Geneva Conventions of 1949 adopted at Geneva on 8 June 1977, Ireland reserves the right to take samples of blood, tissue, saliva or other bodily fluids for DNA comparisons from a person who is detained, interned or otherwise deprived of liberty as a result of a situation referred to in Article 1, in accordance with Irish law and normal Irish medical practice, standards and ethics. Ireland declares that nothing in Article 11 paragraph 2(c) shall prohibit the donation of tissue, bone marrow or of an organ from a person who is detained, interned or otherwise deprived of liberty as a result of a situation referred to in Article 2 to a close relative who requires a donation of tissue, bone marrow or an organ from such a person for medical reasons, so long as the removal of tissue, bone marrow or organs for transplantation is in accordance with Irish law and the operation is carried out in accordance with normal Irish medical practice, standards and ethics.[1307]

1418. Article 4(2) AP II prohibits, *inter alia*, acts of mutilation. Article 4 AP II was adopted by consensus.[1308]

1419. Article 5(2)(e) AP II provides that:

> It is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

Article 5 AP II was adopted by consensus.[1309]

1420. According to Article 8(2)(a)(ii) of the 1998 ICC Statute, "biological experiments" committed against persons protected under the 1949 Geneva Conventions are war crimes.

[1305] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291, § 72.
[1306] Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 1.
[1307] Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, §§ 2–3.
[1308] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[1309] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

1421. Pursuant to Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute, the following is a war crime in both international and non-international armed conflicts:

> subjecting persons who are in the power of an adverse party [or another party to the conflict] to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons.

1422. Article 3 of the 2002 Statute of the Special Court for Sierra Leone provides that the Court is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions and AP II, which include "mutilation".

Other Instruments

1423. Article 56 of the 1863 Lieber Code provides that "a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering . . . by mutilation . . . or any other barbarity".

1424. Principle 22 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "no detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health".

1425. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, biological experiments are considered to be an exceptionally serious war crime and a serious violation of the principles and rules of international law applicable in armed conflict.

1426. Under Article 2(b) of the 1993 ICTY Statute, the Tribunal is competent to prosecute individuals who have carried out biological experiments on persons protected under the provisions of the relevant Geneva Convention.

1427. According to Article 4(a) of the 1994 ICTR Statute, the Tribunal has jurisdiction to try acts in violation of common Article 3 of the 1949 Geneva Conventions, including "mutilation".

1428. Article 18(k) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm" constitute crimes against humanity. Article 20(a)(ii) states that biological experiments are war crimes. Article 20(f)(i) states that "mutilation" committed in violation of international humanitarian law applicable in armed conflict not of an international character is a war crime.

1429. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that mutilation shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*. Article 4(9) adds that every possible measure shall be taken to prevent the mutilation of the wounded and sick.

1430. According to Section 7(2) of the 1999 UN Secretary-General's Bulletin, mutilation of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.

1431. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(x) and (e)(xi), the following is a war crime in both international and non-international armed conflicts:

> subjecting persons who are in the power of an adverse party [or another party to the conflict] to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons.

II. National Practice

Military Manuals

1432. Argentina's Law of War Manual (1969) stipulates that prisoners of war "cannot be subjected to physical mutilation and to medical and scientific experiments of any kind not justified by medical treatment".[1310] It adds that "it is especially prohibited to subject [the wounded and sick] . . . to biological experiments". The prohibition also applies to civilians.[1311]

1433. Argentina's Law of War Manual (1989) provides that it is prohibited to subject the wounded and sick to medical procedures not indicated by their state of health.[1312] This prohibition extends to mutilation or scientific experiments on prisoners of war and civilians in occupied territories.[1313] Such acts are identified as a grave breach of the Geneva Conventions.[1314]

1434. Australia's Commanders' Guide provides that "performing physical mutilations, conducting medical or scientific experimentation and removing tissue or organs for transplantation without consent" is a grave breach of the Geneva Conventions.[1315]

1435. Australia's Defence Force Manual provides that performing physical mutilations, conducting medical or biological experiments or scientific experimentation and removing tissue and organs for transplantation without consent on the wounded and sick, POWs and protected persons is prohibited and is considered a war crime. The manual refers to persons protected under the Geneva Conventions or the Additional Protocols.[1316]

[1310] Argentina, *Law of War Manual* (1969), § 2.013.
[1311] Argentina, *Law of War Manual* (1969), §§ 3.001 (wounded and sick) and 4.012 (civilians).
[1312] Argentina, *Law of War Manual* (1989), § 2.04.
[1313] Argentina, *Law of War Manual* (1989), § 3.12 (POWs) and § 4.29 (civilians in occupied territory).
[1314] Argentina, *Law of War Manual* (1989), § 8.03.
[1315] Australia, *Commanders' Guide* (1994), § 1305(m).
[1316] Australia, *Defence Force Manual* (1994), §§ 953, 990, 1008, 1219 and 1315(m).

1436. Belgium's Law of War Manual provides that carrying out medical and biological experiments on protected persons is a grave breach of Geneva Conventions.[1317]

1437. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 stated that "Islam likewise forbids the . . . mutilation of enemy wounded".[1318]

1438. Burkina Faso's Disciplinary Regulations provides that it is prohibited to mutilate the wounded, sick and shipwrecked, prisoners and civilians.[1319]

1439. Canada's LOAC Manual provides that it is a violation of GC I to "subject the wounded, sick and shipwrecked, even with their consent, to physical mutilations, medical or scientific experiments, or the removal of tissue for transplantation, except where justified by their medical needs".[1320] It prohibits similar acts with regard to persons protected by GC IV.[1321] The manual further provides that it is a war crime and a grave breach of AP I to subject a person to a medical procedure that

> is not indicated by the state of health of that person, and . . . is not consistent with generally accepted medical standards applicable in similar circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty [and to subject a person] to medical or scientific experiments, [or] the removal of tissue for transplantation, except for donations of blood or of skin for grafting given voluntarily and in conformity with generally accepted medical standards, unless justified by the medical needs of the person.[1322]

1440. Ecuador's Naval Manual provides that "nor may [the wounded and sick] be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards".[1323]

1441. France's Disciplinary Regulations as amended provides that soldiers in combat are prohibited to subject the wounded, sick and shipwrecked, prisoners and civilians to mutilations.[1324]

1442. France's LOAC Summary Note provides that biological experiments are war crimes under the law of armed conflicts.[1325]

1443. France's LOAC Manual provides that mutilation is a war crime.[1326]

1444. Germany's Military Manual provides that:

> It is prohibited to subject wounded, sick and shipwrecked persons to any medical procedure which is not consistent with generally accepted standards. In particular,

[1317] Belgium, *Law of War Manual* (1983), p. 55.
[1318] Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.
[1319] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[1320] Canada, *LOAC Manual* (1999), p. 9-2, § 21.
[1321] Canada, *LOAC Manual* (1999), p. 11-4, § 33.
[1322] Canada, *LOAC Manual* (1999), p. 16-2, § 15(a)–(b).
[1323] Ecuador, *Naval Manual* (1989), § 11.4.
[1324] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[1325] France, *LOAC Summary Note* (1992), § 3.4.
[1326] France, *LOAC Manual* (2001), p. 45.

it is prohibited to carry out physical mutilation, medical or other scientific experiments or removal of tissue or organs for transplantation.
...
The wounded and sick have the right to refuse any surgical operation and similar manipulation, in which case medical personnel shall request a written statement to that effect, signed or acknowledged by the patient. Simple diagnostic measures, such as the taking of blood, shall be permitted, as shall measures necessary to prevent, combat and cure contagious diseases and epidemics.[1327]

The manual further states that conducting biological experiments is a grave breach of IHL.[1328]

1445. Israel's Manual on the Laws of War states that "the rationale behind the law of war is that even in the midst of the inferno, there are grave deeds that must not be committed (... medical experiments)".[1329]

1446. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subjected to "mutilations, medical or scientific experiments not indicated by their state of health".[1330]

1447. Morocco's Disciplinary Regulations provides that soldiers in combat are prohibited to subject the wounded, sick and shipwrecked, prisoners and civilians to mutilations.[1331]

1448. The Military Manual of the Netherlands restates the prohibition of mutilation contained in Articles 75 AP I and 4 AP II.[1332] It further states that "it is prohibited to subject the wounded and sick to mutilation and – even with their permission – to medical or scientific experiments". The manual lists "unnecessary medical treatment, mutilation and medical or scientific experiments" among grave breaches of the Geneva Conventions and AP I.[1333]

1449. New Zealand's Military Manual provides that the sick, wounded and shipwrecked "must not be subject to any medical procedure which is not required by their state of health or which is inconsistent with accepted medical standards".[1334] The manual further states that GC IV prohibits the parties from "taking any measure of such character as to cause the physical suffering ... of protected persons in their hands", including mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person.[1335] The manual considers biological experiments as a grave breach of GC I and II.[1336] It adds that:

[1327] Germany, *Military Manual* (1992), §§ 606 and 608.
[1328] Germany, *Military Manual* (1992), § 1209.
[1329] Israel, *Manual on the Laws of War* (1998), p. 4.
[1330] Italy, *IHL Manual* (1991), Vol. I, § 41(e).
[1331] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[1332] Netherlands, *Military Manual* (1993), pp. VIII-3 and XI-4.
[1333] Netherlands, *Military Manual* (1993), pp. VI-2 and IX-5.
[1334] New Zealand, *Military Manual* (1992), § 1003.3, see also § 1003.1 and 4.
[1335] New Zealand, *Military Manual* (1992), § 1321.4.
[1336] New Zealand, *Military Manual* (1992), § 1702.1.

AP I, Art. 11, makes a number of medical practices grave breaches of the Protocol . . . It is a grave breach to carry out on persons detained by an adverse Party, even with their consent, physical mutilations, medical or scientific experiments or removal of tissue or organs for transplantation, except where such action is justified by the medical needs of the person affected.[1337]

1450. Nigeria's Military Manual recalls the content of Article 12 GC I, which "expressly prohibits [subjecting the wounded and sick] to . . . biological experiments".[1338]

1451. Nigeria's Manual on the Laws of War provides that biological experiments on all persons protected by the Geneva Conventions are war crimes.[1339] With regard to the wounded and sick, it adds that "it is particularly prohibited to . . . abandon them to scientific experiments".[1340]

1452. Russia's Military Manual prohibits medical or scientific experiments carried out on war victims, namely the wounded, sick and shipwrecked, POWs and the civilian population.[1341]

1453. Senegal's Disciplinary Regulations provides that it is prohibited for soldiers in combat to mutilate the wounded, sick, shipwrecked, prisoners and civilians.[1342]

1454. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of medical acts on persons deprived of their liberty which are not justified by the state of health of the person concerned and are not in accordance with the generally accepted and recognised medical norms.[1343]

1455. South Africa's LOAC Manual provides that one type of grave breach "relates to combat activities and medical experimentation. It requires both wilfulness and that death or serious injury to body or health is caused (Article 85(3))."[1344] The manual also provides that "physical experimentation and medical experiments (Article 22)" are grave breaches of AP I.[1345]

1456. Spain's LOAC Manual provides that "it is not permitted to subject [POWs] to scientific experiments not justified by medical reasons or which are not in the interests of the prisoner".[1346] The manual further states that subjecting protected persons to medical procedures not required by their state of health and carrying out medical, biological or scientific experiments, committed by medical personnel, are war crimes.[1347] It adds that in occupied territories, "medical or scientific experiments not required by health" are absolutely prohibited.[1348] The manual also provides that subjecting "prisoners, internees

[1337] New Zealand, *Military Manual* (1992), § 1703.2.
[1338] Nigeria, *Military Manual* (1994), p. 13, § 4.
[1339] Nigeria, *Manual on the Laws of War* (undated), § 6(a).
[1340] Nigeria, *Manual on the Laws of War* (undated), § 35.
[1341] Russia, *Military Manual* (1990), § 8(d).
[1342] Senegal, *Disciplinary Regulations* (1990), § 2.
[1343] Senegal, *IHL Manual* (1999), pp. 3 and 24.
[1344] South Africa, *LOAC Manual* (1996), § 36(a).
[1345] South Africa, *LOAC Manual* (1996), § 37(e), see also § 40.
[1346] Spain, *LOAC Manual* (1996), Vol. I, § 8.4.a.(1).
[1347] Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).
[1348] Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(3).

and any other detained person to acts which endanger their physical or mental integrity, such as mutilations, medical or scientific experiments, removal of tissues and organs and any medical procedure not indicated by their state of health and not applied in accordance with generally accepted medical standards" are grave breaches of the 1949 Geneva Conventions and constitute war crimes.[1349]

1457. Sweden's IHL Manual provides that "biological experiments" are grave breaches of the Geneva Conventions.[1350]

1458. Switzerland's Basic Military Manual provides that "medical and scientific experiments" run counter to the obligation of humane treatment and prohibits medical and scientific experiments other than those required for medical reasons. It adds that conducting biological experiments on persons protected by the Geneva Conventions constitutes a grave breach of these instruments.[1351]

1459. The UK Military Manual prohibits measures that cause physical suffering, including mutilations or scientific and medical experiments on protected persons. This rule also applies in occupied territories.[1352] The manual specifies that biological experiments and "wilfully causing great suffering or serious injury to body or to health" are grave breaches of the Geneva Conventions.[1353]

1460. The UK LOAC Manual provides that neither wounded and sick members of the opposing forces nor civilians may be subjected to biological experiments.[1354]

1461. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.[1355] The manual provides that "no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest".[1356] The manual also provides that wounded and sick members of the armed forces shall not be subjected to biological experiments.[1357] It stipulates that medical or scientific experiments not necessitated by the medical treatment of a protected person are prohibited.[1358] The manual also provides that "biological experiments, wilfully causing great suffering or serious injury to body or health" are war crimes under the Geneva Conventions.[1359]

1462. The US Air Force Pamphlet refers to Articles 12 GC I, 12 GC II and 13 GC III and prohibits medical, scientific and biological experiments.[1360]

[1349] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).
[1350] Sweden, *IHL Manual* (1991), Section 4.2, p. 93.
[1351] Switzerland, *Basic Military Manual* (1987), Articles 97, 147 and 192.
[1352] UK, *Military Manual* (1958), §§ 42, 282 and 549.
[1353] UK, *Military Manual* (1958), § 625(a).
[1354] UK, *LOAC Manual* (1981), Section 6, p. 22, § 2 and Section 9, p. 35, § 9.
[1355] US, *Field Manual* (1956), § 11.
[1356] US, *Field Manual* (1956), § 89.
[1357] US, *Field Manual* (1956), § 215.
[1358] US, *Field Manual* (1956), § 271.
[1359] US, *Field Manual* (1956), § 502.
[1360] US, *Air Force Pamphlet* (1976), §§ 12-2(a), 13-2 and 14-4.

1463. The US Instructor's Guide provides that subjecting captured persons to medical or scientific experiments is a capital offence prohibited at any time and in any place whatsoever.[1361]
1464. The US Naval Handbook provides that "nor may [the wounded and sick] be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards".[1362]

National Legislation
1465. Argentina's Draft Code of Military Justice punishes any soldier who submits protected persons to biological experiments and causes them great suffering or subjects them to "medical procedures which are not indicated by their state of health and which are not consistent with generally accepted medical standards which would, under similar medical circumstances, be applied by the responsible party to its own free nationals".[1363]
1466. Armenia's Penal Code contains a list of crimes against the peace and security of mankind, including, when committed during an armed conflict, "biological experiments", as well as

> medical procedure which is not indicated by the state of health of persons under the power of the enemy, ... detrimental to the physical or mental health of these persons or violating generally accepted medical standards, even with the consent of these persons, inflicting physical injuries, subjecting people to medical or scientific experiments or the removal of tissue or organs for transplantation.[1364]

1467. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".[1365]
1468. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "biological experiments" in international armed conflicts, as well as "mutilation" and "medical or scientific experiments" in both international and non-international armed conflicts.[1366] Furthermore, the Act incorporates in the Criminal Code, as war crimes, other grave breaches of AP I, including any "medical procedure" which "seriously endangers a person's physical or mental health or integrity" or which "is not justified by the state of health of the person", and "removal of blood, tissue or organs for transplantation".[1367]
1469. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international

[1361] US, *Instructor's Guide* (1985), p. 8. [1362] US, *Naval Handbook* (1995), § 11-4.
[1363] Argentina, *Draft Code of Military Justice* (1998), Article 289, introducing a new Article 873 in the *Code of Military Justice as amended* (1951).
[1364] Armenia, *Penal Code* (2003), Article 390.1(2) and Article 390.5.
[1365] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[1366] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.27, 268.47, 268.48, 268.71, 268.92 and 268.93.
[1367] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.95 and 268.96.

armed conflicts, medical or scientific experiments on prisoners of war are prohibited.[1368]

1470. Azerbaijan's Criminal Code provides that medical, biological or other experiments and the removal of internal organs are violations of the laws and customs of war.[1369]

1471. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[1370]

1472. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[1371]

1473. The Criminal Code of Belarus provides that subjecting, even with their consent, persons that have laid down their arms or which are defenceless, the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone or other persons enjoying international protection to medical, scientific or biological experiments is a violation of the laws and customs of war.[1372]

1474. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols provides that the following acts constitute crimes under international law:

> biological experiments, . . . acts and omissions not justified in the law which are likely to endanger the physical or mental health and integrity of persons protected by one of the Conventions relative to the protection of wounded, sick and shipwrecked persons, in particular any medical procedure which is not indicated by the state of health of such persons or not consistent with generally accepted medical standards . . . [and] acts which consist in carrying out . . . physical mutilations, medical or scientific experiments or the removal of tissue or organs for transplantation, except in the cases of donations of blood for transfusion or of skin for grafting, provided that such donations are voluntary, consented to and intended for therapeutic purposes.[1373]

1475. The Criminal Code of the Federation of Bosnia and Herzegovina provides that subjecting civilians, prisoners of war, the wounded, sick and shipwrecked to biological, medical and scientific experiments, removal of tissues and organs

[1368] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 21(1).
[1369] Azerbaijan, *Criminal Code* (1999), Article 115.2.
[1370] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[1371] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[1372] Belarus, *Criminal Code* (1999), Article 135(2).
[1373] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(2) and (9)–(10).

for transplant are war crimes.[1374] The Criminal Code of the Republika Srpska contains the same provision.[1375]

1476. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[1376]

1477. Bulgaria's Penal Code as amended provides that ordering or carrying out biological experiments or torture on the wounded, sick, shipwrecked, medical personnel, prisoners of war and the civilian population is a war crime.[1377]

1478. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following acts constitute war crimes in both international and non-international armed conflicts "subjecting persons falling into the hands of the enemy to mutilations or medical or scientific experiments of any kind which are neither required by medical, dental or hospital procedures nor required by their state of health".[1378]

1479. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".[1379]

1480. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions or of AP I] is guilty of an indictable offence".[1380]

1481. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[1381]

1482. Colombia's Penal Code provides for the punishment of anyone who, during an armed conflict, inflicts on a protected person biological experiments or subjects a protected person to any medical act which is not indicated and not in conformity with the generally recognised medical norms.[1382]

1483. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[1383]

[1374] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1), 155 and 156.
[1375] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.
[1376] Botswana, *Geneva Conventions Act* (1970), Section 3(1).
[1377] Bulgaria, *Penal Code as amended* (1968), Articles 410(a), 411(a) and 412(a).
[1378] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(b) and (j) and (D)(k).
[1379] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.
[1380] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[1381] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[1382] Colombia, *Penal Code* (2000), Article 141.
[1383] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

1484. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I]".[1384]

1485. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, biological experiments on the civilian population constitutes a "crime against the civilian population".[1385]

1486. Croatia's Criminal Code provides that it is a war crime to subject the civilian population, the wounded, sick and shipwrecked, prisoners of war, medical or religious personnel to medical, to scientific and biological experiments and to removal of tissues and organs for transplantation.[1386]

1487. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".[1387]

1488. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".[1388]

1489. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of "anyone who during an international or internal armed conflict conducts biological experiments that cause harm to the physical and mental health of protected persons".[1389] It also punishes the carrying out of "medical procedures not indicated by the state of health of protected persons, or which are not in conformity with the generally accepted medical norms".[1390]

1490. Ethiopia's Penal Code provides that carrying out biological experiments is a war crime against the civilian population.[1391]

1491. Under Georgia's Criminal Code, in international or internal armed conflicts, it is a crime to subject protected persons to medical experiments. It adds that it also constitutes a crime to subject persons under the authority of a party (in detention or deprived of liberty) to

> any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure, in particular, subjecting such persons, even with their consent:

[1384] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[1385] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(1).
[1386] Croatia, *Criminal Code* (1997), Articles 158, 159 and 160.
[1387] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).
[1388] Cyprus, *AP I Act* (1979), Section 4(1).
[1389] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Experimentos biológicos".
[1390] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Actos médicos dañinos".
[1391] Ethiopia, *Penal Code* (1957), Article 282(a).

(a) to acts causing physical mutilations;
(b) carrying out medical and scientific experiments;
(c) removal of tissue or organs for transplantation.[1392]

1492. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict, mutilates a person who is to be protected under international humanitarian law or who

exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health
a) by carrying out experiments on such person and who has not consented in advance or whether the experiments concerned are neither medically necessary nor carried out in his or her interest,
b) by removing tissue or organs from such a person for transplantation purposes, save where blood or skin is taken for therapeutic purposes consistent with generally recognized medical principles and where the person has freely and expressly consented in advance, or
c) by using on such persons methods of treatment which are not medically recognized, without there being any medical necessity for doing so and without the person having freely and expressly consented in advance.[1393]

1493. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[1394]

1494. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions and of AP I are punishable offences.[1395] In addition, any "minor breach" of the Geneva Conventions, including violations of common Article 3, of Articles 12 GC I, 12 GC II, 13 GC III and 32 GC IV, and of AP I, including violations of Article 75(2) AP I, as well as any "contravention" of AP II, including violations of Articles 4(2) and 5(2)(e) AP II, are also punishable offences.[1396]

1495. Under Jordan's Draft Military Criminal Code, the following acts constitute war crimes:

biological experiments, ... mutilations, medical and scientific experiments, removal of tissues and organs for transplantations not indicated by the state of health of [protected persons, internees and persons deprived of their liberty in connection with an armed conflict] and which are not in conformity with generally accepted medical standards applied in similar circumstances to operations on own nationals.[1397]

[1392] Georgia, *Criminal Code* (1999), Articles 411(2)(b) and 412.
[1393] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(3) and (8).
[1394] India, *Geneva Conventions Act* (1960), Section 3(1).
[1395] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[1396] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[1397] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(2) and (20).

1496. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[1398]

1497. Under the Draft Amendments to the Code of Military Justice of Lebanon, the following acts constitute war crimes:

> biological experiments, . . . mutilations, medical and scientific experiments, removal of tissues and organs for transplantations not indicated by the state of health of [protected persons, internees and persons deprived of their liberty in connection with an armed conflict] and which are not in conformity with medical standards respected in similar medical circumstances during operations on own nationals.[1399]

1498. Under Lithuania's Criminal Code as amended, carrying out biological experiments on protected persons and removal of organs or tissues for transplantation constitute war crimes.[1400]

1499. Luxembourg's Law on the Punishment of Grave Breaches provides that carrying out biological experiments on protected persons is a grave breach of the Geneva Conventions.[1401]

1500. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[1402]

1501. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[1403]

1502. Under Mali's Penal Code, carrying out medical experiments is a war crime. It adds that mutilation of and carrying out any medical and scientific experiments on enemy persons which are not justified by their state of health is a war crime in international armed conflicts.[1404]

1503. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[1405]

1504. Moldova's Penal Code provides for the punishment of anyone who subjects the wounded, sick, prisoners, civilians, civilian medical personnel or personnel of Red Cross and other similar organisations to "medical, biological or scientific experiments not justified by their state of health".[1406]

[1398] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[1399] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(2) and (20).
[1400] Lithuania, *Criminal Code as amended* (1961), Article 335.
[1401] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(2).
[1402] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[1403] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[1404] Mali, *Penal Code* (2001), Article 31(a) and (i)(10).
[1405] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[1406] Moldova, *Penal Code* (2002), Article 137.

1505. Under the International Crimes Act of the Netherlands, it is a crime to commit "in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions", including "biological experiments",[1407] as well as grave breaches of AP I, including:

> any intentional act or omission which jeopardises the health of anyone who is in the power of a party other than the party to which he or she belongs, and which:
> (i) entails any medical treatment which is not necessary as a consequence of the state of health of the person concerned and is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party responsible for the acts and who are in no way deprived of their liberty;
> (ii) entails the carrying out on the person concerned, even with his consent, of physical mutilations;
> (iii) entails the carrying out on the person concerned, even with his consent, of medical or scientific experiments; or
> (iv) entails removing from the person concerned, even with his consent, tissue or organs for transplantation.[1408]

Likewise, it is a crime, whether in time of international or non-international armed conflict, to subject

> persons who are in the power of an adverse party to the conflict to physical mutilation or medical or scientific experiments of any kind, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such persons.[1409]

Furthermore, it is also a crime to commit, "in the case of an armed conflict not of an international character, a violation of Article 3 common to all of the Geneva Conventions", including "mutilation" of persons taking no active part in the hostilities.[1410]

1506. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".[1411]

1507. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute.[1412]

1508. Nicaragua's Military Penal Code punishes the carrying out on prisoners of war of "medical and scientific experiments not justified by their state of health and without their consent".[1413]

[1407] Netherlands, *International Crimes Act* (2003), Article 5(1)(b).
[1408] Netherlands, *International Crimes Act* (2003), Article 5(2)(b).
[1409] Netherlands, *International Crimes Act* (2003), Articles 5(3)(c) and 6(3)(c).
[1410] Netherlands, *International Crimes Act* (2003), Article 6(1)(a).
[1411] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[1412] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[1413] Nicaragua, *Military Penal Code* (1996), Article 54.

1509. Nicaragua's Draft Penal Code provides for the punishment of anyone who "during an international or internal armed conflict conducts biological experiments . . . on protected persons". It also punishes "carrying out medical procedures not justified by the state of health of the protected persons and which are not in conformity with generally accepted medical standards".[1414]

1510. According to Niger's Penal Code as amended, the following acts, committed against persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, constitute war crimes: mutilations, medical, scientific or biological experiments, removal of tissues and organs for transplantation, as well as

> acts and omissions which are not legally justified and which may endanger the physical and mental integrity of persons protected by one of the conventions relative to the protection of the wounded, sick and shipwrecked, including any act which is not justified by the state of health of these persons or not in conformity with generally accepted medical standards.[1415]

1511. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".[1416]

1512. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[1417]

1513. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[1418]

1514. Paraguay's Penal Code provides for the punishment of anyone who, in violation of the international laws of war, armed conflict or military occupation, carries out medical and scientific experiments against the civilian population, the wounded and sick or prisoners of war.[1419]

1515. Poland's Penal Code provides for the punishment of any person who, in violation of international law, carries out scientific experiments on persons *hors de combat*, protected persons and persons enjoying international protection.[1420]

1516. Romania's Penal Code punishes the carrying out of medical and scientific experiments on the wounded, sick and shipwrecked, members of civil medical

[1414] Nicaragua, *Draft Penal Code* (1999), Articles 446–447.
[1415] Niger, *Penal Code as amended* (1961), Article 208.3(2) and Article 208.3(9)–(10).
[1416] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[1417] Norway, *Military Penal Code as amended* (1902), § 108.
[1418] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).
[1419] Paraguay, *Penal Code* (1997), Article 320(2).
[1420] Poland, *Penal Code* (1997), Article 123(2), see also Article 118(1) (causing serious harm to health as part of a genocide campaign).

services, the Red Cross or similar organisations, prisoners of war, or on all persons in the hands of the adverse party, or subjecting them to mutilations or medical procedures not justified by their state of health.[1421]

1517. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".[1422]

1518. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[1423]

1519. Under Slovenia's Penal Code, subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to biological, medical and other scientific experiments or removal of tissues and organs for transplantation is a war crime.[1424]

1520. Spain's Military Criminal Code provides for the punishment of military personnel who carry out medical or scientific experiments on the wounded, sick and shipwrecked, prisoners of war or the civilian population.[1425]

1521. Spain's Penal Code punishes anyone who, in time of armed conflict, subjects any protected person to biological experiments or medical treatment not justified by their state of health and not recognised by medical standards.[1426]

1522. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence."[1427]

1523. Tajikistan's Criminal Code provides for the punishment of anyone carrying out, in an international or internal armed conflict, medical, scientific or biological experiments on protected persons or subjecting them to mutilations, removal of tissues and organs for transplantation or any other medical procedure not indicated by their state of health and not conforming to generally accepted medical standards.[1428]

1524. Thailand's Prisoners of War Act provides for the punishment of "whoever subjects a prisoner of war to medical, biological, or scientific experiments of any kind which are not justified by the medical treatment of the prisoner

[1421] Romania, *Penal Code* (1968), Article 358.
[1422] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[1423] Singapore, *Geneva Conventions Act* (1973), Section 3(1).
[1424] Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.
[1425] Spain, *Military Criminal Code* (1985), Article 76.
[1426] Spain, *Penal Code* (1995), Article 609.
[1427] Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).
[1428] Tajikistan, *Criminal Code* (1998), Articles 403(2)(b) and 404.

concerned". This prohibition also extends to persons protected by common Article 3 of the 1949 Geneva Conventions.[1429]

1525. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute.[1430]

1526. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[1431]

1527. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions or of [AP I]".[1432]

1528. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute.[1433]

1529. Under the US War Crimes Act as amended, grave breaches of the Geneva Conventions are war crimes.[1434]

1530. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[1435]

1531. Under Yemen's Military Criminal Code, subjecting prisoners of war or civilians to any scientific experiment is a war crime.[1436]

1532. Under the Penal Code as amended of the SFRY (FRY), subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to biological, medical and other scientific experiments or removal of tissues and organs for transplantation is a war crime.[1437]

1533. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions or [AP I]".[1438]

National Case-law

1534. In its judgement in the *Videla case* in 1994 concerning the abduction, torture and murder of Lumi Videla in Chile in 1974, Chile's Appeal Court

[1429] Thailand, *Prisoners of War Act* (1955), Section 12 (prisoners of war) and Section 18 (persons protected by common Article 3).
[1430] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[1431] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[1432] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[1433] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[1434] US, *War Crimes Act as amended* (1996), Section 2441(c).
[1435] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[1436] Yemen, *Military Criminal Code* (1998), Article 21(2).
[1437] SFRY (FRY), *Penal Code as amended* (1976), Articles 142–144.
[1438] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

of Santiago stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place . . . mutilation".[1439]

1535. Colombia's Constitutional Court held in 1995 that the prohibitions contained in Article 4(2) AP II were consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions.[1440]

1536. In the *Hoess trial* in 1947, the Supreme National Tribunal of Poland convicted individuals charged with committing "medical war crimes", including "castration experiments, experiments intended to produce sterilization, premature termination of pregnancy and other experiments on pregnant or childbearing women, experiments of artificial insemination, experiments aimed at cancer research".[1441]

1537. In its judgement in the *Milch case* in 1947, the US Military Tribunal at Nuremberg found the accused guilty of conducting medical experiments on prisoners of war and inhabitants of occupied territories without their consent.[1442]

1538. In the *Brandt (The Medical Trial) case* in 1947, the US Military Tribunal at Nuremberg convicted 16 persons of carrying out medical experiments on prisoners of war and civilians which amounted to cruel and inhuman treatment and which were war crimes and crimes against humanity. The Tribunal found the accused guilty of committing medical experiments which included, but was not limited to:

> High Altitude Experiments, Freezing Experiments, Malaria Experiments, Mustard Gas Experiments, Ravensbrueck Experiments Concerning Sulphanilamide and Other Drugs; Bone, Muscle, and Nerve Regeneration and Bone Transplantation, Sea-Water Experiments, Epidemic Jaundice, Sterlization Experiments, Typhus (Fleckfieber) and Related Experiments, Poison Experiments, Incendiary Bomb Experiments, Jewish Skeleton Collection.

The Tribunal also held that:

> Obviously all of these experiments involving brutalities, tortures, disabling injuries and death were performed in complete disregard of international conventions, the laws and customs of war, the general principle of criminal law as derived from the criminal laws of all civilized nations . . . Manifestly inhuman experiments under such conditions are contrary to "the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."[1443]

[1439] Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.
[1440] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.
[1441] Poland, Supreme National Tribunal at Poznan, *Hoess trial*, Judgement, 11–29 March 1947.
[1442] US, Military Tribunal at Nuremberg, *Milch case*, Judgement, 17 April 1947.
[1443] US, Military Tribunal at Nuremberg, *Brandt (The Medical Trial) case*, Judgement, 20 August 1947.

1539. In its judgement in the *Schultz case* in 1969, the US Court of Military Appeals identified maiming among "crimes universally recognized as properly punishable under the law of war".[1444]

Other National Practice

1540. In 1994, in a note to foreign embassies and all international humanitarian organizations in Azerbaijan, the Ministry of Foreign Affairs of Azerbaijan denounced cases of removal of organs for transplantation by the adverse party.[1445]

1541. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

> We support the principle reflected in article 11 [AP I] that the physical or mental health and integrity of persons under the control of a party to the conflict not be endangered by any unjustified act or omission and not be subjected to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards.[1446]

1542. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[1447]

1543. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular experiments conducted on living prisoners of war. The resolution asked the government of Japan to apologise for these crimes and pay immediate reparations to the victims.[1448]

III. Practice of International Organisations and Conferences

United Nations

1544. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of mutilation perpetrated by the parties to the conflict.[1449]

[1444] US, Court of Military Appeals, *Schultz case*, Judgement, 7 March 1969.
[1445] Azerbaijan, Ministry of Foreign Affairs, Note 151, Baku, 26 March 1994.
[1446] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.
[1447] Report on US Practice, 1997, Chapter 5.3.
[1448] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.
[1449] US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791,

Other International Organisations
1545. No practice was found.

International Conferences
1546. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1547. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[1450]
1548. In the *Semanza case* before the ICTR in 1997, the accused was charged with causing mutilations in a situation of non-international armed conflict in violation of common Article 3 of the 1949 Geneva Conventions, Article 4(2)(a) AP II and Articles 22 and 23 of the 1994 ICTR Statute.[1451]
1549. In its General Comment on Article 7 ICCPR in 1992, the HRC held that:

> Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.[1452]

1550. In 1992, in *Herczegfalvy v. Austria*, the ECtHR stated that:

> 83. In this case it is above all the length of time during which the handcuffs and security bed were used . . . which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue [i.e. treatment with antibiotics and neuroleptics] . . .
> 84. No violation of Article 3 (art. 3) [of the 1950 ECHR] has thus been shown.[1453]

10 November 1992, pp. 8 and 13; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, p. 12.

[1450] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.
[1451] ICTR, *Semanza case*, Indictment, 21 October 1997, Count 7.
[1452] HRC, General Comment No. 20 (Article 7 ICCPR), 10 March 1992, § 7.
[1453] ECtHR, *Herczegfalvy v. Austria*, Judgement (Merits and just satisfaction), 24 September 1992, §§ 83–84.

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

1551. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "mutilation is prohibited, unless indicated by the state of health of the individual or medical ethics (e.g. removal of tissue or organs for transplantation)".[1454]

1552. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following crimes, when committed in an international armed conflict, be subject to the jurisdiction of the Court:

> biological experiments . . . subjecting persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty, to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied in similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty, in particular to carry out on such persons, even with their consent:
> a) physical mutilations;
> b) medical or scientific experiments;
> c) removal of tissue or organs for transplantation.[1455]

In addition, the ICRC proposed that the crime of "mutilation", when committed in a non-international armed conflict, be subject to the jurisdiction of the Court.[1456]

VI. Other Practice

1553. In 1987, in a meeting with the ICRC, the leader of an armed opposition group criticised the inhuman treatment of prisoners by other parties to the conflict but later admitted to mutilating certain prisoners to dissuade them from fighting.[1457]

1554. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "mutilation" shall remain prohibited.[1458]

[1454] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 194.
[1455] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(ii) and (d).
[1456] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 3(i).
[1457] ICRC archive document.
[1458] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(a), *IRRC*, No. 282, 1991, p. 331.

G. Rape and Other Forms of Sexual Violence

I. Treaties and Other Instruments

Treaties

1555. Common Article 3(1)(c) of the 1949 Geneva Conventions provides that "outrages upon personal dignity" are prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

1556. Article 27, second paragraph, GC IV provides that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault".

1557. Article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others provides that:

> The Parties to the present Convention agree to punish any person who . . .
> (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
> (2) Exploits the prostitution of another person, even with the consent of that person.

1558. Article 75(2)(b) AP I provides that "enforced prostitution and any form of indecent assault" shall remain prohibited at any time and in any place whatsoever. Article 75 AP I was adopted by consensus.[1459]

1559. Article 4(2)(e) AP II provides that "enforced prostitution and any form of indecent assault" shall remain prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.[1460]

1560. Article 76(1) AP I provides that women "shall be protected in particular against rape, forced prostitution and any other form of indecent assault". Article 76 AP I was adopted by consensus.[1461]

1561. Article 77(1) AP I provides that children "shall be protected against any form of indecent assault". Article 77 AP I was adopted by consensus.[1462]

1562. Article 27 of the 1990 African Charter on the Rights and Welfare of the Child provides that:

> States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials.

1563. Pursuant to Article 6(d) of the 1998 ICC Statute, "imposing measures intended to prevent births within the group" constitutes genocide when

[1459] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[1460] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[1461] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[1462] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

"committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

1564. Pursuant to Article 7(1)(g) of the 1998 ICC Statute, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitutes a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

1565. Pursuant to Article 8(2)(b)(xxii) and (e)(vi) of the 1998 ICC Statute, "committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence" constitutes a war crime in both international and non-international armed conflicts.

1566. Article 1 of the 2000 Optional Protocol on Child Trade, Prostitution and Pornography provides that the States parties shall prohibit child prostitution and child pornography.

1567. Article 1 of the 2000 Protocol on Trafficking in Persons states that "the purposes of this Protocol are . . . (a) to prevent and combat trafficking in persons, paying particular attention to women and children". Article 5 of the same Protocol provides that:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol [i.e. trafficking in persons] , when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
   (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
   (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
   (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

1568. Article 3 of the 2002 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution provides that:

1. The State Parties to the Convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.
2. The State Parties to the Convention, in their respective territories, shall provide for punishment of any person who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking and knowingly lets or rents a building or other place or any part thereof for the purpose of trafficking.
3. Any attempt or abetment to commit any crime mentioned in paras 1 and 2 above or their financing shall also be punishable.

1569. Article 3(e) of the 2002 Statute of the Special Court for Sierra Leone states that "the Special Court shall have the power to prosecute persons who

committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977", which include rape, enforced prostitution and any form of indecent assault.

Other Instruments

1570. Article 44 of the 1863 Lieber Code provides that "all rape [of persons in the invaded country] is prohibited".

1571. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including rape and the abduction of girls and women for the purpose of enforced prostitution.

1572. Article II(1)(c) of the 1945 Allied Control Council Law No. 10 provides that "rape, or other inhumane acts committed against any civilian population" is a crime against humanity.

1573. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

1574. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

1575. The preamble to the 1993 UN Declaration on the Elimination of Violence against Women expresses concern about the fact that "women in situations of armed conflict are especially vulnerable to violence". Article 2 of the Declaration provides that:

> Violence against women shall be understood to encompass, but not be limited to, the following:
> (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
> (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
> (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

1576. Article 5(g) of the 1993 ICTY Statute provides that rape, when committed in armed conflict, whether international or internal in character, and directed against any civilian population, constitutes a crime against humanity.

1577. According to Article 3(g) of the 1994 ICTR Statute, rape, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, constitutes a crime against humanity. Article 4(c) provides that the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including rape, enforced prostitution and any form of indecent assault.
1578. Under Article 18(j) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "rape, enforced prostitution and any form of sexual abuse" constitute crimes against humanity.
1579. Article 20(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind states that "rape, enforced prostitution and any form of indecent assault" committed in violation of international humanitarian law applicable in international conflict are war crimes.
1580. Article 20(f)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind stipulates that "rape, enforced prostitution and any form of indecent assault" constitutes a war crime in conflicts not of an international character.
1581. Article 2(7) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right not to be subject to rape and sexual abuse.
1582. According to Section 7.2, 7.3 and 7.4 of the 1999 UN Secretary-General's Bulletin, rape, enforced prostitution or any form of sexual assault and humiliation against persons not, or no longer, taking part in military operations and persons placed *hors de combat*, with a specific reference to women and children, are prohibited at any time and in any place.
1583. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxii) and (e)(vi), "committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence" constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

1584. Argentina's Law of War Manual (1969) stipulates that "women will be especially protected against attempts on their honour, particularly against rape, enforced prostitution and indecent assault".[1463]
1585. Argentina's Law of War Manual (1989) states that "women shall be subject to special respect and protected particularly against all forms of indecent assault". It provides that forced prostitution and any other form of indecent

[1463] Argentina, *Law of War Manual* (1969), § 4.010.

assault are prohibited in international and internal armed conflicts and in occupied territories.[1464]

1586. Australia's Commanders' Guide states that the Geneva Conventions provide "particular protection for women and children, specifically against acts of rape or indecency".[1465]

1587. Australia's Defence Force Manual stipulates that "women receive special protection under LOAC against any attack on their honour, in particular against rape, forced prostitution and any other form of indecent assault".[1466]

1588. Canada's LOAC Manual provides that women must be specially protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of indecent assault. It states that this provision also applies in occupied territories. According to the manual, rape is a crime against humanity.[1467]

1589. Canada's Code of Conduct provides that "women and children in particular must not be subjected to rape, enforced prostitution, and any form of indecent assault".[1468]

1590. The PLA Rules of Discipline provides that women are not to be assailed with obscenities.[1469]

1591. The Military Manual of the Dominican Republic provides that "women in combat zones shall be protected against sexual assault and forced prostitution".[1470]

1592. El Salvador's Human Rights Charter of the Armed Forces lists the prohibition of sexual violence against women as one of the ten basic rules. It stipulates that it is prohibited to commit sexual abuse and that soldiers "do not permit others to commit" such acts. According to the manual, sexual abuse is a violation of human rights.[1471]

1593. El Salvador's Soldiers' Manual instructs soldiers not to mistreat women.[1472]

1594. France's LOAC Teaching Note provides that acts of rape are criminally prosecuted.[1473] It states that rape is a grave breach of the law of armed conflict.[1474]

1595. France's LOAC Manual restates Article 7(1) of the 1998 ICC Statute.[1475] It adds that "forced prostitution and any attempts on decency" and "rape" are crimes against humanity.[1476]

[1464] Argentina, *Law of War Manual* (1989), §§ 4.13, 4.15, 4.27 and 7.04.
[1465] Australia, *Commanders' Guide* (1994), § 603.
[1466] Australia, *Defence Force Manual* (1994), §§ 946, 1010 and 1218.
[1467] Canada, *LOAC Manual* (1999), p. 10-3, § 21, p. 11-4, § 30, p. 11-8, § 63, p. 12-4, § 37, p. 16-1, § 4 and p. 17-3, § 21(e).
[1468] Canada, *Code of Conduct* (2001), Rule 4, § 2.
[1469] China, *PLA Rules of Discipline* (1947), Point 8.
[1470] Dominican Republic, *Military Manual* (1980), p. 10.
[1471] El Salvador, *Human Rights Charter of the Armed Forces* (undated), Rule 6, pp. 3, 13 and 18.
[1472] El Salvador, *Soldiers' Manual* (undated), p. 3.
[1473] France, *LOAC Teaching Note* (2000), p. 2.
[1474] France, *LOAC Teaching Note* (2000), p. 7.
[1475] France, *LOAC Manual* (2001), p. 43.
[1476] France, *LOAC Manual* (2001), p. 45.

1596. Germany's Military Manual provides that "any attack on the honour of women, in particular rape, enforced prostitution, or any other form of indecent assault, is prohibited".[1477]

1597. Israel's Manual on the Laws of War states that "the rationale behind the law of war is that even in the midst of the inferno, there are grave deeds [such as rape] that must not be committed". It recalls the definition of crimes against humanity contained in the 1998 ICC Statute, stating that "crimes against humanity were defined as the systematic harming of a civilian population, which includes deeds such as: . . . rape".[1478]

1598. Madagascar's Military Manual states that "women . . . shall be subject to special respect and protected against any indecent assault".[1479]

1599. The Military Manual of the Netherlands restates the prohibition of sexual violence found in common Article 3 to the 1949 Geneva Conventions, Articles 75–77 AP I and Article 4 AP II.[1480]

1600. New Zealand's Military Manual provides that female civilians and female prisoners must be specially protected against rape and other forms of sexual assault.[1481] It further specifies that "women must be specially protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of indecent assault".[1482] The manual restates Article 75(2) AP I.[1483] In the case of non-international armed conflict, the manual prohibits, at any time and anywhere, "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".[1484]

1601. Nicaragua's Military Manual provides that fundamental guarantees for the wounded and sick, POWs and civilians include protection against "degrading treatments and indecent assaults".[1485]

1602. Nigeria's Operational Code of Conduct provides that "women will be protected against any attack on their person, honor and in particular against rape or any form of indecent assault".[1486]

1603. Peru's Human Rights Charter of the Security Forces lists the prohibition of sexual violence against women and children as one of the ten basic rules.[1487]

1604. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of rape, forced prostitution and any form of sexual assault.[1488]

[1477] Germany, *Military Manual* (1992), § 504.
[1478] Israel, *Manual on the Laws of War* (1998), pp. 4 and 68.
[1479] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.
[1480] Netherlands, *Military Manual* (1993), pp. VIII-3, XI-1 and XI-4.
[1481] New Zealand, *Military Manual* (1992), § 916.
[1482] New Zealand, *Military Manual* (1992), § 1114, see also § 1321.2 (civilians).
[1483] New Zealand, *Military Manual* (1992), § 1137.2.
[1484] New Zealand, *Military Manual* (1992), § 1812.1.
[1485] Nicaragua, *Military Manual* (1996), Article 14(32).
[1486] Nigeria, *Operational Code of Conduct* (1967), § 4(i).
[1487] Peru, *Human Rights Charter of the Security Forces* (1991), Rule 6.
[1488] Senegal, *IHL Manual* (1999), pp. 3 and 23.

1605. Spain's LOAC Manual stipulates that "women are subject to special respect and shall be protected in particular against all forms of indecent assault".[1489] It prohibits "attacks on personal dignity, especially degrading and humiliating treatment, enforced prostitution and any form of indecent assault".[1490]

1606. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I and the general protection of women contained in 76(1) AP I are part of customary international law.[1491] It further specifies that "women shall be especially protected against any form of insulting treatment".[1492]

1607. Switzerland's military manuals provide that women must be particularly respected and protected against rape, enforced prostitution and any other form of indecent assault.[1493]

1608. Uganda's Operational Code of Conduct provides that rape is a crime that entails a specific punishment.[1494]

1609. The UK Military Manual states that "women must be specially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault". The manual states that the rule also applies in occupied territories.[1495] It further specifies that forcing women into prostitution, even if it is not considered a grave breach of the Geneva Conventions, qualifies as a war crime.[1496]

1610. The UK LOAC Manual provides that "the question of honour of women is specific; there must be no rape, no enforced prostitution and no indecent assault".[1497]

1611. The US Field Manual restates Article 27 GC IV.[1498]

1612. The US Air Force Pamphlet provides with regard to national or occupied territories that "women are to be protected against sexual attack and enforced prostitution".[1499]

1613. The US Soldier's Manual states that "women in war zones must be protected against rape and forced prostitution".[1500]

1614. The US Instructor's Guide provides with regard to the treatment of non-combatants that "women must be protected from attacks on their honour, to include any form of sexual assault".[1501]

[1489] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1).
[1490] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.
[1491] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[1492] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[1493] Switzerland, *Military Manual* (1984), p. 34; *Basic Military Manual* (1987), Article 146; *Teaching Manual* (1986), p. 43.
[1494] Uganda, *Operational Code of Conduct* (1986), Rule 26(d).
[1495] UK, *Military Manual* (1958), §§ 39 and 547.
[1496] UK, *Military Manual* (1958), § 626.
[1497] UK, *LOAC Manual* (1981), Section 9, p. 35, § 9.
[1498] US, *Field Manual* (1956), § 266.
[1499] US, *Air Force Pamphlet* (1976), § 14-4.
[1500] US, *Soldier's Manual* (1984), p. 21.
[1501] US, *Instructor's Guide* (1985), pp. 8 and 13.

1615. The US Operational Law Handbook states that the "law of war specifically prohibits any attacks on [women's] honour, including any form of sexual assault".[1502]

1616. The YPA Military Manual of the SFRY (FRY) provides for the protection of women against attacks on their honour, especially rape and forced prostitution.[1503]

National Legislation

1617. Argentina's Draft Code of Military Justice punishes any soldier who subjects any protected person to enforced prostitution or any form of indecent assault.[1504]

1618. Under Armenia's Penal Code, the "application of . . . humiliating practices" during an armed conflict constitutes a crime against the peace and security of mankind.[1505] It is also the case of acts of genocide, including "violently preventing births" within a national, ethnic, racial or religious group.[1506]

1619. Australia's War Crimes Act provides that rape and "abduction of girls and women for the purpose of enforced prostitution" are war crimes.[1507]

1620. Under Australia's War Crimes Act as amended, rape, indecent assault and "abduction, or procuring, for immoral purposes" are considered serious war crimes.[1508]

1621. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute, including: "genocide by imposing measures intended to prevent births"; crimes against humanity, including "rape", "sexual slavery", "enforced prostitution", "forced pregnancy", "enforced sterilisation" and "sexual violence"; and war crimes, including "rape", "sexual slavery", "enforced prostitution", "forced pregnancy", "enforced sterilisation" and "sexual violence", in both international and non-international armed conflicts.[1509]

1622. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, rape of civilian persons, degrading and humiliating treatment of women, forced prostitution and attacks on their dignity are prohibited. It further prohibits the rape of prisoners of war and adds that "women and young girls are especially protected against attacks on their honour".[1510]

[1502] US, *Operational Law Handbook* (1993), p. Q-192(2)(a).
[1503] SFRY (FRY), *YPA Military Manual* (1988), § 253.
[1504] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[1505] Armenia, *Penal Code* (2003), Article 390.4(3).
[1506] Armenia, *Penal Code* (2003), Article 393.
[1507] Australia, *War Crimes Act* (1945), Section 3.
[1508] Australia, *War Crimes Act as amended* (1945), Sections 6(1) and 7(1).
[1509] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.6, 268.14-268.19, 268.59-268.64 and 268.82-268.87.
[1510] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17(2), 21(1) and 22(1).

1623. Azerbaijan's Criminal Code provides that "committing rape, sexual slavery, enforced prostitution, enforced sterilization and other acts related to sexual violence" are war crimes.[1511]

1624. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[1512]

1625. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitutes a crime under international law.[1513]

1626. The Criminal Code of the Federation of Bosnia and Herzegovina provides that forced prostitution and rape of civilians is a war crime.[1514] The Criminal Code of the Republika Srpska contains the same provision.[1515]

1627. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence" constitutes a grave breach of the Geneva Conventions.[1516]

1628. Canada's Crimes against Humanity and War Crimes Act provides that genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[1517]

1629. China's Law Governing the Trial of War Criminals provides that rape and "kidnapping females and forcing them to become prostitutes" is a war crime.[1518]

1630. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, carries out or orders the "carrying out of forced sexual acts on protected persons" and "forced prostitution or sexual slavery".[1519]

1631. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "imposing measures intended to prevent births" within an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.[1520] Moreover, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of

[1511] Azerbaijan, *Criminal Code* (1999), Article 116.0.17, see also Article 108 (gender violations: rape, gender enslavement, enforced prostitution and any other forms of sexual violence).
[1512] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[1513] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(2)(7).
[1514] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).
[1515] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).
[1516] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(u), see also Articles 4(C)(f) and 2(d) (genocide) and Article 3(g) (crimes against humanity).
[1517] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[1518] China, *Law Governing the Trial of War Criminals* (1946), Article 3(3) and (17).
[1519] Colombia, *Penal Code* (2000), Articles 139 and 141.
[1520] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.

sexual violence of comparable gravity" when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.[1521] The Act further defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[1522]

1632. Croatia's Criminal Code provides that forced prostitution and rape are war crimes.[1523]

1633. Under El Salvador's Penal Code, "adopting measures aimed at preventing reproduction" of a national, racial or religious group, with the intent to destroy partially or totally such group, is a crime of genocide.[1524]

1634. Estonia's Penal Code provides that rape of a civilian person is a war crime.[1525]

1635. Under Ethiopia's Penal Code "compulsion to acts of prostitution, debauchery and rape" are war crimes against the civilian population.[1526]

1636. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" in international and non-international armed conflicts, is a war crime.[1527]

1637. Germany's Law Introducing the International Crimes Code, provides for the punishment of anyone who, in connection with an international or non-international armed conflict, "sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population".[1528]

1638. Under Hungary's Criminal Code as amended, taking measures aiming at prevention of births within a national, ethnic, racial or religious group, as a part of a genocide campaign, constitutes a "crime against the freedom of peoples".[1529]

1639. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of common Article 3

[1521] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
[1522] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[1523] Croatia, *Criminal Code* (1997), Article 158.
[1524] El Salvador, *Penal Code* (1997), Article 361.
[1525] Estonia, *Penal Code* (2001), § 97, see also § 89 (rape and subjection to prostitution as crimes against humanity) and § 90 (coercive measures preventing childbirth within a group as part of a genocide campaign).
[1526] Ethiopia, *Penal Code* (1957), Article 282(f).
[1527] Georgia, *Criminal Code* (1999), Article 413(d).
[1528] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(4), see also § 6(1)(4) (genocide) and § 7(1)(6) (crimes against humanity).
[1529] Hungary, *Criminal Code as amended* (1978), Section 155(1)(d).

and Article 27 GC IV, and of AP I, including violations of Articles 75(2), 76(1) and 77(1) AP I, as well as any "contravention" of AP II, including violations of Article 4(2)(e) AP II, are punishable offences.[1530]

1640. Israel's Nazis and Nazi Collaborators (Punishment) Law includes "imposing measures intended to prevent births among Jews" in its definition of genocide.[1531]

1641. South Korea's Military Criminal Code provides that the rape of women in combat or in an occupied zone is punishable by the death penalty.[1532]

1642. Under Lithuania's Criminal Code as amended, "rape of women or forcing them to engage in prostitution" constitutes a war crime.[1533]

1643. Mali's Penal Code provides that "rape, sexual slavery, forced prostitution, forced pregnancies, forced sterilisation or any other form of sexual violence which is a grave breach of the 1949 Geneva Conventions" constitutes a war crime in international armed conflicts.[1534]

1644. Mozambique's Military Criminal Law criminalises sexual intercourse with a woman against her will, as well as the rape of minors under 12 years old.[1535]

1645. Myanmar's Defence Service Act provides that:

> Any person subject to this law who commits an offence . . . of rape in relation to [any person not subject to military law] shall not be deemed to be guilty of an offence against this act and shall not be tried by a court-martial unless he commits any of the said offences . . . while in active service.[1536]

1646. The Definition of War Crimes Decree of the Netherlands includes "rape" and "abduction of girls and women for the purpose of enforced prostitution" in its list of war crimes.[1537]

1647. Under the International Crimes Act of the Netherlands, "rape, sexual slavery, enforced prostitution, enforced sterilisation, or any other form of sexual violence which can be deemed to be of a gravity comparable to a grave breach of the Geneva Conventions", "forced pregnancy", as well as "outrages upon personal dignity, in particular humiliating and degrading treatment" of persons taking no active part in the hostilities, constitute crimes, whether committed in time of international or non-international armed conflict.[1538]

[1530] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[1531] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).
[1532] South Korea, *Military Criminal Code* (1962), Article 84(1).
[1533] Lithuania, *Criminal Code as amended* (1961), Article 336.
[1534] Mali, *Penal Code* (2001), Article 31(i)(22), see also Article 29(g) (sexual violence as a crime against humanity) and Article 30(d) (prevention of births as part of a genocide campaign).
[1535] Mozambique, *Military Criminal Law* (1987), Article 85(b)–(c).
[1536] Myanmar, *Defence Services Act* (1959), Section 72.
[1537] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.
[1538] Netherlands, *International Crimes Act* (2003), Articles 5(3)(a) and (b), 5(5)(j), 6(1)(c) and 6(2)(a) and (b), see also Article 3(1)(d) (imposition of measures intended to prevent births within a group as part of a genocide campaign) and Article 4(1)(g) (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity as crimes against humanity).

1648. Under New Zealand's International Crimes and ICC Act, genocide includes the crimes defined in Article 6(d) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(g) of the Statute, and war crimes include the crimes defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.[1539]

1649. According to Niger's Penal Code as amended, it is a crime of genocide to adopt "measures aimed at preventing birth" within a group, with the intent to destroy partially or totally a national, ethnic, racial or religious group or a group defined on the basis of any other arbitrary criterion.[1540]

1650. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[1541]

1651. Under Paraguay's Military Penal Code, rape is a crime.[1542]

1652. Under Slovenia's Penal Code, forced prostitution and rape are war crimes.[1543]

1653. Spain's Military Criminal Code provides for the punishment of military personnel who commit rape of the wounded, sick and shipwrecked, prisoners of war or the civilian population.[1544]

1654. Under Spain's Penal Code, in time of war, armed conflict or occupation, acts of rape, sexual assault and enforced prostitution are criminal offences.[1545]

1655. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(d) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(g) of the Statute, and a war crime as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.[1546]

1656. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(d) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(g) of the Statute, and a war crime as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.[1547]

1657. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of . . . abduction for prostitution, or raping" committed war crimes.[1548]

[1539] New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).
[1540] Niger, *Penal Code as amended* (1961), Article 208.1.
[1541] Norway, *Military Penal Code as amended* (1902), § 108.
[1542] Paraguay, *Military Penal Code* (1980), Articles 289–290.
[1543] Slovenia, *Penal Code* (1994), Article 374(1).
[1544] Spain, *Military Criminal Code* (1985), Article 76.
[1545] Spain, *Penal Code* (1995), Article 612(3).
[1546] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[1547] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[1548] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

1658. The Penal Code as amended of the SFRY (FRY) provides that forced prostitution and rape are war crimes.[1549]

National Case-law

1659. In its judgement in the *Takashi Sakai case* in 1946, the War Crimes Military Tribunal of the Chinese Ministry of National Defence found the accused guilty of war crimes and crimes against humanity inasmuch as he had incited or permitted his subordinates to commit, *inter alia*, acts of rape.[1550]

1660. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II practically reproduced specific constitutional provisions.[1551]

1661. In its judgement in the *John Schultz case* in 1952, the US Court of Military Appeals listed rape as a "crime universally recognized as properly punishable under the law of war".[1552]

1662. In the civil action brought against Radovan Karadžić in the US in 1995, a US Court of Appeals held that rape committed in the course of hostilities violated the laws of war and was a war crime.[1553]

1663. In its memorandum opinion concerning the admissibility of the claim in the *Comfort Women case* in 2001, the US District Court of Columbia stated that "Japan's use of its war-time military to impose 'a premeditated master plan' of sexual slavery upon the women of occupied Asian countries might be characterized properly as a war crime or a crime against humanity".[1554]

Other National Practice

1664. In response to a report by the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade, which recommended that the Australian government establish a mechanism for investigating and identifying those responsible for serious crimes, including rape, committed in the former Yugoslavia, the Australian government replied that this mechanism was already in place subsequent to the enactment of the International War Crimes Tribunal Act of 1995.[1555]

[1549] SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).
[1550] China, War Crimes Military Tribunal of the Ministry of National Defence, *Takashi Sakai case*, Judgement, 29 August 1946.
[1551] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.
[1552] US, Court of Military Appeals, *John Schultz case*, Judgement, 5 August 1952.
[1553] US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.
[1554] US, District Court of Columbia, *Comfort Women case*, Memorandum Opinion and Judgement, 4 October 2001.
[1555] Australia, Department of Foreign Affairs and Trade, Legal Office, Australian Practice in International Law, 1995, Chapter XII, printed in *Australian Yearbook of International Law*, 1996, pp. 626–628.

1665. In 1991, three political parties in the German parliament tabled a resolution that referred to rape as a crime in the context of the Sudanese civil war.[1556]

1666. In 1992, in a written reply to questions in parliament concerning the systematic rape of Muslim women and girls by Serb forces in Bosnia and Herzegovina, the German government stated that it had made "vigorous and repeated representations to the 'Yugoslav' government, both bilaterally and within the framework of the European Community, in connection with these rapes and other grave human rights violations". It reaffirmed that rape was "already prohibited in armed conflict and deemed a war crime under the existing provisions of international humanitarian law" and cited Article 27 GC IV and Article 4(2)(e) AP II in support of its position. The government further stated that "should the reports of systematic mass rape of predominantly Muslim women and girls be confirmed, this would, moreover, meet the statutory definition for systematic harm to an ethnical group within the meaning of the 1948 Genocide Convention".[1557]

1667. In a letter to parliament in 1993, the Minister of Foreign Affairs of the Netherlands condemned the maltreatment and rape of women in the former Yugoslavia.[1558]

1668. In 1995, the Commission on Human Rights of the Philippines proposed that rape and sexual violence in situations of conflict be recognised as war crimes.[1559]

1669. In 1993, during a debate in the House of Lords in 1993, the UK Minister of State, FCO, stated that "rape probably already comes within the definition of a war crime".[1560]

1670. In 1994, in a briefing note on Britain's peacemaking role in the former Yugoslavia, the UK Minister of State, FCO, in reply to the question as to whether he considered rape as a war crime, stated that:

In international armed conflicts, a war crime can be defined as any serious violation of the laws and customs of war, including grave breaches of the 1949 Geneva Conventions. Article 27 of the Fourth Geneva Convention specifically prohibits rape; and Article 3, which applies to non-international armed conflicts and which

[1556] Germany, Lower House of Parliament, Proposal by the CDU/CSU and FDP, Entwicklungspolitische Chancen in Umbruchsituationen nutzen – entwicklungspolitische Herausforderungen and den Beispielen Äthiopien einschließlich Eritrea, Somalia, Sudan und Angola, *BT-Drucksache* 12/1814, 11 December 1991, p. 4.

[1557] Germany, Lower House of Parliament, Answer by the government to questions by members of Parliament, Systematische Vergewaltigung als Mittel der serbischen Kriegsführung u.a. in Bosnien, *BT-Drucksache* 12/4048, 29 December 1992, pp. 2–3.

[1558] Netherlands, Lower House of Parliament, Letter from the Minister of Foreign Affairs concerning the situation in Yugoslavia, 1992–1993 Session, Doc. 22 181, No. 36, 25 February 1993, p. 1.

[1559] Philippines, Commission on Human Rights, *Philippine Human Rights Plan 1996–2000*, 1995, Vol. 2, § 14.

[1560] UK, House of Lords, Statement by the Minister of State, FCO, *Hansard*, 24 May 1993, Vol. 225, col. 575.

is common to all four Conventions, refers to "outrages upon personal dignity, in particular humiliating and degrading treatment". This would clearly include rape.[1561]

1671. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that ... women be protected against rape and indecent assault".[1562]

1672. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of sexual violence and rape perpetrated by the parties to the conflict.[1563]

1673. In 1992, in its final report on the conduct of the Gulf War, the US Department of Defense listed some specific Iraqi war crimes, in particular "inhumane treatment of Kuwaiti and third country civilians, to include rape".[1564]

1674. In 1998, in response to the situation in Kosovo, but also referring to the other conflicts in the former Yugoslavia, the US Congress adopted a resolution by unanimous consent stating that:

Whereas there is reason to believe that as President of the Federal Republic of Yugoslavia (Serbia and Montenegro), Slobodan Miloševic was responsible for the conception and direction of a war of aggression ... and that mass rape and forced impregnation were among the tools used to wage this war ...

it is the sense of Congress that ... the United States should publicly declare that it considers that there is reason to believe that Slobodan Miloševic, President of the Federal Republic of Yugoslavia (Serbia and Montenegro), has committed war crimes, crimes against humanity and genocide.[1565]

1675. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the rape of civilian women on the island of Guam and in Nanjing.[1566]

[1561] UK, House of Lords, Briefing Note by the Foreign and Commonwealth Office on Britain's peacemaking role in former Yugoslavia, *Hansard*, 9 June 1994, Vol. 555, col. 1321.

[1562] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

[1563] US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 7–8; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second Submission), annexed to Letter dated 22 October 1992 to the UN Secretary-General, UN Doc. S/24705, 23 October 1992, pp. 7, 10–11 and 13; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, Annex, pp. 9 and 16–18; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, pp. 6–8, 10 and 12.

[1564] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

[1565] US, Congress, S. Con. Resolution 105 on the Sense of Congress Regarding the Culpability of Slobodan Miloševic, 17 July 1998, *Congressional Record* (Senate), pp. S8456–S8458.

[1566] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

1676. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[1567]

1677. In an exceptional report submitted to CEDAW in 1993, the FRY reported its position that abuses of women in war zones were crimes contrary to IHL and apologised for an earlier statement which might have given the false impression that rape was considered normal behaviour in times of war.[1568]

III. Practice of International Organisations and Conferences

United Nations

1678. In a resolution adopted in 1992, the UN Security Council stated that it was "appalled by reports of massive, organised and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina" and strongly condemned "these acts of unspeakable brutality".[1569]

1679. In a resolution adopted in 1993 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council stated that it condemned "massive, organized and systematic detention and rape of women".[1570]

1680. In a resolution adopted in 1993, the UN Security Council expressed grave alarm at the widespread and flagrant violations of IHL occurring within the territory of the former Yugoslavia, especially Bosnia and Herzegovina, including "reports of massive, organised and systematic rape of women".[1571]

1681. In a resolution adopted in 1995 on the situation in Bosnia and Herzegovina, the UN Security Council stated that rape was a "grave violation of international humanitarian law".[1572]

1682. In a resolution adopted in 1995, the UN Security Council expressed grave concern and condemned in the strongest possible terms the violations of IHL and human rights in Bosnia and Herzegovina, including "evidence of a consistent pattern of rape".[1573]

1683. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council urged all parties to armed conflicts "to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict".[1574]

[1567] Report on US Practice, 1997, Chapter 5.3.
[1568] FRY, Statement before CEDAW, UN Doc. A/48/39, 12 April 1994, §§ 761 and 769.
[1569] UN Security Council, Res. 798, 18 December 1992, preamble and § 2.
[1570] UN Security Council, Res. 820, 17 April 1993, § 6.
[1571] UN Security Council, Res. 827, 25 May 1993, preamble.
[1572] UN Security Council, Res. 1019, 9 November 1995, preamble.
[1573] UN Security Council, Res. 1034, 21 December 1995, preamble and § 2.
[1574] UN Security Council, Res. 1261, 25 August 1999, § 10.

1684. In a resolution adopted in 2000 on women and peace and security, the UN Security Council called on "all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict".[1575]

1685. In 1998, in a statement by its President on Sierra Leone, the UN Security Council condemned as gross violations of IHL "atrocities against the civilian population, particularly women and children", including widespread rape.[1576]

1686. In 1998, in a statement by its President on children and armed conflict, the UN Security Council strongly condemned the sexual abuse of children.[1577]

1687. In 1993, in a resolution proclaiming the UN Declaration on the Elimination of Violence against Women, the UN General Assembly stated that:

> States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:
> (a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;
> (b) Refrain from engaging in violence against women;
> (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
> (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence . . .[1578]

1688. In a resolution adopted in 1993, the UN General Assembly strongly condemned the practice of rape and abuse of women and children in areas of armed conflict in the former Yugoslavia and emphasised "the particularly heinous nature of the crime of rape". It considered that "the abhorrent practice of rape and abuse of women and children" constituted a war crime.[1579]

1689. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly expressed "its outrage that the systematic practice of rape continues to be used as a weapon of war against women and children and as an instrument of ethnic cleansing" and recognized that "rape in this context constitutes a war crime".[1580]

[1575] UN Security Council, Res. 1325, 31 October 2000, § 10.
[1576] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, § 1.
[1577] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, § 2.
[1578] UN General Assembly, Res. 48/104, 20 December 1993, Article 4.
[1579] UN General Assembly, Res. 48/143, 20 December 1993, §§ 1–3.
[1580] UN General Assembly, Res. 49/196, 23 December 1994, § 16.

1690. In a resolution adopted in 1995 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly stated that it:

> Strongly condemns the abhorrent practice of rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, which constitutes a war crime;
>
> ... Expresses its outrage that the systematic practice of rape has been used as a weapon of war and an instrument of ethnic cleansing against women and children in the Republic of Bosnia and Herzegovina;
>
> ... Reaffirms that rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, and calls upon States to take all measures required for the protection of women and children from such acts and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.[1581]

1691. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and FRY (Serbia and Montenegro), the UN General Assembly expressed its outrage that "the systematic practice of rape has been used as a weapon of war against women and children and as an instrument of ethnic cleansing, and recognizes that rape in this context constitutes a war crime".[1582]

1692. In a resolution on Rwanda adopted in 1996, the UN General Assembly expressed "its deep concern at the intense suffering of the victims of genocide and crimes against humanity" and recognized "the ongoing suffering of their survivors, particularly the extremely high number of traumatized children and women victims of rape and sexual violence".[1583]

1693. In a resolution adopted in 1996 on the rights of the child, the UN General Assembly reaffirmed that:

> Rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, and calls upon all States to take all measures required for the protection of women and children from all acts of gender-based violence, including rape, sexual exploitation and forced pregnancy, and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.[1584]

1694. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights expressed its outrage that "the systematic practice of rape continues to be used as

[1581] UN General Assembly, Res. 50/192, 22 December 1995, §§ 1–3; see also Res. 50/193, 22 December 1995 and Res. 51/115, 12 December 1996, §§ 1 and 3.
[1582] UN General Assembly, Res. 50/193, 22 December 1995, § 15.
[1583] UN General Assembly, Res. 51/114, 12 December 1996, § 3.
[1584] UN General Assembly, Res. 51/77, 12 December 1996, § 28; see also Res. 52/107, 12 December 1997, Section IV, § 12.

a weapon of war against women and children and as an instrument of 'ethnic cleansing'" and recognized that "rape in these circumstances constitutes a war crime".[1585]

1695. In a resolution adopted in 1996, the UN Commission on Human Rights condemned "in the strongest terms" all violations of human rights and international humanitarian law during the conflicts in the former Yugoslavia, in particular massive and systematic violations, including rape, and reaffirmed that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable" and called for the punishment of those responsible.[1586]

1696. In a resolution adopted in 1998 on abduction of children from northern Uganda, the UN Commission on Human Rights condemned in the strongest terms all parties involved in the rape of children.[1587]

1697. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights reaffirmed that "rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide" and called upon "all States to take all measures required for the protection of children and women from all acts of gender-based violence, including rape, sexual exploitation and forced pregnancy".[1588]

1698. In a resolution adopted in 1995 on the situation in the territory of the former Yugoslavia, the UN Sub-Commission on Human Rights condemned rape as a war crime.[1589]

1699. In a resolution adopted in 1998, following a study by the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the UN Sub-Commission on Human Rights reiterated the Rapporteur's view that "the existing international legal frameworks of humanitarian law, human rights law and criminal law clearly prohibit and criminalize sexual violence . . . in all circumstances".[1590]

1700. In 1996, in a report on the impact of armed conflict on children, the expert appointed by the UN Secretary-General recommended that "practical protection measures to prevent sexual violence . . . must be a priority in all assistance programmes in refugee and displaced [persons] camps". The report further stated that:

> Acts of gender-based violence, particularly rape, committed during armed conflicts constitute a violation of international humanitarian law. When it occurs on a massive scale or as a matter of orchestrated policy, this added dimension is recognized . . . as a crime against humanity.

[1585] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 14.
[1586] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, §§ 1–2.
[1587] UN Commission on Human Rights, Res. 1998/75, 22 April 1998, § 3.
[1588] UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 13.
[1589] UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 7.
[1590] UN Sub-Commission on Human Rights, Res. 1998/18, 21 August 1998, § 3

The report also emphasised that "unwanted pregnancy resulting from forced impregnation should be recognised as a distinct harm".[1591]

1701. In 1998, in report on assistance to unaccompanied refugee minors, which included a section on internally displaced children, the UN Secretary-General noted that UNICEF had been "pressing for an end to the systematic abduction of children from northern Uganda by members of an armed group" to base camps in southern Sudan where they were reportedly "tortured, enslaved, raped and otherwise abused".[1592]

1702. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[1593]

1703. In 1996, in a report on her mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on violence against women, its causes and consequences argued that:

> Even if it is considered that the 1949 Geneva Conventions are not evidence of customary international law because of *ratione temporis* and that the 1929 Geneva Convention is not applicable because Japan was not a signatory, Japan was a party to the Hague Convention and Annexed Regulations concerning the Laws and Customs of War on Land of 1907. The Regulations are not applicable if all belligerents are not parties to the Convention (art. 2) but its provisions would be a clear example of customary international law operating at that time. Article 46 of the Hague Regulations places on States the obligation to protect family honour and rights. Family honour has been interpreted to include the right of women in the family not to be subjected to the humiliating practice of rape.[1594]

The Special Rapporteur also stated that "the abduction and systematic rape of women and girl children in the case of 'comfort women' clearly constituted an inhumane act against the civilian population and a crime against humanity".[1595]

1704. In 1998, in a report on violence against women, its causes and consequences, the Special Rapporteur of the UN Commission on Human Rights stated that:

[1591] Expert appointed by the UN Secretary-General on the Impact of Armed Conflict on Children, Report, UN Doc. A/51/306, 26 August 1996, §§ 90(c), 91 and 104.

[1592] UN Secretary-General, Assistance to unaccompanied refugee minors, Report, UN Doc. A/53/325, 26 August 1998, § 20.

[1593] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

[1594] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 101.

[1595] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 113.

Until recently, violence against women in armed conflict has been couched in terms of "protection" and "honour". Article 27 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War treats violence against women as a crime of honour rather than as a crime of violence. By using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. Thus, criminal sexual assault, in both national and international law, is linked to the morality of the victim. When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as "dirty" or "spoiled". Consequently, many women will neither report nor discuss the violence that has been perpetrated against them. The nature of rape and the silence that tends to surround it makes it a particularly difficult human rights violation to investigate.

. . .

Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation of the enemy group. It is a battle among men fought over the bodies of women.[1596]

1705. In 1998, in her final report on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Commission on Human Rights defined "sexual violence" as:

any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person's sexual characteristics, such as forcing a person to strip naked in public, mutilating a person's genitals, or slicing off a woman's breasts.[1597]

The Special Rapporteur further stated that the following constituted rape:

The insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape.[1598]

The Special Rapporteur also stated that "sexual slavery" should be understood:

to be the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence.

. . .

[1596] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1998/54, 26 January 1998, Part I, §§ 4 and 5.

[1597] UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 21.

[1598] UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 24.

In addition to treaty law, the prohibition of slavery is a *jus cogens* norm in customary international law. The crime of slavery does not require government involvement or State action, and constitutes an international crime whether committed by State actors or private individuals.[1599]

With regard to the nature of sexual offences, while the Rapporteur asserted that they constituted crimes against humanity, she considered that "acts of sexual slavery and sexual violence may constitute war crimes in certain cases".[1600]

1706. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN Commission on Human Rights stated that:

Violence against women during wartime continues to involve horrendous crimes that must shock the conscience of humanity. Despite the significant progress that has been made in recent years to strengthen legal prohibitions against rape and other sexual violence, women and girls throughout the world continue to be the victims of unimaginable brutality. As the case studies illustrate, gender-based violence can take a variety of forms. Since 1997, women and girls have been raped – vaginally, anally and orally – sometimes with burning wood, knives or other objects. They have been raped by government forces and non-State actors, by police responsible for their protection, by refugee camp and border guards, by neighbours, local politicians, and sometimes family members under threat of death. They have been maimed or sexually mutilated, and often later killed or left to die. Women have been subjected to humiliating strip searches, forced to parade or dance naked in front of soldiers or in public, and to perform domestic chores while nude.[1601]

1707. Principle 2 of the Recommended Principles on Human Rights and Human Trafficking which are contained in a report of the UNHCHR of 2002 provides that "States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons". Principles 12–16 furthermore provide that:

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts 2 and related conduct.
13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.
14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties.

[1599] UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 27–28.

[1600] UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 56.

[1601] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/2001/73, 23 January 2001, § 44.

States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.
16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.[1602]

1708. Guideline 4 of the Recommended Guidelines on Human Rights and Human Trafficking which are contained in a report of the UNHCHR of 2002 provides that:

States should consider:

1. Amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized.
2. Enacting legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons. Reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services.
3. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals). Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.
4. Making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, the legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.

...

11. Making legislative provision for the punishment of public sector involvement or complicity in trafficking and related exploitation.[1603]

Other International Organisations

1709. In a declaration adopted in 1993, the Committee of Ministers of the Council of Europe stated that it condemned the systematic practice of rape in

[1602] UNHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report to ECOSOC, UN Doc. E/2002/68/Add.1, 20 May 2002, Recommended Principles on Human Rights and Human Trafficking, Principles 2 and 12–16.

[1603] UNHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report to ECOSOC, UN Doc. E/2002/68/Add.1, 20 May 2002, Recommended Guidelines on Human Rights and Human Trafficking, Guideline 4.

Bosnia and Herzegovina and reaffirmed that the use of sexual violence as an instrument of warfare constituted a war crime.[1604]

1710. In a resolution adopted in 1993 on the massive and flagrant violations of human rights in the territory of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe declared its "profound consternation . . . at the perpetration of crimes against humanity such as . . . the systematic rape of women belonging to minority groups, and in particular to the Muslim population".[1605]

1711. In a resolution adopted in 1993, the European Parliament expressed its view that the ICTY should "consider acts of violence against women committed in former Yugoslavia".[1606]

1712. In a resolution adopted in 1993 on the rape of women in the former Yugoslavia, the European Parliament demanded that the systematic abuse of women be considered a war crime and a crime against humanity and called for the revision of existing military codes of conduct to set up new guidelines on the collection of evidence on the incidence of rape.[1607]

1713. In 1993, the EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia stated that "the mission believes there is now a strong case for clearly identifying [rape as a war crime], irrespective of whether they occur in national or international conflicts".[1608]

1714. In 2001, ECOWAS adopted a declaration on the fight against trafficking in persons in which the members committed themselves to:

> Adopt, as quickly as possible, such legislative and other measures as that are necessary to establish as criminal offences the trafficking in persons within, between, or from, their territory; to organize, direct, or participate as an accomplice, in this trafficking.[1609]

1715. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council stated that it followed with grave concern and deep regret the degradation of the situation in Bosnia and Herzegovina, including the "carrying out of the worst crimes of . . . rape" perpetrated by the irregular Serbian troops.[1610]

[1604] Council of Europe, Committee of Ministers, Declaration on the Rape of Women and Children in the Territory of Former Yugoslavia, 18 February 1993, § 4.

[1605] Council of Europe, Parliamentary Assembly, Res. 994, 3 February 1993, § 1.

[1606] EU, European Parliament, Resolution on human rights in the world and Community human rights policy for the years 1991–92, 26 April 1993, §§ 7 and 8.

[1607] European Parliament, Resolution on the rape of women in the former Yugoslavia, 11 March 1993, §§ 1, 3 and 4.

[1608] EC, Report of the investigative mission into the treatment of Muslim women in the former Yugoslavia, annexed to Letter dated 2 February 1993 from Denmark to the UN Secretary-General, UN Doc. S/25240, 3 February 1993, Annex I, § 42.

[1609] ECOWAS, Declaration on the Fight against Trafficking in Persons (Decl. A/DC12/12/01), 25th Ordinary Session of Authority of Heads of State and Government, Dakar, 20–21 December 2001, § 5.

[1610] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 8.

1716. In 2002, the OAS Inter-American Commission of Women adopted a resolution on fighting the crime of trafficking in persons, especially women, adolescents, and children, in which it acknowledged "that trafficking in women and children for labour-related and sexual exploitation purposes and other contemporary forms of slavery constitute a violation of human rights". It also reaffirmed that:

> That trafficking in women, adolescents, and children for exploitation in the Americas is an offense that must be prevented, suppressed, and punished through the adoption of a multidimensional approach involving the judicial system, the national and border police, immigration authorities, health and labor ministries, consulates, and civil society, as well as the victims and their families.[1611]

International Conferences

1717. In a resolution adopted in 1993 on urgent action in the former Yugoslavia, the 89th Inter-Parliamentary Conference categorically condemned "the systematic rape of women and girls in the former Yugoslavia, especially in Bosnia and Herzegovina", urged the belligerent parties "immediately to cease violence against women and girls" and declared that "systematic rape of women and girls in armed conflicts is a war crime and must be designated as a crime against humanity under international law".[1612]

1718. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed its dismay at and strongly condemned as abhorrent practices the "massive violations of human rights especially in the form of... systematic rape of women in war situations" and reiterated its call that "perpetrators of such crimes be punished and such practices immediately stopped".[1613]

1719. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they refused "to accept that... women [are] raped" and that they were "alarmed by the marked increase in acts of sexual violence directed notably against women and children". They reiterated that "such acts constitute grave breaches of international humanitarian law".[1614]

1720. In a resolution adopted in 1993 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the 90th

[1611] OAS, Inter-American Commission of Women, Res. CIM/RES. 225 (XXXI-0/02), Fighting the Crime of Trafficking in Persons, especially Women, Adolescents, and Children, 31 October 2002, preamble.

[1612] 89th Inter-Parliamentary Conference, New Delhi, 12–17 April 1993, Resolution on the need for urgent action in the former Yugoslavia, particularly as regards the protection of minorities and the prevention of further loss of life in order that peaceful coexistence and respect for human rights can be restored for all peoples, §§ 12 and 13.

[1613] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(28).

[1614] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1) and (3), *ILM*, Vol. 33, 1994, p. 298.

Inter-Parliamentary Conference condemned "the renewed outbreak of systematic sexual violence against women and children which constitutes a grave violation of international humanitarian law".[1615]

1721. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict, which contained a section on women, stating that the Conference:

> (a) expresses its outrage at practices of sexual violence in armed conflicts, in particular the use of rape as an instrument of terror, forced prostitution and any other form of indecent assault;
> ...
> (c) strongly condemns sexual violence, in particular rape, in the conduct of armed conflict as a war crime, and under certain circumstances a crime against humanity, and urges the establishment and strengthening of mechanisms to investigate, bring to justice and punish all those responsible;
> (d) underlines the importance of providing appropriate training to prosecutors, judges and other officials in handling such cases, in order to preserve the dignity and interests of the victims.[1616]

1722. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including ... gender-based violence in particular rape and other forms of sexual violence ... and threats to carry out such actions".[1617]

IV. Practice of International Judicial and Quasi-judicial Bodies

1723. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[1618]

1724. In the *Nyiramasuhuko and Ntahobali case* before the ICTR in 1997, the accused were charged with "rape as a part of a widespread and systematic attack on a civilian population on political, ethnic or racial grounds", thereby committing crimes against humanity and a serious violation of common Article 3 of the 1949 Geneva Conventions and AP II.[1619]

[1615] 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.
[1616] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § B(a), (c) and (d).
[1617] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).
[1618] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.
[1619] ICTR, *Nyiramasuhuko and Ntahobali case*, Indictment, 26 May 1997, Counts 5 and 6.

1725. In the *Akayesu case* before the ICTR in 1997, the accused was charged with crimes against humanity (rape) and violations of common Article 3 of the 1949 Geneva Conventions and Article 4(2)(e) AP II (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault). It provided that "in this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity".[1620]

1726. In its judgement in the *Akayesu case* in 1998, the ICTR Trial Chamber recognised for the first time that acts of sexual violence can be prosecuted as constituent elements of a genocidal campaign. Jean-Paul Akayesu, then Mayor of Taba commune, was charged with genocide, crimes against humanity and war crimes and with having known that acts of sexual violence were being committed and having facilitated the commission of such acts by permitting them to be carried out on communal premises.[1621] The Trial Chamber considered that:

> Rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts . . . Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity . . .
>
> The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[1622]

The ICTR Trial Chamber further held that:

> Rape and sexual violence . . . constitute genocide in the same way as any other act as long as they are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such . . . Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[1623]

1727. In the *Musema case* before the ICTR in 1996, the accused was charged with "the rape of Tutsi civilians, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds" and stated that the accused had "thereby committed a crime against humanity".[1624]

[1620] ICTR, *Akayesu case*, Amended Indictment, 30 June 1997, Counts 13 and 15 and § 10(A).
[1621] ICTR, *Akayesu case*, Judgement, 2 September 1998, § 12(B).
[1622] ICTR, *Akayesu case*, Judgement, 2 September 1998, § 596–598.
[1623] ICTR, *Akayesu case*, Judgement, 2 September 1998, § 731.
[1624] ICTR, *Musema case*, Amended Indictment, 12 July 1996, Count 7.

1728. In its judgement in the *Musema case* in 2000, the ICTR Trial Chamber found that the evidence presented – considering both the murders as well as acts of serious bodily and mental harm, including rape and other forms of sexual violence – amounted to genocide. The Trial Chamber stated that "acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such." The Trial Chamber found that "the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack." The Trial Chamber found Musema guilty of crimes against humanity (rape).[1625]

1729. In its review of the indictment in the *Nikolić case* in 1995, the ICTY Trial Chamber stated that it considered that "rape and other forms of sexual assault inflicted on women in circumstances such as those described by the witnesses, may fall within the definition of torture submitted by the Prosecutor".[1626]

1730. In the *Kvočka case* before the ICTY in 1998, the accused was charged with "sexual assault . . . of Bosnian Muslim, Bosnian Croat and other non-Serb detainees".[1627]

1731. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that "there can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law" and that it considered "rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive". It also considered that:

> The rape of any person [is] a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official . . . It is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.

It then stated that whenever rape and other forms of sexual violence meet the conditions, they shall constitute torture, in the same manner as any other acts that meet these criteria.[1628]

1732. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber noted that a prohibition of rape and serious sexual assault in armed conflict under customary international law has

[1625] ICTR, *Musema case*, Judgement, 27 January 2000, §§ 907, 933 and 966.
[1626] ICTY, *Nikolić case*, Review of the Indictment, 20 October 1995, § 33.
[1627] ICTY, *Kvočka case*, Indictment, 12 June 1998, § 28, see also § 35.
[1628] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 476, 479, 495–496.

gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the "Martens clause" laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II (1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.[1629]

The Tribunal also defined rape and serious sexual assault:

Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

(i) the sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.

. . .

As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.[1630]

The Tribunal found the accused guilty of a violation of the laws and customs of war (outrages upon dignity, including rape).[1631]

1733. In the judgement on appeal in the *Furundžija case* in 2000, the ICTY Appeals Chamber stated that:

With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognised rape as a war crime. In the Delalić and Others Judgement, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war. This recognition by the international community of rape as a

[1629] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 168.
[1630] ICTY, *Furundžija case*, Judgement, 10 December 1998, §§ 185 and 186.
[1631] ICTY, *Furundžija case*, Judgement, 10 December 1998, Part IX.

war crime is also reflected in the Rome Statute where it is designated as a war crime.[1632]

1734. In its judgement in the *Kunarac case* in 2000, the ICTY Trial Chamber held that:

The Chamber further considers that it is unnecessary to discuss any additional requirements for the application of rape charges based on treaty law, since common Article 3 alone is sufficient in principle to form the basis of these charges under Article 3 [of the ICTY Statute], as is observed below.
. . .
Rape has been charged against the three accused as a violation of the laws or customs of war under Article 3 and as a crime against humanity under Article 5 of the Statute. The Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction in Article 5(g). The jurisdiction to prosecute rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 to the 1949 Geneva Conventions, is also clearly established.
. . .
The Trial Chamber considers that the Furundžija definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which, as foreshadowed in the hearing and as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.[1633]

The Tribunal found the accused guilty of "crimes against humanity (rape)" and "violations of the laws or customs of war (rape)".[1634]

1735. In its General Recommendation on Violence against Women in 1992, CEDAW provided that:

1. Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.
   . . .
6. The [1979 Convention on the Elimination of Discrimination against Women] in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.
   . . .

[1632] ICTY, *Furundžija case*, Judgement on Appeal, 21 July 2000, § 210.
[1633] ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 406, 436 and 438.
[1634] ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 883, 886 and 888.

16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.[1635]

1736. In a letter to the Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, the Chair of CEDAW emphasised that rape and other attacks on women's physical and mental integrity violated international human rights guarantees and constituted grave breaches of GC IV and of customary international law. The Special Rapporteur replied that he shared the Committee's preoccupation with the reported occurrence of mass rape and other attacks on the physical and mental integrity of women in the conflict in the former Yugoslavia.[1636]

1737. In 1998, CEDAW stated in relation to Indonesia that:

The Committee is concerned that the information provided on the situation of women in areas of armed conflict reflects a limited understanding of the problem. The Government's remarks are confined to the participation of women in armed forces and do not address the vulnerability of women to sexual exploitation in conflict situations.[1637]

1738. In 2000, CEDAW stated in relation to India that:

The Committee is concerned that women are exposed to the risk of high levels of violence, rape, sexual harassment, humiliation and torture in areas where there are armed insurrections.

. . . The Committee recommends a review of prevention of terrorism legislation and the Armed Forces Special Provisions Act . . . so that special powers given to the security forces do not prevent the investigation and prosecution of acts of violence against women in conflict areas and during detention and arrest.[1638]

1739. In 1997, in its recommendations on Myanmar, the CRC expressed grave concern with regard to "numerous documented cases of rape of young girls by soldiers" and strongly recommended that:

all reported cases of abuse, rape and/or violence against children committed by members of the armed forces be rapidly, impartially, thoroughly and systematically investigated. Appropriate judicial sanctions should be applied to perpetrators and wide publicity should be given to such sanctions.[1639]

1740. In *S. W. v. UK* in 1995, the ECtHR stated that:

43. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the

[1635] CEDAW, General Recommendation No. 19 (Violence against women), 29 January 1992, §§ 1, 6 and 16.
[1636] CEDAW, Report on its 12th Session, UN Doc. A/48/38, 28 May 1993, Annex 1, p. 115 and Annex II, p. 116.
[1637] CEDAW, Report on its 18th and 19th Session, UN Doc. A/53/38/rev.1, 1998, § 295.
[1638] CEDAW, Report on its 22nd and 23d Session, UN Doc. A/55/38, 2000. §§ 71–72.
[1639] CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, §§ 40–41.

immunity of a husband from prosecution for rape upon his wife . . . There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law . . .

44. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords – that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim – cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment . . . What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.
45. Consequently, . . . Mr Justice Rose did not render a decision permitting a finding of guilt incompatible with Article 7 (art. 7) of the [ECHR].[1640]

1741. In its judgement in *Aydin v. Turkey* in 1997, the ECtHR stated that:

83. While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

. . .

86. Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. Indeed the court would have reached this conclusion on either of these grounds taken separately.[1641]

1742. In 2001, in *Valasinas v. Lithuania*, the ECtHR stated that:

117. The Court considers that, while strip-searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and

[1640] ECtHR, *S. W. v. UK*, Judgement, 22 November 1995, §§ 43–45.
[1641] ECtHR, *Aydin v. Turkey*, Judgement, 25 September 1997, § 83.

diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him. The Court concludes, therefore, that the search of 7 May 1998 amounted to degrading treatment within the meaning of Article 3 of the Convention.

118. Accordingly, there has been a violation of Article 3 [of the 1950 ECHR] in this respect.[1642]

1743. In a case concerning Peru in 1996, the IACiHR stated that:

Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity.

In the context of international humanitarian law, Article 27 of the Fourth Geneva Convention of 1949 concerning the protection due to civilians in times of war explicitly prohibits sexual abuse. Article 147 of that Convention which lists acts considered as "serious offenses" or "war crimes" includes rape in that it constitutes "torture or inhuman treatment". The International Committee of the Red Cross (ICRC) has declared that the "serious offense" of "deliberately causing great suffering or seriously harming physical integrity or health" includes sexual abuse.

Moreover, Article 76 of Additional Protocol I to the 1949 Geneva Conventions expressly prohibits rape or other types of sexual abuse. Article 85(4), for its part, states that when these practices are based on racial discrimination they constitute "serious offenses". As established in the Fourth Convention and Protocol I, any act of rape committed individually constitutes a war crime.

In the case of non-international conflicts, both Article 3 common to the four Geneva Conventions and Article 4(2) of Protocol II additional to the Conventions, include the prohibition against rape and other sexual abuse insofar as they are the outcome of harm deliberately influenced on a person. The ICRC has stated that the prohibition laid down in Protocol II reaffirms and complements the common Article 3 since it was necessary to strengthen the protection of women, who can be victims of rape, forced prostitution or other types of abuse.

Article 5 of the Statute of the [ICTY] established for investigating the serious violations of international humanitarian law committed in the territory of the former Yogoslavia, considers rape practiced on a systematic and large scale a crime against humanity.

In the context of international human rights law, the American Convention on Human Rights stipulates in its Article 5 that:

1. Every person has the right to have his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment . . .

The letter of the Convention does not specify what is to be understood by torture. However, in the inter-American sphere, acts constituting torture are established in the Inter-American Convention to Prevent and Punish Torture . . .

[1642] ECtHR, *Valasinas v. Lithuania*, Judgement (Merits and just satisfaction), 24 July 2001, §§ 117–118.

Accordingly, for torture to exist three elements have to be combined:

1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person;
2. it must be committed with a purpose;
3. it must be committed by a public official or by a private person acting at the instigation of the former.

Regarding the first element, the Commission considers that rape is a physical and mental abuse that is perpetrated as a result of an act of violence. The definition of rape contained in Article 170 of the Peruvian Criminal Code confirms this by using the phrasing "[h]e who, *with violence* or serious threat, obliges a person to practice the sex act . . ." The Special Rapporteur against Torture has noted that sexual abuse is one of the various methods of physical torture. Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community. In this connection, the above-mentioned Special Rapporteur has stated that, particularly in Peru, " . . . rape would appear to be a weapon used to punish, intimidate and humiliate."

Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

. . .

The second element establishes that for an act to be torture it must have been committed intentionally, i.e. to produce a certain result in the victim.

. . .

The third requirement of the definition of torture is that the act must have been perpetrated by a public official or by a private individual at the instigation of the former.

As concluded in the foregoing, the man who raped [the victim] was member of the security forces who had himself accompanied by a large group of soldiers.

Accordingly, the Commission, having established that the three elements of the definition of torture are present in the case under consideration, concludes that the Peruvian State is responsible for violation of Article 5 of the American Convention.[1643] [emphasis in original]

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

1744. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "humiliating and degrading treatment (e.g. enforced prostitution, any form of indecent assault or other outrages upon personal dignity) is prohibited".[1644]

[1643] IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, Section V(A)(3)(a).

[1644] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 192 and 195.

1745. In 1992, in a memorandum on the issue of rape as a war crime, the ICRC stated that the definition of grave breaches in Article 147 GC IV, in particular wilfully causing great suffering or serious injury to body or health, "obviously covers not only rape, but also any other attack on a woman's dignity".[1645]
1746. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of rape and enforced prostitution, as serious violations of international humanitarian law applicable in international and non-international conflicts, be subject to the jurisdiction of the Court.[1646]
1747. In its pledge to promote the respect of women in armed conflicts, made at the 27th International Conference of the Red Cross and Red Crescent in 1999, the ICRC expressed grave concern about "the occurrence of sexual violence in armed conflict" and stated that "sexual violence, in all its forms, is prohibited under international humanitarian law and should be vigorously prevented". The ICRC pledged to place focus "on actively disseminating the prohibition of all forms of sexual violence to parties to an armed conflict".[1647]

VI. Other Practice

1748. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and denounced the "rape of spouses in the presence of their husbands and relatives".[1648]
1749. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that rape is and shall remain prohibited.[1649]
1750. In 1995, the IIHL stated that any declaration on minimum humanitarian standards should be based on "principles . . . of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding". According to the IIHL, women were a category calling for special mention, as they were exposed to additional forms of violence. It stated that an article should be inserted in the declaration which could read "women shall be especially protected against any attack on their honour, in particular against rape,

[1645] ICRC, Aide-Memoire, Geneva, 3 December 1992.
[1646] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(a)(iii) and 3(iv).
[1647] ICRC, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[1648] ICRC archive document.
[1649] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(a), *IRRC*, No. 282, 1991, p. 331.

enforced prostitution, or any other form of indecent assault. They are entitled to treatment which takes into account their special needs."[1650]

1751. In 1993, in a report on Kashmir, Asia Watch and Physicians for Human Rights stated that "Indian security forces and militant forces in Kashmir use rape as a weapon: to punish, intimidate, coerce, humiliate and degrade their female victims". They further stated that "Indian government authorities have rarely investigated charges of rape by security forces in Kashmir" and that they were "unaware of any efforts by the militant groups to prevent their forces from committing rape".[1651]

1752. The Bangkok NGO Declaration on Human Rights adopted in 1993 stated that "crimes against women, including rape . . . and domestic violence, are rampant. Crimes against women are crimes against humanity, and the failure of governments to prosecute those responsible implies complicity."[1652]

1753. In December 2000, a Japanese NGO simulated a "Women's International War Crimes Tribunal on Japan's Military Sexual Slavery" which had jurisdiction over crimes committed against women, including sexual slavery.[1653]

H. Slavery, Slave Trade and Forced Labour

Note: *For practice concerning compensation for forced labour, see Chapter 42, section B.*

General

I. Treaties and Other Instruments

Treaties

1754. Article 6 of the 1899 HR provides that:

The State may utilize the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations.

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

Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

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

[1650] IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary- General, § 18, reprinted in Report of the UN Secretary-General, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 10.

[1651] Physicians for Human Rights and Asia Watch, Press Release, Rape in Kashmir: A Crime of War, India, 9 May 1993.

[1652] World Conference on Human Rights, Regional Preparatory Meeting for the Asia-Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 6.

[1653] VAWW-NET Japan, Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, 7–12 December 2000.

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

1755. Article 6 of the 1907 HR provides that:

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

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

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

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

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

1756. In Articles 1 and 2 of the 1926 Slavery Convention, the contracting parties agreed to "prevent and suppress the slave trade" and "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms". They also provided that:

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

1757. Article 31 of the 1929 Geneva POW Convention provides that "work done by prisoners of war shall have no direct connection with the operations of the war".

1758. Article 1 of the 1930 Forced Labour Convention provides that "Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period". Article 2 adds that "the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

1759. Article 6 of the 1945 IMT Charter (Nuremberg) provides that "deportation to slave labor or for any other purpose of civilian population of or in occupied territory" is a war crime and that "enslavement" is a crime against humanity.

1760. Articles 49–68 GC III regulate the labour of prisoners of war.

1761. Article 50 GC III lays down the categories of work that prisoners of war may be compelled to do.

1762. Article 52 GC III provides that prisoners of war shall not be compelled to carry out unhealthy, dangerous or humiliating work.

1763. Article 40, first and second paragraphs, GC IV provides that:

> Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.
>
> If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

1764. Article 51, second paragraph, GC IV provides that:

> The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.

1765. Article 95, first paragraph, GC IV provides that:

> The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

1766. Article 4(1) of the 1950 ECHR provides that "no one shall be held in slavery or servitude". Article 4(2) provides that "no one shall be required to perform forced or compulsory labour". According to Article 15(2), Article 4(1) is non-derogable.

1767. Article 1 of the 1956 Supplementary Convention on the Abolition of Slavery provides that "each of the States Parties . . . shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment" of slavery and institutions and practices similar to slavery, such as debt bondage, serfdom and inheritance or transfer of women or children.

1768. Article 1 of the 1957 Convention concerning the Abolition of Forced Labour provides that:

> Each Member of the [ILO] which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:
>
> (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
> (b) As a method of mobilising and using labour for purposes of economic development;
> (c) As a means of labour discipline;
> (d) As a punishment for having participated in strikes;
> (e) As a means of racial, social, national or religious discrimination.

1769. Article 2 of the 1957 Convention concerning the Abolition of Forced Labour states that "each Member . . . undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in article 1 of this Convention".
1770. Article 8 of the 1966 ICCPR provides that:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour.

According to Article 4(2) ICCPR, the prohibition of slavery and servitude is non-derogable.
1771. Article 6(1) of the 1969 ACHR provides that "no one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women". Article 27(2) states that this prohibition is non-derogable.
1772. Article 4(2)(f) AP II provides that "slavery and the slave trade in all their forms" are and shall remain prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.[1654]
1773. Article 5(1)(e) AP II provides that persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained "shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population". Article 5 AP II was adopted by consensus.[1655]
1774. Article 5 of the 1981 ACHPR states that "all forms of exploitation and degradation of man, particularly slavery, slave trade . . . shall be prohibited".
1775. Article 29(a) of the 1990 African Charter on the Rights and Welfare of the Child provides that "States Parties to the present Charter shall take appropriate measures to prevent: (a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person, including parents or legal guardians of the child".
1776. According to Article 1(3) of the 1995 Agreement on Human Rights annexed to the Dayton Accords, the parties shall "secure to all persons within their jurisdiction the right not to be held in slavery".
1777. Article 7(1)(c) of the 1998 ICC Statute provides that enslavement, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, constitutes a crime against humanity. Article 7(2)(c) defines "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".

[1654] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[1655] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

1778. Article 8(2)(b)(xxii) and (e)(vi) of the 1998 ICC Statute provides that "sexual slavery [and] enforced prostitution" constitute war crimes in international and non-international armed conflicts respectively.

1779. Article 1 of the 1999 Convention on the Worst Forms of Child Labour provides that States "shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency". Article 3 provides that the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

1780. Article 1 of the 2000 Optional Protocol on Child Trade, Prostitution and Pornography provides that the States parties shall prohibit the sale of children. It also contains detailed implementation measures to be adopted.

1781. Articles 1, 3 and 5 of the 2000 Protocol on Trafficking in Persons provides that States parties shall criminalise, *inter alia*, attempts to commit trafficking in persons, participation as an accomplice in trafficking in persons and organization or direction of other persons to commit trafficking in persons.

Other Instruments

1782. Article 23 of the 1863 Lieber Code provides that "private citizens are no longer . . . enslaved".

1783. Article 42 of the 1863 Lieber Code provides that:

> In a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military force of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations.

1784. Article 58 of the 1863 Lieber Code stipulates that "the United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations."

1785. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on

Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including forced labour of civilians in connection with the military operations of the enemy and the employment of prisoners of war on unauthorised works.

1786. Article II(1) of the 1945 Allied Control Council Law No. 10 provides that "deportation to slave labour or for any other purpose, of civilian population from occupied territory" is a war crime and that "enslavement . . . or other inhumane acts committed against any civilian population" is a crime against humanity.

1787. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including "enslavement".

1788. Article 4 of the 1948 UDHR provides that "no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms".

1789. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" is a war crime and that "enslavement . . . and other inhuman acts done against any civilian population" is a crime against humanity.

1790. Article 2(11) of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind includes enslavement in its list of crimes against humanity.

1791. Article 11(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that "human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty".

1792. Article 21 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind includes "establishing or maintaining over persons a status of slavery, servitude or forced labour" as systematic or massive violations of human rights. The commentary explains that slavery is defined in the following treaties: the 1926 Slavery Convention, 1956 Supplementary Convention on the Abolition of Slavery, 1966 ICCPR, 1930 Forced Labour Convention and the 1957 Convention concerning the Abolition of Forced Labour.

1793. Article 5(c) of the 1993 ICTY Statute provides that enslavement, when committed in armed conflict, whether international or internal in character, and directed against any civilian population, constitutes a crime against humanity.

1794. Article 3(c) of the 1994 ICTR Statute provides that enslavement, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, constitutes a crime against humanity.

1795. Article 18(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind includes enslavement among crimes against humanity.

1796. Article 2(8) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right not to be held in involuntary servitude or to perform forced or compulsory labour.
1797. According to Section 7.2 of the 1999 UN Secretary-General's Bulletin, enslavement of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.
1798. Article 5 of the 2000 EU Charter of Fundamental Rights provides that "no one shall be held in slavery or servitude" and that "trafficking in human beings is prohibited".
1799. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxii) and (e)(vi), "sexual slavery [and] enforced prostitution" constitute war crimes in both international and non-international armed conflicts.

II. National Practice

Military Manuals

1800. According to Canada's LOAC Manual, enslavement is a crime against humanity.[1656]
1801. Ecuador's Naval Manual provides that "offences against civilian inhabitants of the occupied territory, including . . . forced labour" are representative war crimes.[1657]
1802. France's LOAC Manual restates Article 4 of the 1948 UDHR and Article 7(1) of the 1998 ICC Statute, which include enslavement in the list of crimes against humanity.[1658]
1803. Israel's Manual on the Laws of War recalls the definition of crimes against humanity contained in the 1998 ICC Statute by stating that "crimes against humanity were defined as the systematic harming of a civilian population, which includes deeds such as: . . . enslavement".[1659]
1804. The Military Manual of the Netherlands restates the rules on labour carried out by POWs as found in Articles 49–52, 54, 60, 64 GC III and Article 51 GC IV.[1660] The manual further restates the prohibition of slavery and slave trade as found in Article 4 AP II.[1661]
1805. New Zealand's Military Manual refers to AP II and prohibits at any time and anywhere "slavery and the slave trade in all their forms".[1662]

[1656] Canada, *LOAC Manual* (1999), p. 16-1, § 4(c).
[1657] Ecuador, *Naval Manual* (1989), § 6.2.5(2).
[1658] France, *LOAC Manual* (2001), pp. 43 and 51.
[1659] Israel, *Manual on the Laws of War* (1998), p. 68.
[1660] Netherlands, *Military Manual* (1993), pp. VI-9/VII-10 and VIII-5.
[1661] Netherlands, *Military Manual* (1993), p. XI-4.
[1662] New Zealand, *Military Manual* (1992), § 1812.1.

1806. Nigeria's Manual on the Laws of War gives a list of examples of war crimes, *inter alia*, "compelling prisoners of war to perform prohibited work" and "using and, in particular, deporting civilians for forced labour".[1663]
1807. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of slavery and the slave trade in any form.[1664]
1808. South Africa's LOAC Manual provides that the "compelling of civilians to perform prohibited labour" is a grave breach of the Geneva Conventions and their Additional Protocols.[1665]
1809. The UK Military Manual provides that "compelling prisoners of war to perform prohibited work", "using and, in particular, deporting civilians for forced labour" are examples of punishable violations of the laws of war or war crimes.[1666]
1810. The US Field Manual states that compelling prisoners of war and civilians to perform prohibited labour is a war crime.[1667]
1811. The US Air Force Pamphlet restates Article 51 GC IV and provides that "wilfully compelling civilians or PWs to perform prohibited labour" is an act involving individual criminal responsibility.[1668]
1812. The US Instructor's Guide states that:

> In addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . compelling prisoners of war to perform prohibited labor such as removing mines or digging defensive positions [and] compelling civilians to perform prohibited labor such as carrying mortars.[1669]

1813. The US Naval Handbook provides that "international law strictly prohibits the use of the seas for the purpose of transporting slaves".[1670] It also stipulates that it is prohibited to subject prisoners of war to "unhealthy, dangerous, or otherwise prohibited labour".[1671] It adds that imposing "forced labor" on civilian inhabitants of occupied territory is a war crime.[1672]

National Legislation
1814. Albania's Military Penal Code provides that sentencing a person to slave labour is a war crime.[1673]
1815. Under Armenia's Penal Code, "enslavement" constitutes a crime against humanity.[1674]

[1663] Nigeria, *Manual on the Laws of War* (undated), § 6(11) and (13).
[1664] Senegal, *IHL Manual* (1999), pp. 3 and 23. [1665] South Africa, *LOAC Manual* (1996), § 39(i).
[1666] UK, *Military Manual* (1958), § 626(k) and (m).
[1667] US, *Field Manual* (1956), § 504(k) and (m).
[1668] US, *Air Force Pamphlet* (1976), §§ 14-6(b) and 15-3(c)(9).
[1669] US, *Instructor's Guide* (1985), p. 13. [1670] US, *Naval Handbook* (1995), § 3.6.
[1671] US, *Naval Handbook* (1995), § 6.2.5.(1). [1672] US, *Naval Handbook* (1995), § 6.2.5.(2).
[1673] Albania, *Military Penal Code* (1995), Articles 73–75.
[1674] Armenia, *Penal Code* (2003), Article 392.

1816. Australia's War Crimes Act provides that "forced labour of civilians in connection with the military operations of the enemy" is a war crime.[1675]

1817. Under Australia's War Crimes Act as amended, the deportation of a person to, or the internment of a person in, a death camp or a slave labour camp is a serious war crime.[1676]

1818. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute: crimes against humanity, including "enslavement"; and war crimes, including "sexual slavery" and "enforced prostitution", in both international and non-international armed conflicts.[1677]

1819. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, forcing persons under 18 years to work is prohibited.[1678]

1820. Azerbaijan's Criminal Code provides that "making [protected persons] carry out forced labour" is a violation of the laws and customs of war.[1679]

1821. Bangladesh's International Crimes (Tribunal) Act states that "deportation to slave labour . . . of civilian population in the territory of Bangladesh" constitutes a war crime. It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[1680]

1822. Under the Criminal Code of Belarus, the deportation of the civilian population to forced labour is a violation of the laws and customs of war.[1681]

1823. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, provides that enslavement constitutes a crime under international law.[1682]

1824. The Criminal Code of the Federation of Bosnia and Herzegovina provides that compelling civilians to carry out forced labour is a war crime.[1683] The Criminal Code of the Republika Srpska contains the same provision.[1684]

1825. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that enslavement is a crime against humanity.[1685]

[1675] Australia, *War Crimes Act* (1945), Section 3.
[1676] Australia, *War Crimes Act as amended* (1945), Section 6.
[1677] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.10, 268.60, 268.61, 268.83 and 268.84.
[1678] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17.
[1679] Azerbaijan, *Criminal Code* (1999), Article 115.2.
[1680] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d) and (e).
[1681] Belarus, *Criminal Code* (1999), Article 135(2).
[1682] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(2)(3).
[1683] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).
[1684] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).
[1685] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(c).

1826. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity and war crimes defined in Articles 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[1686]

1827. China's Law Governing the Trial of War Criminals provides that "scheming to enslave the inhabitants of occupied territory" and "forcing prisoners of war to engage in work not allowed by the International Conventions" constitute war crimes.[1687]

1828. The DRC Code of Military Justice as amended provides that compelling civilians to carry out forced labour is an offence.[1688]

1829. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "enslavement", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.[1689] The Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[1690]

1830. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, detention of the civilian population in forced labour camps constitutes a "crime against the civilian population".[1691]

1831. Croatia's Criminal Code provides that subjecting the civilian population to forced labour is a war crime.[1692] It also punishes any person who "places another person in slavery, or keeps a person in such a state or a similar state, buys, sells or hands him or her over to another person, or is an intermediary in the purchase, sale or handing over of a person, or encourages another person to sell the freedom of a person in his or her care".[1693]

1832. Ethiopia's Penal Code provides that "systematic deportation, transfer or detention in concentration or forced labour camps" is a war crime against the civilian population.[1694]

1833. Under France's Penal Code, enslavement is a crime against humanity.[1695]

1834. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 49–68 GC III and 40, 51 and 95 GC IV, as well as any "contravention" of AP II, including violations of Article 4(2)(f) AP II, are punishable offences.[1696]

1835. Israel's Nazis and Nazi Collaborators (Punishment) Law includes deportation to forced labour of the civilian population of or in occupied territories in its definition of war crimes.[1697]

[1686] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[1687] China, *Law Governing the Trial of War Criminals* (1946), Article 3(23) and (30).
[1688] DRC, *Code of Military Justice as amended* (1972), Article 526.
[1689] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
[1690] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[1691] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(3).
[1692] Croatia, *Criminal Code* (1997), Article 158(1).
[1693] Croatia, *Criminal Code* (1997), Article 175.
[1694] Ethiopia, *Penal Code* (1957), Article 282(c).
[1695] France, *Penal Code* (1994), Article 212–1.
[1696] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[1697] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b), this section also includes enslavement as a crime against humanity.

1836. Italy's Wartime Military Penal Code provides for the punishment of any member of the military who compels prisoners of war to carry out labour which is directly linked to military operations or which is especially prohibited by law or international conventions.[1698]

1837. Kenya's Constitution provides that no person shall be held in slavery or servitude.[1699]

1838. Latvia's Criminal Code provides that assignment to forced labour of prisoners of war and civilians in the occupied territories is a war crime.[1700]

1839. Under Lithuania's Criminal Code as amended, the unlawful internment of civilians in labour camps is an offence.[1701]

1840. Under Luxembourg's Law on the Repression of War Crimes, any constraint to work and provide services destined for war purposes outside or in the territory of Luxembourg constitutes a war crime.[1702]

1841. Mali's Penal Code provides that enslavement of a group of the civilian population is a crime against humanity.[1703]

1842. The Definition of War Crimes Decree of the Netherlands includes "forced labour of civilians in connection with the military operations of the enemy" and "the employment of prisoners of war on unauthorised works" in its list of war crimes.[1704]

1843. Under the International Crimes Act of the Netherlands, "enslavement" committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity. Enslavement is defined as "the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children".[1705]

1844. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crimes defined in Article 7(1)(c) of the 1998 ICC Statute, and war crimes include the crimes defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.[1706]

1845. Nicaragua's Military Penal Code punishes the compelling of prisoners of war to carry out work related to the war effort.[1707]

1846. According to Niger's Penal Code as amended, enslavement is a crime against humanity.[1708]

1847. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of

[1698] Italy, *Wartime Military Penal Code* (1941), Articles 182 and 212(2).
[1699] Kenya, *Constitution* (1992), Article 73(1).
[1700] Latvia, *Criminal Code* (1998), Section 74.
[1701] Lithuania, *Criminal Code as amended* (1961), Article 336.
[1702] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(1).
[1703] Mali, *Penal Code* (2001), Article 29(a).
[1704] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.
[1705] Netherlands, *International Crimes Act* (2003), Articles 4(1)(c) and 4(2)(b).
[1706] New Zealand, *International Crimes and ICC Act* (2000), Sections 10(2) and 11(2).
[1707] Nicaragua, *Military Penal Code* (1996), Article 55(2).
[1708] Niger, *Penal Code as amended* (1961), Article 208.2.

12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[1709]

1848. Paraguay's Penal Code provides that during war, armed conflict or military occupation, it is a war crime to subject the civilian population, the wounded and sick and prisoners of war to forced labour.[1710]

1849. Under the War Crimes Trial Executive Order of the Philippines, "enslavement [of] . . . civilian populations before or during [the Second World War]" constitutes a war crime.[1711]

1850. Under Slovenia's Penal Code, subjecting civilians to forced labour is a war crime.[1712]

1851. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(c) of the 1998 ICC Statute, and war crimes as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.[1713]

1852. Ukraine's Criminal Code penalises the deportation of the civilian population to forced labour.[1714]

1853. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(c) of the 1998 ICC Statute, and war crimes as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.[1715]

1854. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as enslavement of the civilian population.[1716]

1855. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as enslavement of the civilian population.[1717]

1856. Under Uzbekistan's Criminal Code, ordering or subjecting civilians to forced labour is a violation of the laws and customs of war.[1718]

1857. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of . . . forced labour of the population of Yugoslavia" committed war crimes.[1719]

[1709] Norway, *Military Penal Code as amended* (1902), § 108.
[1710] Paraguay, *Penal Code* (1997) Article 320(4).
[1711] Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).
[1712] Slovenia, *Penal Code* (1994), Article 374(1).
[1713] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[1714] Ukraine, *Criminal Code* (2001), Article 408(1).
[1715] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[1716] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.
[1717] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(*b*).
[1718] Uzbekistan, *Criminal Code* (1994), Clause 152.
[1719] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

1858. The Penal Code as amended of the SFRY (FRY) provides that subjecting civilians to forced labour is a war crime.[1720]

National Case-law

1859. In the *Rudolph and Minister of Employment and Immigration case* in 1992, the Canadian Federal Court of Appeal upheld an order for the removal from Canada of the accused, a German national who during the Second World War had requested and supervised the deportation and use of foreign civilians as slave labourers in the production of V2 rockets, on the ground that he had committed outside Canada an act that constituted a war crime.[1721]

1860. Colombia's Constitutional Court held in 1995 that the prohibitions contained in Article 4(2) AP II were perfectly consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions. The Court said that the prohibition of Article 4(2)(f) was almost identical to Article 17 of the Constitution.[1722]

1861. In its judgement in the *Roechling case* in 1948, the General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany held the accused guilty of forcing prisoners of war to work in the German metallurgical industry, whose output was directly connected with the operations of war. The Tribunal considered that the use of the term "operations of war" should be understood as envisaging a prohibition of the employment of prisoners of war in work capable of increasing the war potential of the enemy.[1723]

1862. In its judgement in the *Eichmann case* in 1961, the District Court of Jerusalem held that "enslavement" caused serious bodily or mental harm and amounted to a violation of Israel's Nazis and Nazi Collaborators (Punishment) Law.[1724]

1863. In its judgement in the *Koshiro case* in 1947, the Temporary Court-Martial of Makassar of the Netherlands found that forcing prisoners of war to build ammunition depots and fill them with ammunition amounted to "employing prisoners of war on war work" and qualified it as a violation of Article 6 of the 1907 HR and of Article 31 of the 1929 Geneva POW Convention.[1725]

1864. In its judgement in the *Rohrig and Others case* in 1950, a Special Court of Cassation of the Netherlands found the accused guilty of having deported

[1720] SFRY (FRY), *Penal Code as amended* (1976), Article 142(1), see also Article 155 (enslavement).
[1721] Canada, Federal Court of Appeal, *Rudolph and Minister of Employment and Immigration case*, Judgement, 1 May 1992.
[1722] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.
[1723] France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, Judgement, 30 June 1948.
[1724] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.
[1725] Netherlands, Temporary Court-Martial of Makassar, *Koshiro case*, Judgement, 5 February 1947.

civilians from the Netherlands to Germany and having put them to forced labour in the construction of the fortifications of the German "West Wall".[1726]

1865. In its judgement in the *Greiser case* in 1947, the Supreme National Tribunal of Poland at Poznan found the accused guilty of deporting the civilian population to forced labour camps.[1727]

1866. In its judgement in the *Student case* in 1946, the UK Military Court at Lüneberg found the accused guilty of forcing prisoners of war to unload arms, ammunition and warlike stores from German aircraft.[1728]

1867. In its judgement in the *Pohl case* in 1947, the US Military Tribunal at Nuremberg, in considering charges of war crimes and crimes against humanity, held that:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[1729]

1868. In the *List (Hostages Trial) case* in 1948, the US Military Tribunal at Nuremberg found the defendants guilty of committing acts of "deportation to slave labour of prisoners of war and members of the civilian populations in territories occupied by the German Armed Forces".[1730]

1869. In the *Milch case* in 1947, the US Military Tribunal at Nuremberg found the accused guilty of war crimes in that he was responsible for the slave labour and deportation to slave labour of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorisation of such persons. The Tribunal found the accused guilty of crimes against humanity for the same war crimes insofar as they related to foreign nationals. Judge Fitzroy D Phillips referred to the definition of crimes in the 1945 Allied Control Council Law No. 10 and stated in his concurring opinion that the law treats as separate crimes and different types of crime deportation to slave labour (as a war crime) and enslavement (as a crime against humanity).[1731]

1870. In its judgement in the *Krauch (I. G. Farben Trial) case* in 1948, the US Military Tribunal at Nuremberg, without attempting to define what constituted "work in direct relation to war operations" within the meaning of the 1929 Geneva POW Convention, held that the use of prisoners of war in coal

[1726] Netherlands, Special Court of Cassation, *Rohrig and Others case*, Judgement, 15 May 1950.
[1727] Poland, Supreme National Tribunal of Poland at Poznan, *Greiser case*, Judgement, 7 July 1946.
[1728] UK, Military Court at Lüneberg, *Student case*, Judgement, 10 May 1946.
[1729] US, Military Tribunal at Nuremberg, *Pohl case*, Judgement, 3 November 1947.
[1730] US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.
[1731] US, Military Tribunal at Nuremberg, *Milch case*, Judgement, 17 April 1947.

mines under the existing conditions amounted to a violation of the Convention and, therefore, was a war crime. With regard to the deportation of the civilian inhabitants of occupied territories to slave labour, the Tribunal held that:

> The use of concentration camp labour and forced foreign workers at Auschwitz, with the initiative displayed by the officials of Farben in the procurement and utilization of such labour, is a crime against humanity and, to the extent that non-German nationals were involved, also a war crime, to which the slave labour programme of the Reich will not warrant the defence of necessity.[1732]

1871. In its judgement in the *Krupp case* in 1948, the US Military Tribunal at Nuremberg referred to the statement of the law applicable to the deportation to slave labour and enslavement made by Judge Phillips in the *Milch case* and found the accused guilty of forcing French prisoners of war to work in the armament industry.[1733]

1872. In its judgement in the *Von Leeb case (The High Command Trial)* in 1948, the US Military Tribunal at Nuremberg found that forcing the civilian inhabitants of occupied territories to construct fortifications was prohibited work.[1734]

Other National Practice

1873. In a statement before the CRC in 1997, the representative of Myanmar, responding to the comment that "children should work as 'porters' for the army – apparently on a systematic basis", stated that he was aware that the law permitting the recruitment of child labour, in particular for portering duties, was incompatible with the 1989 Convention on the Rights of the Child and ILO standards and consideration was being given to repealing it.[1735]

1874. In a report submitted in 1992 pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of hard and forced labour perpetrated by the parties to the conflict.[1736]

1875. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the enslavement of millions of Koreans.[1737]

1876. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in

[1732] US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 29 July 1948.
[1733] US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.
[1734] US, Military Tribunal at Nuremberg, *Von Leeb case* (*The High Command Trial*), Judgement, 28 October 1948.
[1735] Myanmar, Statement before the CRC, UN Doc. CRC/C/SR.359, 21 March 1997, §§ 17 and 43.
[1736] US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 14.
[1737] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[1738]

III. Practice of International Organisations and Conferences

United Nations

1877. In two resolutions adopted in 1995, the UN Security Council expressed its grave concern and condemned in the strongest possible terms the violations of IHL and human rights in Bosnia and Herzegovina, including evidence of a consistent pattern of forced labour. It referred to forced labour as a "grave violation of international humanitarian law".[1739]

1878. In 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council reminded the parties concerned that "they must not compel detainees to do work of a military nature or destined to serve a military purpose".[1740]

1879. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and FRY, the UN General Assembly expressed its concern regarding "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including . . . forced labour".[1741]

1880. In a resolution adopted in 1996, the UN General Assembly expressed "deep concern at the government of Sudan's failure to take measures to halt the use of large numbers of women and children in the slave trade, in situations of servitude and for forced labour". It urged the government to investigate and put an immediate end to these practices.[1742]

1881. In a resolution adopted in 1996, the UN Commission on Human Rights urged the government of Sudan, following Sudan's letter to the Centre for Human Rights of 22 March 1996, to carry out its investigations without delay into cases of slavery, servitude, the slave trade, forced labour and similar institutions and practice, as reported by the Special Rapporteur.[1743]

1882. In a resolution adopted in 1998 on the situation of human rights in Myanmar, the UN Commission on Human Rights expressed concern at the widespread use of forced labour "including for work on infrastructure projects

[1738] Report on US Practice, 1997, Chapter 5.3.
[1739] UN Security Council, Res. 1019, 9 November 1995, preamble; Res. 1034, 21 December 1995, preamble and § 2.
[1740] UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.
[1741] UN General Assembly, Res. 50/193, 22 December 1995, preamble.
[1742] UN General Assembly, Res. 51/112, 12 December 1996, §§ 1–3 and 12.
[1743] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 10.

and as porters for the army". It specifically condemned this practice in relation to women and children.[1744]

1883. In 1996, in the report on her mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, its Causes and Consequences stated that she was

> aware of the position of the government of Japan whereby the application of the term "slavery", defined as "the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised" in accordance with Article 1(1) of the 1926 Slavery Convention, was inaccurate in the case of "comfort women" under existing provisions of international law.
>
> ... the practice of "comfort women" should be considered a clear case of sexual slavery and slave-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms.[1745]

1884. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, its Causes and Consequences stated that:

> During wartime, women are often trafficked across borders to sexually service combatants to the armed conflict. Armed conflict increases the risk of women and girls being abducted and forced into sexual slavery and/or forced prostitution. Although most conflicts are now internal ones, women and girls may be transported across international borders, often to camps of soldiers or rebels located in the territory of a neighbouring State. At least some of these abductions result in women and girls being sold to others and trafficked to other regions or countries. The Governments which host and support the rebel forces also assume a specific obligation to stop the trafficking in human beings and to hold accountable those found responsible for such crimes.[1746]

1885. In 1998, the Special Rapporteur of the UN Sub-Commission on Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, having carried out a comprehensive study of the question of rape and other forms of sexual violence during armed conflict, stated that:

> In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm. The "comfort stations" that were maintained by the Japanese military during the Second World War (see appendix) and the "rape camps" that have been well documented in the former Yugoslavia are particularly egregious examples of sexual slavery. Sexual slavery also encompasses situations where women

[1744] UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3(a), (c) and (d).

[1745] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, §§ 7–8.

[1746] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/2001/73, 23 January 2001, § 53.

and girls are forced into "marriage", domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors. For instance, in addition to the cases documented in Rwanda and the former Yugoslavia, there are reports from Myanmar of women and girls who have been raped and otherwise sexually abused after being forced into "marriages" or forced to work as porters or minefield sweepers for the military. In Liberia, there are similar reports of women and girls who have been forced by combatants into working as cooks and who are also held as sexual slaves.

...

Sexual slavery also encompasses most, if not all forms of forced prostitution. The terms "forced prostitution" or "enforced prostitution" appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied. "Forced prostitution" generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.

...

Older definitions of forced prostitution focus either in vague terms on "immoral" attacks on a woman's "honour", or else they are nearly indistinct from definitions that seem more accurately to describe the condition of slavery. Despite these limitations, as the crime is clearly criminalized within the Geneva Conventions and the Additional Protocols thereto, it remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations.

...

As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery.[1747]

1886. In 1974, the UN Sub-Commission on Human Rights was authorized by ECOSOC to establish a Working Group on contemporary forms of slavery to:

review developments in the fields of slavery, the slave trade and the slavery-like practices, of apartheid and colonialism, the traffic in persons and the exploitation of the prostitution of others, as defined in the 1926 Slavery Convention, the 1956 Supplementary Convention on the Abolition of Slavery and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.[1748]

In its report containing recommendations to the Sub-Commission in 2001, the Working Group reaffirmed that "every woman, man and child has a fundamental right to be free from all forms of slavery and servitude" and that "forced labour is a contemporary form of slavery".[1749]

[1747] UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 30–33.

[1748] UN Sub-Commission on Human Rights, Working Group on Contemporary Forms of Slavery, Report on its 26th Session, UN Doc. E/CN.4/Sub.2/2001/30, 16 July 2001, § 1.

[1749] UN Sub-Commission on Human Rights, Working Group on Contemporary Forms of Slavery, Report on its 26th Session, UN Doc. E/CN.4/Sub.2/2001/30, 16 July 2001, § 136, Recommendation 1 (General and preamble) and Recommendation 10, § 1 (Forced labour).

Other International Organisations
1887. No practice was found.

International Conferences
1888. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1889. The indictment in the *case of the Major War Criminals* before the IMT Nuremberg in 1945 listed "enslavement" among crimes against humanity. It added that:

The defendants conscripted and forced the inhabitants to labor and requisitioned their services for purposes other than meeting the needs of the armies of occupation and to an extent far out of proportion to the resources of the countries involved. All the civilians so conscripted were forced to work for the German war effort. Civilians were required to register and many of those who registered were forced to join the Todt Organization and the Speer Legion, both of which were semi-military organizations involving some military training. These acts violated Articles 46 and 52 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and Article 6 (b) of the Charter.[1750]

1890. In its judgement in the *case of the Major War Criminals* in 1945, the IMT Nuremberg stated that "the laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of The Hague Convention" and that "the policy of the German occupation authorities was in flagrant violation of the terms of this Convention".[1751]
1891. The indictment in the *case of the Major War Criminals* before the IMT Tokyo in 1946 contained references to forced labour and mentioned violations, including "deportation and enslavement of the inhabitants . . . contrary to [the 1907 HR] and to the Laws and Customs of War: Large numbers of the inhabitants or [occupied] territories were . . . arrested and interned without justification, sent to forced labour . . .".[1752]
1892. In its judgement in the *case of the Major War Criminals* in 1948, the IMT Tokyo stated with respect to the use of labour by civilians from occupied territories that:

Having decided upon a policy of employing prisoners of war and civilian internees on work directly contributing to the prosecution of the war, and having established

[1750] IMT Nuremberg, *Case of the Major War Criminals*, Indictment, 20 November 1945, Counts 1, 3(E), 3(H) and 4.
[1751] IMT Nuremberg, *Case of the Major War Criminals*, Indictment, 20 November 1945, Judgement (Slave Labour Policy).
[1752] IMT Tokyo, *Case of the Major War Criminals*, Indictment, 29 April 1946, Count 53, Appendix D.

a system to carry that policy into execution, the Japanese went further and supplemented this source of manpower by recruiting labourers from the native population of the occupied territories. This recruiting of labourers was accomplished by false promises, and by force... The labourers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted labourers on the one hand and prisoners of war and civilian internees on the other hand. They were all regarded as slave labourers to be used to the limit of their endurance.[1753]

1893. In the *Kunarac case* before the ICTY in 1996, the accused was charged with slavery as a crime against humanity. The accused were charged with detaining nine women in a private apartment where the women were sexually assaulted on a regular basis and forced to work both inside and outside the home.[1754]

1894. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber stated that "at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person" and that "the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers."[1755] The Tribunal found the accused guilty of crimes against humanity (enslavement).[1756]

1895. In the *Krnojelac case* before the ICTY in 1997, the accused was charged with "slavery" as a violation of the laws and customs of war pursuant to Article 3 of the Statute, on the basis of both the 1926 Slavery Convention and customary international law, and with "enslavement" as a crime against humanity pursuant to Article 5 of the 1993 ICTY Statute. The case revealed that detainees were forced to work, *inter alia*, in mines, construction, farming, mine detection and trench-digging on the front line. "The detainees were not paid for their work. Work was not voluntary. Even ill or injured detainees were forced to work. Those who refused were sent to solitary confinement."[1757] In its judgement in 2002, the Trial Chamber found the accused guilty of "enslavement as a crime against humanity" and of "slavery as a violation of the laws or customs of war".[1758]

1896. In 1993, in its concluding observations on the report of Sudan, the CRC expressed "its concern regarding the issues of forced labour and slavery".[1759]

1897. In 1997, in its concluding observations on the report of Myanmar, the CRC expressed its grave concern for "cases of children systematically being

[1753] IMT Tokyo, *Case of the Major War Criminals*, Judgement, 12 November 1948, pp. 416–417.
[1754] ICTY, *Kunarac case*, Initial Indictment, 26 June 1996.
[1755] ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 539–540.
[1756] ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 883 and 886.
[1757] ICTY, *Krnojelac case*, Initial Indictment, 17 June 1997, §§ 5.36–5.41.
[1758] ICTY, *Krnojelac case*, Judgement, 15 March 2002, § 525.
[1759] CRC, Concluding observations on the report of Sudan, UN Doc. CRC/C/15/Add.6, 18 February 1993, § 12.

forced into labour, including as porters" and strongly recommended the abolition of children's involvement in forced labour.[1760]

1898. In its admissibility decision in *Van Droogenbroeck v. Belgium* in 1979, the ECiHR (guided by Article 1 of the 1956 Supplementary Convention on the Abolition of Slavery) observed that the distinction between servitude and forced labour was not explicitly stated in the 1950 ECHR and that "it may be considered, however, that in addition to the obligation to perform certain services for others, the notion of servitude embraces the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition".[1761]

1899. In its judgement in *Van der Mussele v. Belgium* in 1983, the ECtHR noted that the 1950 ECHR "lays down a general and absolute prohibition of forced or compulsory labour" but it "does not define what is meant by 'forced or compulsory labour'". The Court referred to the definitions provided in the 1930 Forced Labour Convention and stated that:

> For there to be forced or compulsory labour, for the purposes of Article [4(2)] of the European Convention, two cumulative conditions have to be satisfied: not only must the labour be performed by the person against his or her will, but either the obligation to carry it out must be "unjust" or "oppressive" or its performance must constitute "an avoidable hardship", in other words be "needlessly distressing" or "somewhat harassing".[1762]

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

1900. In 1994, the Red Crescent Society of Azerbaijan denounced the treatment of prisoners by Armenia and Nagorno-Karabakh, including forced labour.[1763]

VI. Other Practice

1901. The Bangkok NGO Declaration on Human Rights adopted in 1993 stated that:

> Crimes against women, including sexual slavery and trafficking are rampant. Crimes against women are crimes against humanity, and the failure of governments to prosecute those responsible implies complicity . . . In crisis situations – ethnic violence, communal riots, armed conflicts, military conflicts, military occupation and displacement of population – women's rights are specifically violated.[1764]

[1760] CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, §§ 21 and 42.
[1761] ECiHR, *Van Droogenbroeck v. Belgium*, Admissibility Decision, 5 July 1979, p 59.
[1762] ECtHR, *Van der Mussele v Belgium*, Judgement, 20 November 1983, § 37.
[1763] Red Crescent Society of Azerbaijan, Declaration of the Executive Committee, 21 April 1994.
[1764] World Conference on Human Rights, Regional Preparatory Meeting for the Asia-Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 6.

1902. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (b) slavery or slave trade".[1765]
1903. In 1994, the International Commission of Jurists argued that the 1921 International Convention for the Suppression of the Traffic in Women and Children was evidence of customary law in existence at the time of its adoption.[1766]
1904. In December 2000, a Japanese NGO simulated a "Women's International War Crimes Tribunal on Japan's Military Sexual Slavery" which had jurisdiction over crimes committed against women, including sexual slavery and enslavement.[1767]

Compelling persons to serve in the forces of a hostile power

I. Treaties and Other Instruments

Treaties
1905. Article 52 of the 1899 HR provides that:

> Neither requisitions in kind nor services can be demanded from . . . inhabitants except for the needs of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

1906. Article 44 of the 1899 HR provides that "any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited".
1907. Article 23(h) of the 1907 HR provides that it is "a belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war".
1908. Article 52 of the 1907 HR provides that:

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

1909. Article 51, first paragraph, GC IV provides that "the Occupying Power may not compel protected persons to serve in its armed or auxiliary forces.

[1765] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(b).
[1766] Ustinia Dolgopol and Snehal Paranjape, *Comfort Women: an Unfinished Ordeal*, International Commission of Jurists, Geneva, 1994.
[1767] VAWW-NET Japan, Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, 7–12 December 2000.

No pressure or propaganda which aims at securing voluntary enlistment is permitted."

1910. Articles 130 GC III and 147 GC IV provide that compelling a prisoner of war or a protected person to serve in the forces of a hostile power is a grave breach of these instruments.

1911. Article 8 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the return of military personnel and civilians provides that captured military personnel of the parties and captured foreign civilians of the parties "shall not be forced to join the armed forces of the detaining party".

1912. Pursuant to Article 8(2)(a)(vi) and (b)(xv) of the 1998 ICC Statute, "compelling a prisoner of war or other protected person to serve in the forces of a hostile power" and "compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war" constitute war crimes in international armed conflicts.

Other Instruments

1913. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including compulsory enlistment of soldiers among the inhabitants of occupied territory.

1914. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, "compelling a protected person to serve in the forces of a hostile Power" is considered as an exceptionally serious war crime and as a serious violation of the principles and rules of international law applicable in armed conflict.

1915. Article 2 of the 1993 ICTY Statute gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions and expressly includes "compelling a prisoner of war or civilian to serve in the forces of a hostile power".

1916. Under Article 20(a)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "compelling a prisoner of war or other protected person to serve in the forces of a hostile Power" constitutes a war crime.

1917. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vi) and (b)(xv), "compelling a prisoner of war or other protected person to serve in the forces of a hostile power" and "compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war" constitute war crimes in international armed conflicts.

II. National Practice

Military Manuals

1918. Argentina's Law of War Manual provides that compelling a protected person to serve in the armed forces of a hostile power is a grave breach of the Geneva Conventions.[1768]

1919. Australia's Commanders' Guide states that "compelling PW or other protected persons to serve in the forces of a hostile power" is a crime which warrants the institution of criminal proceedings.[1769]

1920. Australia's Defence Force Manual provides that "the population [in occupied areas] cannot be compelled to participate in any work which would involve participation in military operations".[1770]

1921. Belgium's Law of War Manual states that compelling a prisoner of war to serve in the armed forces of the enemy is a grave breach of the Geneva Conventions.[1771]

1922. Benin's Military Manual prohibits "compelling nationals of the enemy State to take part in military operations against their own country, even if they used to serve you before the outbreak of hostilities". The same prohibition applies to prisoners of war.[1772]

1923. Burkina Faso's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".[1773]

1924. Cameroon's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".[1774]

1925. Canada's LOAC Manual provides that "the occupying power is prohibited from compelling protected persons to enlist in its armed forces and may not use any pressure or propaganda aimed at securing their voluntary enlistment. To compel the population of occupied territory so to enlist is a grave breach of [GC IV]."[1775] The manual adds that "it is also a breach to compel a PW to serve in the forces of the hostile power" and that "in the case of civilians in the hands of the adverse party, it is also a grave breach . . . to compel a protected person to serve in the forces of a hostile power". It further states that "in accordance with the Hague Rules, a number of acts are 'especially forbidden' . . . compelling enemy nationals to take part in hostilities against their own country, even if they were members of the particular belligerent's forces before the commencement of the conflict".[1776]

[1768] Argentina, *Law of War Manual* (1989), § 8.03.
[1769] Australia, *Commanders' Guide* (1994), § 1305(e); see also *Defence Force Manual* (1994), § 1315(e).
[1770] Australia, *Defence Force Manual* (1994), § 1222.
[1771] Belgium, *Law of War Manual* (1983), p. 55.
[1772] Benin, *Military Manual* (1995), Fascicule II, p. 12, § 2-1 and Fascicule III, p. 12.
[1773] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[1774] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[1775] Canada, *LOAC Manual* (1999), p. 12-5, § 42.
[1776] Canada, *LOAC Manual* (1999), p. 16-2, §§ 13 and 14 and p. 16-3, § 20.

1926. France's Disciplinary Regulations as amended prohibits "compelling nationals of the adverse party to take part in war operations against their own country".[1777]

1927. France's LOAC Summary Note stipulates that "compelling [prisoners of war] to serve in enemy armed forces" is a war crime under the law of armed conflict.[1778]

1928. France's LOAC Manual provides that prisoners of war "shall not be compelled to take part in activities with a military character or objective".[1779]

1929. Germany's Military Manual states that "compelling prisoners of war and civilians to serve in the forces of the adversary" is a grave breach of IHL.[1780]

1930. Israel's Manual on the Laws of War stipulates that "the Conventions expressly forbid harnessing prisoners to the war effort of the detaining state".[1781]

1931. Italy's IHL Manual forbids the compelling "of enemy soldiers to participate in military actions against their own country". It provides that "the inhabitants of an occupied territory ... shall not be enrolled into the national armed forces, or ... provide services directly linked to the war".[1782] The manual stipulates that "in no case shall civilian persons be compelled to carry out works which would oblige them to take part in military operations".[1783]

1932. Kenya's LOAC Manual provides that captured combatants "shall not be compelled to engage in activities having a military character or purpose".[1784]

1933. South Korea's Military Regulation 187 provides that "forcing war prisoners to serve the enemy army" is an unjustifiable crime.[1785]

1934. Mali's Army Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".[1786]

1935. Morocco's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".[1787]

1936. The Military Manual of the Netherlands provides that compelling a protected person to serve a hostile power is a grave breach of the Geneva Conventions and their Additional Protocols.[1788]

1937. New Zealand's Military Manual refers to Article 23 of the 1907 HR and provides that "a belligerent is forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country, even if they were in the service of the belligerent before the commencement of the war". It further provides that:

[1777] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[1778] France, *LOAC Summary Note* (1992), § 3.4.
[1779] France, *LOAC Manual* (2001), p. 102.
[1780] Germany, *Military Manual* (1992), § 1209.
[1781] Israel, *Manual on the Laws of War* (1998), p. 53.
[1782] Italy, *IHL Manual* (1991), Vol. I, §§ 11 and 39.
[1783] Italy, *IHL Manual* (1991), Vol. I, § 48(11).
[1784] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.
[1785] South Korea, *Military Regulation 187* (1991), § 4.2.
[1786] Mali, *Army Regulations* (1979), Article 36.
[1787] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[1788] Netherlands, *Military Manual* (1993), p. IX-5.

The Occupying Power must not compel protected persons to serve in its armed or auxiliary forces but [Article 51 GC IV] lays down expressly that pressure or propaganda which aims at securing voluntary enlistment in those forces is prohibited. To compel the population of occupied territory so to enlist is a grave breach of IV GC.[1789]

According to the manual, it is a grave breach of GC III and GC IV to compel a prisoner of war and a protected civilian to serve in the forces of the hostile power.[1790] It also states that it is a war crime and an offence against the law of armed conflict to compel "enemy nationals to take part in hostilities against their own State, even if they were members of the particular belligerent's forces before the beginning of the conflict".[1791]

1938. Nigeria's Soldiers' Code of Conduct and Military Manual provide that "a belligerent is forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war".[1792]

1939. Nigeria's Manual on the Laws of War states that compelling a prisoner of war and a protected person to serve in the forces of the hostile power is a grave breach of the Geneva Conventions and is considered a serious war crime.[1793] It further states that "compelling a citizen to take part in war operations directed against his own state" is an illegitimate tactic.[1794]

1940. Under Russia's Military Manual, it is prohibited as a method of warfare "to compel persons belonging to the enemy party to participate in hostilities against their country".[1795]

1941. Senegal's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".[1796]

1942. South Africa's LOAC Manual states that "compelling a protected person to serve in the forces of the hostile power" is a grave breach of the Geneva Conventions.[1797]

1943. Sweden's IHL Manual provides that "according to [GC IV], an occupying power may not compel protected persons to serve in its armed forces or auxiliary organizations. It is likewise forbidden to use any pressure to persuade persons to enlist voluntarily in the forces of the occupying power." It adds that "the Convention also states that protected persons may not be compelled to perform any work which would involve them in the obligation of taking part in military operations".[1798] The manual further stipulates that "the status

[1789] New Zealand, *Military Manual* (1992), § 1320.2.
[1790] New Zealand, *Military Manual* (1992), § 1702(2) and 1702(3)(c).
[1791] New Zealand, *Military Manual* (1992), § 1704(2)(i).
[1792] Nigeria, *Soldiers' Code of Conduct* (undated), p. 4; *Military Manual* (1994), p. 40, § 6.
[1793] Nigeria, *Manual on the Laws of War* (undated), § 6(a) and (c).
[1794] Nigeria, *Manual on the Laws of War* (undated), § 14(a).
[1795] Russia, *Military Manual* (1990), § 5(q).
[1796] Senegal, *Disciplinary Regulations* (1990), Article 34(2).
[1797] South Africa, *LOAC Manual* (1996), § 40.
[1798] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 124.

of protected persons also entails the advantage that this category of refugees cannot be compelled to serve in the armed forces of the occupying power (GC IV, Art. 51)".[1799] It also provides that "compelling a protected person to serve in the armed forces of the hostile power" is a grave breach of the Geneva Conventions.[1800]

1944. Switzerland's Basic Military Manual provides that "protected persons shall not be compelled to do any work which would make it compulsory for them to take part in military operations. It is prohibited to recruit labour force in order to achieve a mobilisation of workers placed under a military or half-military regime."[1801] The manual further specifies that "compelling [prisoners of war and civilians] to serve in the forces of the enemy Power" is a grave breach of the Geneva Conventions.[1802]

1945. Togo's Military Manual prohibits the "compelling of nationals of the enemy State to take part in military operations against their own country, even if they used to serve you before the outbreak of hostilities". The same prohibition applies to prisoners of war.[1803]

1946. The UK Military Manual provides that "protected persons of enemy nationality . . . must not be required to do work directly related to the conduct of military operations". The compelling of prisoners of war and civilians to serve in the forces of the hostile power is strictly prohibited.[1804] It also states that "compelling a prisoner of war to serve in the forces of the hostile power" is a war crime.[1805] It adds that "compelling a person to serve in the forces of the hostile power" is a war crime under GC IV.[1806]

1947. Under the UK LOAC Manual, it is prohibited "to compel enemy nationals to take part in operations against their own country, even if they were in your service before the outbreak of hostilities".[1807]

1948. The US Field Manual provides that compelling a prisoner of war or a protected person to serve in the forces of a hostile power is a grave breach of the Geneva Conventions.[1808]

1949. The US Air Force Pamphlet recalls Article 23 of the 1907 HR, which "forbids compelling nationals of the hostile party to take part in the operations of war directed against their own country", and Article 45 of the 1907 HR, which "forbids compelling the inhabitants of occupied territory to swear allegiance to the hostile power". The Pamphlet also refers to Article 51 GC IV and states that "compulsory military service by protected persons in the armed forces

[1799] Sweden, *IHL Manual* (1991), Section 6.1.4, p. 127.
[1800] Sweden, *IHL Manual* (1991), Section 4.2, p. 93.
[1801] Switzerland, *Basic Military Manual* (1987), Article 178.
[1802] Switzerland, *Basic Military Manual* (1987), Article 192.
[1803] Togo, *Military Manual* (1996), Fascicule II, p. 12, § 2-1 and Fascicule III, p. 12.
[1804] UK, *Military Manual* (1958), §§ 48, 282 and 556.
[1805] UK, *Military Manual* (1958), § 625(b).
[1806] UK, *Military Manual* (1958), § 625(c).
[1807] UK, *LOAC Manual* (1981), Section 4, p. 14, § 5, see also Annex A, p. 46, § 9.
[1808] US, *Field Manual (*1956), §§ 418 and 502.

of the occupant is prohibited".[1809] It adds that "wilfully compelling civilians or PWs to perform prohibited labour" is an act involving individual criminal responsibility".[1810]

1950. According to the US Air Force Commander's Handbook, "a belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country".[1811]

National Legislation

1951. Argentina's Draft Code of Military Justice punishes any soldier who "compels a prisoner of war or a civilian to serve in the armed forces of the adverse party".[1812]

1952. Under Armenia's Penal Code, "compelling a protected person or a prisoner of war to serve in the opponent army", during an armed conflict, constitutes a crime against the peace and security of mankind.[1813]

1953. Australia's War Crimes Act provides that "compulsory enlistment of soldiers among the inhabitants of occupied territory" is a war crime.[1814]

1954. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[1815]

1955. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "compelling service in hostile forces" and "compelling participation in military operations", in international armed conflicts.[1816]

1956. Azerbaijan's Criminal Code provides that "compelling prisoners of war or other persons protected by international humanitarian law to serve in the forces of a hostile power, as well as compelling citizens of an enemy State to take part in hostilities against their State" are violations of the laws and customs of war.[1817]

1957. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[1818]

1958. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect

[1809] US, *Air Force Pamphlet* (1976), § 14-6(a) and (b).
[1810] US, *Air Force Pamphlet* (1976), § 15-3(c)(9).
[1811] US, *Air Force Commander's Handbook* (1980), § 32.
[1812] Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(3) in the *Code of Military Justice as amended* (1951).
[1813] Armenia, *Penal Code* (2003), Article 390.2(2).
[1814] Australia, *War Crimes Act* (1945), Section 3.
[1815] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[1816] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.30 and 268.53.
[1817] Azerbaijan, *Criminal Code* (1999), Article 115.1.
[1818] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

of similar offences in Barbados as if the grave breach had been committed in Barbados".[1819]

1959. Under the Criminal Code of Belarus, the following is a violation of the laws and customs of war:

> Compelling persons that have laid down their arms or are defenceless, the wounded, sick and shipwrecked, sanitary and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone, or other persons enjoying international protection to serve in the forces of a foreign power" is a violation of laws and customs of war.[1820]

1960. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that compelling a prisoner of war, a civilian person or persons protected by AP I and AP II to serve in the forces of a hostile power or adverse party constitutes a crime under international law.[1821]

1961. The Criminal Code of the Federation of Bosnia and Herzegovina provides that compelling civilians and prisoners of war to serve in the armed forces of the enemy power is a war crime.[1822] The Criminal Code of the Republika Srpska contains the same provision.[1823]

1962. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[1824]

1963. Bulgaria's Penal Code as amended provides that compelling a captive or a civilian "to serve in the armed forces of an enemy state" is a war crime.[1825]

1964. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that compelling a prisoner of war, a protected person or an enemy national to serve in the forces of the enemy power is a war crime in international armed conflicts.[1826]

1965. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".[1827]

[1819] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[1820] Belarus, *Criminal Code* (1999), Article 135(1).
[1821] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(4).
[1822] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1) and 156.
[1823] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1) and 435.
[1824] Botswana, *Geneva Conventions Act* (1970), Section 3(1).
[1825] Bulgaria, *Penal Code as amended* (1968), Articles 411(b) and 412(d).
[1826] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(e) and (B)(o).
[1827] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

1966. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".[1828]
1967. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[1829]
1968. Under Chile's Code of Military Justice, compelling a prisoner of war to fight against his or her own army is an "offence against international law".[1830]
1969. China's Law Governing the Trial of War Criminals provides that "forcing non-combatants to engage in military activities with the enemy" and "conscription by force of inhabitants in the occupied territory" constitute war crimes.[1831]
1970. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, compels or orders the compelling of a protected person to serve in the armed forces of the enemy.[1832]
1971. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[1833]
1972. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".[1834]
1973. Côte d'Ivoire's Penal Code as amended provides that in time of war or occupation, organising, ordering or compelling the civilian population to serve in the enemy armed forces, intelligence services or administration constitutes a "crime against the civilian population".[1835] The same provision applies with regard to prisoners of war.[1836]
1974. Croatia's Criminal Code provides that compelling civilians and prisoners of war to serve in the armed forces or in the administration of the enemy power is a war crime.[1837]
1975. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".[1838]

[1828] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[1829] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[1830] Chile, *Code of Military Justice* (1925), Article 261(1).
[1831] China, *Law Governing the Trial of War Criminals* (1946), Article 3(20) and (22).
[1832] Colombia, *Penal Code* (2000), Article 150.
[1833] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[1834] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[1835] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(4).
[1836] Côte d'Ivoire, *Penal Code as amended* (1981), Article 139(2).
[1837] Croatia, *Criminal Code* (1997), Articles 158 and 160.
[1838] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

1976. The Code of Military Justice of the Dominican Republic punishes any member of the armed forces who compels a prisoner of war to fight against his or her own country.[1839]

1977. El Salvador's Code of Military Justice provides that coercing POWs or other persons in the power of the adverse party to serve in the armed forces of the enemy is a war crime.[1840]

1978. Under Estonia's Penal Code, compelling civilians, prisoners of war and interned civilians to serve in the armed forces of the enemy or to take part in military operations is a war crime.[1841]

1979. Ethiopia's Penal Code provides that it is a war crime to forcibly enlist the civilian population, prisoners of war and interned persons in the enemy's armed forces, intelligence services or administration.[1842]

1980. Georgia's Criminal Code provides that it is a crime, in international or internal armed conflicts, to compel a prisoner of war or any other protected person to serve in the armed forces of the enemy.[1843]

1981. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international armed conflict "compels a protected person . . . by force or threat of appreciable harm to serve in the forces of a hostile power, [or] compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country".[1844]

1982. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[1845]

1983. Ireland's Geneva Conventions Act as amended provides that grave breaches of the 1949 Geneva Conventions are punishable offences.[1846] In addition, any "minor breach" of the Geneva Conventions, including violations of Article 51 GC IV, is a punishable offence.[1847]

1984. Italy's Law of War Decree as amended provides that "it is prohibited to compel your enemies to participate in actions of war against their own country".[1848] It instructs soldiers that "you cannot implicate prisoners of war in work which would involve their participation in military operations".[1849] It also states that "enemies cannot, in any case, even if they used to serve the State before the outbreak of hostilities, be compelled to enlist

[1839] Dominican Republic, *Code of Military Justice* (1953), Article 201(1).
[1840] El Salvador, *Code of Military Justice* (1934), Article 69(1).
[1841] Estonia, *Penal Code* (2001), §§ 97 and 98.
[1842] Ethiopia, *Penal Code* (1957), Articles 282(d) and 284(b).
[1843] Georgia, *Criminal Code* (1999), Article 411(2)(d).
[1844] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(3)–(4).
[1845] India, *Geneva Conventions Act* (1960), Section 3(1).
[1846] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[1847] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[1848] Italy, *Law of War Decree as amended* (1938), Article 37.
[1849] Italy, *Law of War Decree as amended* (1938), Article 106(3).

in the armed forces of the State, or to render services directly linked to the war".[1850]

1985. Italy's Wartime Military Penal Code provides for the punishment of any member of the military who compels enemy nationals to take part in war actions against their own country.[1851]

1986. Jordan's Draft Military Criminal Code provides that compelling prisoners of war or protected persons to serve in the armed forces of the enemy is a war crime.[1852]

1987. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[1853]

1988. Under the Draft Amendments to the Code of Military Justice of Lebanon, compelling prisoners of war or protected persons to serve in the armed forces of the enemy constitutes a war crime.[1854]

1989. Under Lithuania's Criminal Code as amended, the compulsory use of civilians and prisoners of war in the armed forces of the enemy is a war crime.[1855]

1990. Luxembourg's Law on the Repression of War Crimes provides that "any enlistment by the enemy (or its agents) in either the regular army, police units or military or paramilitary organisations" is a war crime.[1856]

1991. Under Luxembourg's Law on the Punishment of Grave Breaches, "compelling a person protected by [GC III] and [GC IV] to serve in the armed forces of the enemy power" is a grave breach of the Geneva Conventions.[1857]

1992. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[1858]

1993. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[1859]

1994. Mali's Penal Code provides that compelling a prisoner of war or a protected person to serve in the armed forces of a foreign power is a war crime. It adds that "compelling by a belligerent the nationals of the adverse party to

[1850] Italy, *Law of War Decree as amended* (1938), Article 281.
[1851] Italy, *Wartime Military Penal Code* (1941), Article 182.
[1852] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(5).
[1853] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[1854] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(5).
[1855] Lithuania, *Criminal Code as amended* (1961), Article 338.
[1856] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(1).
[1857] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(4).
[1858] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[1859] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

take part in hostilities against their country, even if they were in the service of the belligerent before the commencement of hostilities," constitutes a war crime in international armed conflicts.[1860]

1995. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[1861]

1996. Mexico's Code of Military Justice as amended provides for the punishment of persons found guilty of forcing detainees to participate in military campaigns against their own country.[1862]

1997. Moldova's Penal Code provides a punishment for anyone who compels protected persons "to serve in the armed forces of the enemy".[1863]

1998. The Definition of War Crimes Decree of the Netherlands includes "compulsory enlistment of soldiers among the inhabitants of occupied territory" in its list of war crimes.[1864]

1999. Under the International Crimes Act of the Netherlands, it is a crime to commit in an international armed conflict grave breaches of the 1949 Geneva Conventions, including "compelling a prisoner of war or other protected person to serve in the armed forces of a hostile power", as well as "compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war".[1865]

2000. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[1866]

2001. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(vi) and(b)(xv) of the 1998 ICC Statute.[1867]

2002. Nicaragua's Military Penal Code punishes the compelling of prisoners of war to fight against their own armed forces. It also punishes the compelling of enemy civilians to serve in Nicaragua's armed forces.[1868]

2003. According to Niger's Penal Code as amended, it is a war crime to "compel to serve in the armed forces of the enemy power or of the adverse party" persons protected by the 1949 Geneva Conventions or their Additional Protocols of 1977.[1869]

[1860] Mali, *Penal Code* (2001), Article 31(e) and (i)(15).
[1861] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[1862] Mexico, *Code of Military Justice as amended* (1933), Article 324(V).
[1863] Moldova, *Penal Code* (2002), Article 137(2)(a).
[1864] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.
[1865] Netherlands, *International Crimes Act* (2003), Articles 5(1)(e) and 5(5)(f).
[1866] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[1867] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[1868] Nicaragua, *Military Penal Code* (1996), Articles 55(1) and 58.
[1869] Niger, *Penal Code as amended* (1961), Article 208.3(4).

2004. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".[1870]

2005. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[1871]

2006. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[1872]

2007. Paraguay's Penal Code states that coercing prisoners of war or other persons in the power of the adverse party to serve in the armed forces of the enemy is a war crime.[1873]

2008. Peru's Code of Military Justice provides that compelling prisoners of war to fight against their own forces is a violation of the law of nations.[1874]

2009. Poland's Penal Code provides for the punishment of any person who, in violation of international law, compels persons *hors de combat*, protected persons and persons enjoying international protection to "serve in hostile armed forces".[1875]

2010. Portugal's Penal Code provides that in times of war, armed conflict or occupation, compelling the civilian population, the wounded, the sick and prisoners of war to serve in the enemy armed forces is a war crime.[1876]

2011. Romania's Penal Code punishes the compelling of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or of all persons in the hands of the adverse party to serve in the armed forces of the foreign power.[1877]

2012. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".[1878]

2013. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[1879]

[1870] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[1871] Norway, *Military Penal Code as amended* (1902), § 108(a).
[1872] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).
[1873] Paraguay, *Penal Code* (1997), Article 320(6).
[1874] Peru, *Code of Military Justice* (1980), Article 95(1).
[1875] Poland, *Penal Code* (1997), Article 124.
[1876] Portugal, *Penal Code* (1996), Article 241(e).
[1877] Romania, *Penal Code* (1968), Article 358(a).
[1878] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[1879] Singapore, *Geneva Conventions Act* (1973), Section 3(1).

2014. Slovenia's Penal Code provides that compelling civilian persons and prisoners of war to serve in the armed forces or administration of the enemy is a war crime.[1880]

2015. Spain's Military Criminal Code punishes the compelling of prisoners of war and civilians to fight against their own forces.[1881]

2016. Spain's Penal Code provides for the punishment of anyone found guilty of "compelling a prisoner of war or a civilian person to serve, in whatever form, in the Armed Forces of the Adverse Party".[1882]

2017. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[1883]

2018. Sweden's Penal Code as amended provides that compelling prisoners of war or civilian persons to serve in the armed forces of the enemy is a crime against international law.[1884]

2019. Under Tajikistan's Criminal Code, "compelling a prisoner of war or any other protected person to serve in the armed forces of the hostile power" is a punishable offence.[1885]

2020. Thailand's Prisoners of War Act provides for the punishment of "whoever coerces a prisoner of war into active service with his enemy's forces".[1886]

2021. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (b)(xv) of the 1998 ICC Statute.[1887]

2022. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[1888]

2023. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".[1889]

2024. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (b)(xv) of the 1998 ICC Statute.[1890]

[1880] Slovenia, *Penal Code* (1994), Articles 374(1) and 376.
[1881] Spain, *Military Criminal Code* (1985), Article 77(5)–(6).
[1882] Spain, *Penal Code* (1995), Article 611(3).
[1883] Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).
[1884] Sweden, *Penal Code as amended* (1962), Article 22(6).
[1885] Tajikistan, *Criminal Code* (1998), Article 403(2)(d).
[1886] Thailand, *Prisoners of War Act* (1955), Section 15.
[1887] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[1888] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[1889] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[1890] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

2025. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions, grave breaches of the Geneva Conventions and violations of Article 23 of the 1907 HR are war crimes.[1891]
2026. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[1892]
2027. Uruguay's Military Penal Code as amended punishes the compelling of prisoners of war to fight against their own armed forces.[1893]
2028. Venezuela's Code of Military Justice as amended provides for the punishment of anyone who compels a prisoner of war to fight against his or her own forces.[1894]
2029. Under Yemen's Military Criminal Code, compelling prisoners of war or civilians to serve in the armed forces of the enemy constitutes a war crime.[1895]
2030. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of ... compulsory mobilisation" committed a war crime.[1896]
2031. The Penal Code as amended of the SFRY (FRY) provides that compelling civilians and prisoners of war to serve in the forces of a hostile power or administration is a war crime.[1897]
2032. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".[1898]

National Case-law
2033. In its judgement in the *Wagner case* in 1946, the Permanent Military Tribunal at Strasbourg in France ruled that the introduction of compulsory military service for Alsatian civilians was a war crime.[1899]
2034. In its judgement in the *Weizsaecker case* in 1949, the US Military Tribunal at Nuremberg held that "pressure or coercion to compel [prisoners of war] to enter into the armed forces obviously violated international law" and that the conscription of foreign nationals into the armed forces of a belligerent was a crime against humanity.[1900]

[1891] US, *War Crimes Act as amended* (1996), Section 2441(c).
[1892] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[1893] Uruguay, *Military Penal Code as amended* (1943), Article 58(8).
[1894] Venezuela, *Code of Military Justice as amended* (1998), Article 474(15).
[1895] Yemen, *Military Criminal Code* (1998), Article 21(3).
[1896] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[1897] SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1) and 144.
[1898] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).
[1899] France, Permanent Military Tribunal at Strasbourg, *Wagner case*, Judgement, 3 May 1946.
[1900] US, Military Tribunal at Nuremberg, *Weizsaecker case*, Judgement, 14 April 1949.

Other National Practice

2035. According to the Report on the Practice of Chile, the prohibition of compelling a prisoner of war to fight against his or her own country (reflected in Article 261 of the Chilean Code of Military Justice), predates the Geneva Conventions and is based on the 1907 HR.[1901]

2036. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "compelling hostages to serve in the armed forces of Iraq constitute Grave Breaches (that is, major violations of the law of war) under Article 147 GC [IV]".[1902] It also listed some specific Iraqi war crimes including "compelling Kuwaiti and third country nationals to serve in the armed forces of Iraq, in violation of Articles 51 and 147 GC [IV]".[1903]

2037. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the SFRY Ministry of Defence included the following: "The YPA are arrested, while in their identity booklets they state that the military service is completed, and then are forcefully mobilised into Slovenian forces."[1904]

III. Practice of International Organisations and Conferences

United Nations

2038. In 1996, in his report on the situation of human rights in Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that "if a prisoner is captured and he refuses to change sides, he is cruelly tortured and executed".[1905]

Other International Organisations

2039. No practice was found.

International Conferences

2040. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflicts in 2002 expressed deep concern about "the number and expansion of conflicts in Africa" and alarm at "the spread of violence, in particular

[1901] Report on the Practice of Chile, 1997, Chapter 6.5.
[1902] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 618.
[1903] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.
[1904] SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 3(ii).
[1905] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 9.

in the form of . . . compelling civilians to join in the armed forces . . . which seriously violate[s] the rules of International Humanitarian Law".[1906]

IV. Practice of International Judicial and Quasi-judicial Bodies

2041. No practice was found.

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

2042. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "compelling [protected persons] to serve in the forces of an enemy Party" constitutes a grave breach of the law of war.[1907]

2043. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of "compelling a prisoner of war or another protected person to serve with forces of a hostile Power", when committed in an international armed conflict, be subject to the jurisdiction of the Court.[1908]

VI. Other Practice

2044. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and denounced the rounding up of the homeless in barracks in order to compel them to join the army and physical liquidation of those who refused to do so.[1909]

I. Hostage-Taking

I. Treaties and Other Instruments

Treaties

2045. Under Article 6(b) of the 1945 IMT Charter (Nuremberg) "killing of hostages" is a war crime.

2046. Common Article 3 of the 1949 Geneva Conventions states that the taking of hostages is and shall remain prohibited at any time and in any place whatsoever.

[1906] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.
[1907] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776(j).
[1908] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(iv).
[1909] ICRC archive document.

2047. Article 34 GC IV states that the taking of hostages is prohibited.
2048. Article 147 GC IV states that hostage-taking is a grave breach of GC IV.
2049. Article 2 of the 1973 Convention on Crimes against Internationally Protected Persons obliges State parties to make punishable attacks upon the person or liberty of an internationally protected person.
2050. Article 75(2)(c) AP I states that the taking of hostages is an act which is and "shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents". Article 75 AP I was adopted by consensus.[1910]
2051. Article 4(2)(c) AP II states that the taking of hostages is prohibited. Article 4 AP II was adopted by consensus.[1911]
2052. The 1979 International Convention against the Taking of Hostages criminalises hostage-taking. Article 1 provides that:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as "hostage") in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage, commits the offence of taking of hostages.

2053. Article 12 of the 1979 International Convention against the Taking of Hostages specifies that the Convention is not applicable to acts of hostage-taking committed in armed conflicts if the Geneva Conventions or the Additional Protocols thereto are applicable in so far as the Conventions require States to prosecute or hand over the hostage-takers.
2054. Pursuant to Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute, the "taking of hostages" constitutes a war crime in both international and non-international armed conflicts.
2055. Article 3(c) of the 2002 Statute of the Special Court for Sierra Leone provides that "the Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977", which include "taking of hostages".

Other Instruments
2056. Article II(1)(b) of the 1945 Allied Control Council Law No. 10 provides that "killing of hostages" is a war crime.
2057. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that "killing of hostages" is a war crime.

[1910] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[1911] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

2058. Under Rule 4 of the 1950 UN Command Rules and Regulations, Military Commissions of the UN Command had jurisdiction over offences such as the improper treatment of hostages.
2059. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, "acts of . . . taking of hostages" are considered as an exceptionally serious war crime and as a serious violation of the principles and rules of international law applicable in armed conflict.
2060. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
2061. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.
2062. Under Article 2(h) of the 1993 ICTY Statute, the Tribunal is competent to prosecute the taking of civilians as hostages.
2063. Under Article 4(c) of the 1994 ICTR Statute, the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including the taking of hostages.
2064. According to Article 20(a)(viii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, the "taking of hostages" is regarded as a war crime. Under Article 20(f)(iii), "taking of hostages" constitutes a war crime in conflicts not of an international character.
2065. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that all acts of violence, including hostage-taking, shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.
2066. According to Section 7.2 of the 1999 UN Secretary-General's Bulletin, the taking hostage of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.
2067. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(viii) and (c)(iii), the "taking of hostages" constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals
2068. Argentina's Law of War Manual (1969) and Law of War Manual (1989) prohibit the taking of hostages.[1912]

[1912] Argentina, *Law of War Manual* (1969), §§ 4.012 and 8.001; *Law of War Manual* (1989), §§ 4.15, 4.29, 7.04 and 8.03.

2069. Australia's Commanders' Guide provides that "taking protected persons as hostages" is a crime likely to warrant institution of criminal proceedings.[1913]
2070. Australia's Defence Force Manual provides that hostage-taking is prohibited.[1914]
2071. Belgium's Law of War Manual prohibits hostage-taking and adds that it constitutes a grave breach of the Geneva Conventions.[1915]
2072. Belgium's Teaching Manual for Soldiers explains that the prohibition on taking hostages is a necessary corollary of the obligation to respect the civilian population.[1916]
2073. Benin's Military Manual states that the taking of hostages is prohibited in international and non-international armed conflicts.[1917]
2074. Burkina Faso's Disciplinary Regulations prohibits hostage-taking.[1918]
2075. Cameroon's Disciplinary Regulations prohibits hostage-taking.[1919]
2076. Cameroon's Instructors' Manual explicitly forbids civilian hostage-taking.[1920]
2077. Canada's LOAC Manual prohibits the taking of hostages in international and non-international armed conflicts.[1921]
2078. Colombia's Basic Military Manual prohibits the taking of the civilian population as hostages.[1922]
2079. Congo's Disciplinary Regulations prohibits hostage-taking.[1923]
2080. Croatia's LOAC Compendium provides that "hostage-taking" is a grave breach of IHL and a war crime.[1924]
2081. Croatia's Soldiers' Manual explicitly forbids civilian hostage-taking.[1925]
2082. The Military Manual of the Dominican Republic provides that "it is a breach of the laws of war to take civilians as hostages".[1926]
2083. Ecuador's Naval Manual provides that "enemy civilians may not be interned as hostages".[1927]
2084. France's Disciplinary Regulations as amended prohibits hostage-taking.[1928]

[1913] Australia, *Commanders' Guide* (1994), § 1305(c).
[1914] Australia, *Defence Force Manual* (1994), §§ 953 and 1315.
[1915] Belgium, *Law of War Manual* (1983), pp. 50 and 55.
[1916] Belgium, *Teaching Manual for Soldiers* (undated), pp. 10, 14 and 41 and slide 1/7.
[1917] Benin, *Military Manual* (1995), Fascicule I, p. 17, Fascicule II, p. 19 and Fascicule III, p. 4.
[1918] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[1919] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[1920] Cameroon, *Instructors' Manual* (1992), p. 151, § 421(1).
[1921] Canada, *LOAC Manual* (1999), p. 11-4, §§ 33(e) and 63(c), p. 16-3, § 14(e) and p. 17-2, §§ 10 and 21.
[1922] Colombia, *Basic Military Manual* (1995), p. 30.
[1923] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[1924] Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.
[1925] Croatia, *Soldiers' Manual* (1992), p. 5.
[1926] Dominican Republic, *Military Manual* (1980), p. 10.
[1927] Ecuador, *Naval Manual* (1989), § 11-9.
[1928] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).

2085. France's LOAC Summary Note states that the taking of hostages is a war crime under the law of armed conflict.[1929]

2086. France's LOAC Teaching Note provides that neither prisoners of war nor any protected persons shall be used as hostages and that hostage-taking is a violation of the laws of armed conflict.[1930]

2087. France's LOAC Manual provides that hostage-taking is a war crime. It adds that hostage-taking is expressly prohibited by the law of armed conflict and has been considered a war crime since 1949.[1931] The manual also states that one of the three main principles common to IHL and human rights is the principle of security, which prohibits the taking of hostages.[1932]

2088. Germany's Military Manual states that "the taking of hostages is prohibited".[1933] It also states that hostage-taking is prohibited in case of occupation.[1934] The manual provides that hostage-taking is a grave breach of IHL.[1935]

2089. Hungary's Military Manual provides that hostage-taking is a grave breach of IHL and a war crime.[1936]

2090. Italy's IHL Manual prohibits hostage-taking and states that the taking of hostages is a war crime.[1937]

2091. Italy's LOAC Elementary Rules Manual prohibits hostage-taking.[1938]

2092. Kenya's LOAC Manual lists as one of the soldier's rules for behaviour in combat "do not take hostages".[1939]

2093. South Korea's Military Regulation 187 provides that taking hostages is an "unjustifiable crime".[1940]

2094. Madagascar's Military Manual states that the taking of hostages is prohibited.[1941]

2095. Mali's Army Regulations prohibits hostage-taking.[1942]

2096. Morocco's Disciplinary Regulations prohibits hostage-taking.[1943]

2097. The Military Manual of the Netherlands restates the prohibition of hostage-taking found in common Article 3 to the 1949 Geneva Conventions and Articles 75 AP I and 4 AP II.[1944] The manual further provides that hostage-taking is a grave breach of the Geneva Conventions and AP I.[1945]

[1929] France, *LOAC Summary Note* (1992), § 3.4.
[1930] France, *LOAC Teaching Note* (2000), pp. 3, 5 and 7.
[1931] France, *LOAC Manual* (2001), pp. 45 and 51.
[1932] France, *LOAC Manual* (2001), p. 101.
[1933] Germany, *Military Manual* (1992), § 508.
[1934] Germany, *Military Manual* (1992), § 537.
[1935] Germany, *Military Manual* (1992), § 1209.
[1936] Hungary, *Military Manual* (1992), p. 90.
[1937] Italy, *IHL Manual* (1991), Vol. I, §§ 20, 41(f), 48(6) and 84.
[1938] Italy, *LOAC Elementary Rules Manual* (1991), § 17.
[1939] Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6 and Précis No. 3, p. 14, § 2.
[1940] South Korea, *Military Regulation 187* (1991), § 4.2.
[1941] Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 17, Fiche No. 4-T, § 23 and Fiche No. 5-T, § 8.
[1942] Mali, *Army Regulations* (1979), Article 36.
[1943] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[1944] Netherlands, *Military Manual* (1993), pp. VIII-3, XI-1 and XI-4.
[1945] Netherlands, *Military Manual* (1993), p. IX-5.

2098. New Zealand's Military Manual restates Article 75(2) AP I, which provides for the prohibition of "the taking of hostages" at any time and in any place whatsoever, whether committed by civilian or by military agents.[1946] It also states that "the taking of hostages is now forbidden by treaty".[1947] The manual further provides that it is a grave breach of GC IV "to take a protected civilian hostage" (Article 147).[1948] The manual prohibits hostage-taking in non-international armed conflicts and explains that "it has now become accepted, in international conflicts at least, that the taking of hostages is an offence under customary law and most systems of national law forbid such actions".[1949]

2099. Nicaragua's Military Manual prohibits the taking of hostages, including the threat to commit such acts.[1950]

2100. Nigeria's Manual on the Laws of War provides that hostage-taking is a grave breach of the Geneva Conventions and is considered a serious war crime.[1951] The manual also specifies that "killing of hostages" is a war crime.[1952]

2101. The Soldier's Rules of the Philippines instructs soldiers: "Do not take hostages."[1953]

2102. Romania's Soldiers' Manual provides that hostage-taking of civilians and captured combatants is prohibited.[1954]

2103. Russia's Military Manual prohibits "the taking of hostages" as a method of warfare.[1955]

2104. Senegal's IHL Manual restates common Article 3 of the 1949 Geneva Conventions and prohibits the taking of hostages.[1956]

2105. South Africa's LOAC Manual states that the "taking of hostages" is a grave breach of the Geneva Conventions.[1957]

2106. Spain's LOAC Manual prohibits the taking of hostages among the civilian population.[1958] The same prohibition applies to prisoners of war.[1959]

2107. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.[1960] The manual also provides that "taking hostages" is a grave breach of the Geneva Conventions.[1961]

[1946] New Zealand, *Military Manual* (1992), § 1137.2.
[1947] New Zealand, *Military Manual* (1992), § 1607.
[1948] New Zealand, *Military Manual* (1992), § 1702.3(e).
[1949] New Zealand, *Military Manual* (1992), § 1812.1(c), including footnote 35, and § 1807.1.
[1950] Nicaragua, *Military Manual* (1996), Articles 7(2) and 14(35).
[1951] Nigeria, *Manual on the Laws of War* (undated), § 6(c).
[1952] Nigeria, *Manual on the Laws of War* (undated), § 6(17).
[1953] Philippines, *Soldier's Rules* (1989), § 8.
[1954] Romania, *Soldiers' Manual* (1991), pp. 15 and 34.
[1955] Russia, *Military Manual* (1990), § 5(m).
[1956] Senegal, *IHL Manual* (1999), pp. 4 and 23.
[1957] South Africa, *LOAC Manual* (1996), § 40.
[1958] Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(1), see also § 10.6.b.(4) and 10.8.b.
[1959] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.
[1960] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[1961] Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

2108. Switzerland's Basic Military Manual prohibits the taking of hostages and any order given to that end.[1962] It specifies that the taking of protected civilians as hostages is a grave breach of the Geneva Conventions.[1963]
2109. Togo's Military Manual states that hostage-taking is prohibited in international and non-international armed conflicts.[1964]
2110. The UK Military Manual forbids the taking hostage of the civilian population, whether in an occupied territory or not.[1965] It specifies that "the taking of hostages" among persons protected by GC IV is a grave breach of that Convention.[1966] The manual also mentions the killing of hostages in its list of war crimes.[1967]
2111. The UK LOAC Manual prohibits the taking of hostages, including in non-international armed conflicts.[1968]
2112. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions and provides that the "taking of hostages" is a war crime under GC IV.[1969]
2113. The US Air Force Pamphlet states that hostage-taking is a grave breach of the Geneva Conventions.[1970]
2114. The US Instructor's Guide prohibits hostage-taking and specifies that it is a grave breach of the Geneva Conventions.[1971]
2115. The US Naval Handbook provides that "enemy civilians may not be interned as hostages".[1972]
2116. The YPA Military Manual of the SFRY (FRY) forbids civilian hostage-taking.[1973]

National Legislation
2117. Argentina's Draft Code of Military Justice punishes any soldier who takes any protected person hostage.[1974]
2118. Under Armenia's Penal Code, "taking hostages" during an armed conflict constitutes a crime against the peace and security of mankind.[1975]
2119. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[1976]

[1962] Switzerland, *Basic Military Manual* (1987), Articles 147(d)–(e) and 154.
[1963] Switzerland, *Basic Military Manual* (1987), Article 192(1)(c).
[1964] Togo, *Military Manual* (1996), Fascicule I, p. 18, Fascicule II, p. 19 and Fascicule III, p. 4.
[1965] UK, *Military Manual* (1958), §§ 42, 131, 554 and 650.
[1966] UK, *Military Manual* (1958), § 625(c). [1967] UK, *Military Manual* (1958), § 626(q).
[1968] UK, *LOAC Manual* (1981), Section 9, p. 35, § 9 and Section 12, p. 42, § 2, see also Annex A, p. 48, § 20.
[1969] US, *Field Manual* (1956), §§ 11 and 502(c). [1970] US, *Air Force Pamphlet* (1976), § 15-3(c).
[1971] US, *Instructor's Guide* (1985), p. 8. [1972] US, *Naval Handbook* (1995), § 11-8.
[1973] SFRY (FRY), *YPA Military Manual* (1988), § 253(3).
[1974] Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(4) in the *Code of Military Justice as amended* (1951).
[1975] Armenia, *Penal Code* (2003), Article 390.2(5).
[1976] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

2120. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "taking hostages" in both international and non-international armed conflicts.[1977]
2121. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, the hostage-taking of civilians is prohibited.[1978]
2122. Azerbaijan's Criminal Code provides that the taking hostage of protected persons is a violation of the laws and customs of war.[1979]
2123. Bangladesh's International Crimes (Tribunal) Act states that the killing of hostages is a war crime.[1980] It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[1981]
2124. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[1982]
2125. The Criminal Code of Belarus provides that the capture and detention of persons as hostage who have laid down their arms or who are defenceless, the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone or other persons enjoying international protection are a violation of the laws and customs of war.[1983]
2126. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that hostage-taking constitutes a crime under international law.[1984]
2127. The Criminal Code of the Federation of Bosnia and Herzegovina provides that hostage-taking is a war crime.[1985] The Criminal Code of the Republika Srpska contains the same provision.[1986]
2128. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[1987]

[1977] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.34 and 268.75.
[1978] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17(3).
[1979] Azerbaijan, *Criminal Code* (1999), Article 115.2.
[1980] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d).
[1981] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[1982] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[1983] Belarus, *Criminal Code* (1999), Article 135(2).
[1984] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(7).
[1985] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).
[1986] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).
[1987] Botswana, *Geneva Conventions Act* (1970), Section 3(1).

2129. Bulgaria's Penal Code as amended provides that ordering or carrying out the taking of a civilian hostage is a war crime.[1988]

2130. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that hostage-taking is a war crime in both international and non-international armed conflicts.[1989]

2131. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".[1990]

2132. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".[1991]

2133. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[1992]

2134. China's Law Governing the Trial of War Criminals provides that the "killing of hostages" constitutes a war crime.[1993]

2135. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, orders or carries out the taking of hostages.[1994]

2136. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[1995]

2137. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".[1996]

2138. Côte d'Ivoire's Penal Code as amended provides that in time of war or occupation, the organising ordering or carrying out of hostage-taking constitutes a "crime against the civilian population".[1997]

2139. Croatia's Criminal Code provides that hostage-taking is a war crime.[1998]

2140. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave

[1988] Bulgaria, *Penal Code as amended* (1968), Article 412(b).
[1989] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(h) and (C)(c).
[1990] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.
[1991] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[1992] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[1993] China, *Law Governing the Trial of War Criminals* (1946), Article 3, § 2.
[1994] Colombia, *Penal Code* (2000), Article 148.
[1995] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[1996] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[1997] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(5).
[1998] Croatia, *Criminal Code* (1997), Articles 158 and 171.

breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".[1999]

2141. Under El Salvador's Penal Code, "the killing of hostages" during an international or a civil war is a crime.[2000]

2142. Under the Draft Amendments to the Penal Code of El Salvador, hostage-taking is prohibited in both international and non-international armed conflicts.[2001]

2143. Estonia's Penal Code provides that hostage-taking of civilians is a war crime.[2002]

2144. Under Ethiopia's Penal Code, in time of war, armed conflict or occupation, the organising, ordering or carrying out of hostage-taking of civilians constitutes a war crime.[2003]

2145. Under Georgia's Criminal Code, hostage-taking is a crime in international and internal armed conflicts.[2004]

2146. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict, "takes hostage a person who is to be protected under international humanitarian law".[2005]

2147. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[2006]

2148. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.[2007] In addition, any "minor breach" of the Geneva Conventions, including violations of common Article 3 and Article 34 GC IV, and of AP I, including violations of Article 75(2)(c) AP I, as well as any "contravention" of AP II, including violations of Article 4(2)(c) AP II, are also punishable offences.[2008]

2149. Israel's Nazis and Nazi Collaborators (Punishment) Law includes "killing of hostages" in its definition of war crimes.[2009]

2150. Jordan's Draft Military Criminal Code provides that hostage-taking is a war crime.[2010]

2151. Kazakhstan's Penal Code provides that hostage-taking is a crime.[2011]

[1999] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).
[2000] El Salvador, *Penal Code* (1997), Article 362.
[2001] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Toma de rehenes".
[2002] Estonia, *Penal Code* (2001), § 97.
[2003] Ethiopia, *Penal Code* (1957), Article 282(g).
[2004] Georgia, *Criminal Code* (1999), Article 411(2)(g).
[2005] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(2).
[2006] India, *Geneva Conventions Act* (1960), Section 3(1).
[2007] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[2008] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[2009] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).
[2010] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(6).
[2011] Kazakhstan, *Penal Code* (1997), Article 229.

2152. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[2012]

2153. Kyrgyzstan's Criminal Code provides that hostage-taking is a punishable offence.[2013]

2154. Under the Draft Amendments to the Code of Military Justice of Lebanon, hostage-taking of protected persons constitutes a war crime.[2014]

2155. Under Lithuania's Criminal Code as amended, hostage-taking is a war crime.[2015]

2156. Luxembourg's Law on the Punishment of Grave Breaches provides that hostage-taking is a grave breach of the Geneva Conventions.[2016]

2157. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[2017]

2158. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[2018]

2159. Under Mali's Penal Code, hostage-taking is a war crime.[2019]

2160. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[2020]

2161. Mexico's Code of Military Justice as amended criminalises the taking of hostages.[2021]

2162. Moldova's Penal Code punishes the hostage-taking of protected persons.[2022]

2163. Under the International Crimes Act of the Netherlands, "the taking of hostages" is a crime, whether committed in an international armed conflict (as a grave breach of the 1949 Geneva Conventions) or in a non-international armed conflict (as a violation of Article 3 common to the Geneva Conventions).[2023]

2164. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures

[2012] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[2013] Kyrgyzstan, *Criminal Code* (1997), Article 224.
[2014] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(6).
[2015] Lithuania, *Criminal Code as amended* (1961), Article 336.
[2016] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(8).
[2017] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[2018] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[2019] Mali, *Penal Code* (2001), Article 31(h).
[2020] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[2021] Mexico, *Code of Military Justice as amended* (1933), Article 215.
[2022] Moldova, *Penal Code* (2002), Article 137(2)(b).
[2023] Netherlands, *International Crimes Act* (2003), Articles 5(1)(h) and 6(1)(b).

the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[2024]

2165. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute.[2025]

2166. Nicaragua's Military Penal Code provides that hostage-taking is an offence against the laws and customs of war, in both international and non-international conflicts.[2026]

2167. Nicaragua's Draft Penal Code punishes hostage-taking in international and internal armed conflicts.[2027]

2168. According to Niger's Penal Code as amended, hostage-taking of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 is a war crime.[2028]

2169. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".[2029]

2170. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[2030]

2171. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[2031]

2172. Poland's Penal Code provides for the punishment of any person who, in violation of international law, takes persons *hors de combat*, protected persons and persons enjoying international protection hostage.[2032]

2173. Portugal's Penal Code provides for the punishment of anyone who, in violation of international law, in times of war, armed conflict or occupation, takes the civilian population, the wounded and sick or prisoners of war hostage.[2033]

2174. Romania's Penal Code punishes the hostage-taking of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar

[2024] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[2025] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[2026] Nicaragua, *Military Penal Code* (1996), Articles 48 and 49, see also Article 58.
[2027] Nicaragua, *Draft Penal Code* (1999), Article 453.
[2028] Niger, *Penal Code as amended* (1961), Article 208.3(7).
[2029] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[2030] Norway, *Military Penal Code as amended* (1902), § 108.
[2031] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).
[2032] Poland, *Penal Code* (1997), Article 123(2).
[2033] Portugal, *Penal Code* (1996), Article 241(1)(d).

organisations, prisoners of war, or of all persons in the hands of the adverse party.[2034]

2175. Russia's Criminal Code punishes "the capture or detention of a person as a hostage committed with a view to compel a State, an organisation or a person to accomplish or to abstain from a certain action as a condition for release of the hostage".[2035]

2176. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".[2036]

2177. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[2037]

2178. Slovenia's Penal Code provides that hostage-taking is a war crime.[2038]

2179. Under Spain's Military Criminal Code, hostage-taking of nationals of the State with which Spain is at war is an offence against the laws and customs of war.[2039]

2180. Spain's Penal Code punishes anyone who, in time of armed conflict, takes any protected person hostage.[2040]

2181. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the [Geneva] Conventions, is guilty of an indictable offence".[2041]

2182. Tajikistan's Criminal Code provides for the punishment of hostage-taking in international or non-international armed conflicts.[2042]

2183. Thailand's Prisoners of War Act provides a punishment for "whoever takes a hostage" in a non-international armed conflict.[2043]

2184. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute.[2044]

2185. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets

[2034] Romania, *Penal Code* (1968), Article 358(b).
[2035] Russia, *Criminal Code* (1996), Article 206.
[2036] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[2037] Singapore, *Geneva Conventions Act* (1973), Section 3(1).
[2038] Slovenia, *Penal Code* (1994), Article 374(1).
[2039] Spain, *Military Criminal Code* (1985), Article 77(6).
[2040] Spain, *Penal Code* (1995), Article 611(4).
[2041] Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).
[2042] Tajikistan, *Criminal Code* (1998), Article 403(2)(g).
[2043] Thailand, *Prisoners of War Act* (1955), Section 19.
[2044] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[2045]

2186. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".[2046]

2187. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute.[2047]

2188. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.[2048]

2189. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[2049]

2190. Under Yemen's Military Criminal Code, hostage-taking of civilians is a war crime.[2050]

2191. The Penal Code as amended of the SFRY (FRY) provides that hostage-taking is a war crime.[2051]

2192. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".[2052]

National Case-law

2193. The Report on the Practice of Colombia refers to a decision by the Council of State in which the Council notes that the category of direct attacks on civilians also includes hostage-taking and that "this is especially true when the military operations are disorderly and improvised and an unwillingness to protect the hostages is combined with a total disregard for human rights and the basic principles of the law of nations".[2053]

2194. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II were consistent with the Constitution and practically reproduced specific constitutional provisions.[2054]

[2045] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[2046] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[2047] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[2048] US, *War Crimes Act as amended* (1996), Section 2441(c).
[2049] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[2050] Yemen, *Military Criminal Code* (1998), Article 21(4).
[2051] SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).
[2052] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).
[2053] Colombia, Council of State, *Constitutional Case No. 9276*, Judgement, 19 August 1994.
[2054] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

2195. In its judgement in the *List (Hostages Trial) case* in 1948, the US Military Tribunal at Nuremberg considered the right to take hostages from the innocent civilian population of an occupied territory and stated that:

> Certain rules of customary law . . . lay down the rules applicable to the subject of hostages.
> . . .
> The term "hostages" will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken.

The Tribunal further stated that:

> The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may, only as a last resort, take and execute hostages . . . The occupant is required to use every available method to secure order and tranquility before . . . taking and execution of hostages.
> . . .
> If attacks upon troops and military installations [continue to] occur . . . hostages may be taken from the population to deter similar acts in the future provided it can be shown that the population generally is a party to the offence, either actively or passively.
> . . .
> It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason that the hostages will be shot . . . Unless the foregoing requirements are met, the shooting of hostages is . . . a war crime in itself.[2055]

Other National Practice

2196. On the basis of an interview with a retired army general, the Report on the Practice of Botswana considers that should an internal conflict arise, Article 4 AP II would be applied by military personnel.[2056]

2197. According to the Report on the Practice of France, hostage-taking is inadmissible. This entails refusing any distinction as to its object, to forbid such behaviour and to refuse any condition to obtain the liberation of hostages. According to the report, diplomatic, UN and NGO personnel are particularly concerned.[2057]

2198. In 1995, in the context of the conflict in Nagorno-Karabakh, all political parties in the German parliament requested the release of hostages.[2058]

[2055] US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.
[2056] Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.4.
[2057] Report on the Practice of France, 1999, Chapter 5.3.
[2058] Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, the Greens and FDP, Initiative zum Karabach-Konflikt, *BT-Drucksache*13/1029, 30 March 1995, p. 1.

2199. In 1976, during a debate in the Sixth Committee of the UN General Assembly, Italy stated that the odious practice of taking hostages was clearly condemned under the modern rules of war. It further stated that:

> Each time a hostage had been taken, those responsible have been disowned by the organisations for which they had claimed to act, showing that the practice was condemned in respect of both international and non-international armed conflict . . . The need was therefore not to protect any particular category of persons but simply to devise an effective ban on the practice of taking hostages as such, in view of its inhuman nature, which was an affront to the bases of the social conscience.[2059]

Italy also recalled UN General Assembly Resolution 2645 (XXV) of 1970, Article 34 GC IV and common Article 3 of the 1949 Geneva Conventions and declared that the proposed convention on the taking of hostages was entirely in keeping with the evolution of IHL.[2060]

2200. In 1979, during a debate in the Sixth Committee of the UN General Assembly, Italy commented on the outcome of the work of the Ad Hoc Committee on the Drafting of a Convention against the Taking of Hostages and stated that the taking of hostages was one of the greatest evils of modern times and an act which, even in wartime, was considered an international crime.[2061]

2201. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[2062] The report refers to a booklet prepared by the ICRC and notes that the Jordanian armed forces are instructed not to take civilian hostages.[2063]

2202. In 1995, the Pakistani government condemned the kidnapping of British and American nationals in the context of the conflict in Kashmir, emphasising that it was the responsibility of the Indian government to ensure the safety of visitors to the region.[2064]

2203. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that [all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions] not be subjected to . . . the taking of hostages". He added that "the basic core of [AP II] is, of course, reflected in common Article 3 of the 1949 [Geneva] Conventions and therefore is, and should be, a part

[2059] Italy, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C. 6/31/SR.55, 26 November 1976, § 13.
[2060] Italy, Statement before the Sixth Committee of the UN General Assembly, UN; Doc. A/C.6/ 31/SR.55, 26 November 1976, §§ 14 and 15.
[2061] Italy, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/ 34/SR.11, 5 October 1979, § 13.
[2062] Report on the Practice of Jordan, 1997, Chapter 5.
[2063] Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.1.
[2064] Pakistan, Foreign Office Briefings, Transcript of the press briefing by the Foreign Office spokesman, 13 July 1995, pp. 73–80.

of generally accepted customary law. This specifically includes its prohibitions on . . . hostagetaking."[2065]

2204. In 1991, in a letter to the President of the UN Security Council, the US protested against "the announcement of the intention of the Government of Iraq to hold prisoners of war as hostages . . . in flagrant violation of the Third Geneva Convention of 1949".[2066]

2205. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

> Whatever the purpose, whether for intimidation, concessions, reprisal, or to render areas or legitimate military objects immune from military operations, the taking of hostages is unequivocally and expressly prohibited by Article 34 GC [IV] . . .
>
> The taking of hostages . . . constitute Grave Breaches (that is, major violations of the law of war) under Article 147 GC [IV].[2067]

The report listed Iraqi war crimes, including the taking of hostages.[2068] It also mentioned some specific Iraqi war crimes:

- the taking of Kuwaiti nationals as hostages . . . in violation of Articles 34 . . . and 147 GC [IV].
- the taking of third nationals in Kuwait as hostages . . . in violation of Articles 34 . . . and 147 GC[IV].
- the taking of third nationals in Iraq as hostages . . . in violation of Articles 34 . . . and 147 GC [IV].[2069]

2206. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[2070]

2207. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY included the following example: "Taking hostages among wives and children of YPA soldiers, they brought them

[2065] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427 and 430–431.

[2066] US, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991.

[2067] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 617–618 and 624.

[2068] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

[2069] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

[2070] Report on US Practice, 1997, Chapter 5.3.

in front of barracks and forced them to call upon their husbands and fathers to surrender."[2071]

2208. In 1974, in a letter to the ICRC, a party to an international armed conflict denounced, on the basis of Article 34 GC IV, the taking of civilian hostages by the other party.[2072]

III. Practice of International Organisations and Conferences

United Nations

2209. In a resolution adopted in 1989 on incidents of hostage-taking and abduction, the UN Security Council considered that the taking of hostages and abductions were "offences of grave concern to all States" and "serious violations of international humanitarian law". It also condemned "unequivocally all acts of hostage-taking and abduction" and demanded "the immediate safe release of all hostages and abducted persons, wherever and by whomever they are being held".[2073]

2210. In a resolution adopted in 1990 in connection with the Iraqi occupation of Kuwait, the UN Security Council stated that it condemned "the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage" and demanded that they immediately "cease and desist from taking third-State nationals hostage [and] mistreating and oppressing Kuwaiti and third-State nationals".[2074]

2211. In two statements by its President in 1997 and 1998 concerning the situation in Tajikistan, the UN Security Council denounced the taking of relief workers and others as hostages, demanded their immediate release and expressly stressed the inadmissibility of kidnapping.[2075]

2212. In a statement by its President in 1998, the UN Security Council condemned hostage-taking by former members of the deposed junta in Sierra Leone and called for the immediate release of all international personnel and others who had been held hostage.[2076]

2213. In a resolution adopted in 1998, the UN General Assembly strongly condemned the overwhelming number of human rights violations committed by the authorities of the FRY, the police and the military authorities in Kosovo, including the taking of civilian hostages, in breach of international humanitarian law, including common Article 3 of the 1949 Geneva Conventions and AP II.[2077]

[2071] SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(v).
[2072] ICRC archive document.
[2073] UN Security Council, Res. 638, 31 July 1989, preamble and §§ 1–2.
[2074] UN Security Council, Res. 664, 18 August 1990, § 1; see also Res. 674, 29 October 1990, § 1; Res. 686, 2 March 1991, § 2(c); Res. 706, 15 August 1991, § 6.
[2075] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997; Statement by the President, UN Doc. S/PRST/1998/4, 24 February 1998.
[2076] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/5, 26 February 1998.
[2077] UN General Assembly, Res. 53/164, 9 December 1998, § 8.

2214. In a resolution adopted in 1992 on the situation of human rights in Iraq, the UN Commission on Human Rights strongly condemned hostage-taking.[2078]

2215. In a resolution adopted in 1992, the UN Commission on Human Rights included the taking of hostages among violations of human rights in the territory of the former Yugoslavia.[2079]

2216. In a resolution adopted in 1995, the UN Commission on Human Rights condemned hostage-taking during the internal armed conflict in Cambodia. It expressed its "grave concern over the atrocities committed by the Khmer Rouge including the taking and killing of foreign hostages".[2080]

2217. In a resolution on Cambodia adopted in 1998, the UN Commission on Human Rights endorsed the comments of the Special Representative stating that "in recent history the most serious human rights violations in Cambodia have been committed by the Khmer Rouge" and cited the taking and killing of hostages as an example.[2081]

2218. In a resolution on Lebanon adopted in 1998, the UN Commission on Human Rights "called upon the government of Israel . . . to refrain from holding Lebanese detainees incarcerated in its prisons as hostages for bargaining purposes and to release them immediately".[2082]

2219. In a resolution on hostage-taking adopted in 1998, the UN Commission on Human Rights condemned all acts of hostage-taking anywhere in the world and stated that such acts were illegal wherever and by whomever committed and that they were unjustifiable under any circumstances, as their aim was the destruction of fundamental human rights. The Commission demanded the immediate and unconditional release of all hostages.[2083]

2220. In a resolution on hostage-taking adopted in 2001, the UN Commission on Human Rights stated that the Commission:

> recognizes that hostage-taking calls for resolute, firm and concerted efforts on the part of the international community in order, in strict conformity with international human rights standards, to bring such abhorrent practices to an end,
>
> . . .
>
> reaffirms that hostage-taking, wherever and by whomever committed, is an illegal act aimed at the destruction of human rights and is, under any circumstances, unjustifiable, including as a means to promote and protect human rights.[2084]

2221. In 1996, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that, following a series of hostage-taking incidents, the two sides had agreed to exchange all hostages and to consider

[2078] UN Commission on Human Rights, Res. 1992/71, 5 March 1992, § 2(d).
[2079] UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, § 5.
[2080] UN Commission on Human Rights, Res. 1995/55, 3 March 1995, § 11.
[2081] UN Commission on Human Rights, Res. 1998/60, 17 April 1998, § 19.
[2082] UN Commission on Human Rights, Res. 1998/62, 21 April 1998, § 4.
[2083] UN Commission on Human Rights, Res. 1998/73, 22 April 1998, §§ 1–4.
[2084] UN Commission on Human Rights, Res. 2001/38, 23 April 2001, preamble and § 1.

kidnapping a crime whose authors would be arrested and prosecuted. In the space of one month, UNOMIG assisted in the exchange of 13 hostages, 11 held by the Abkhaz side, two by the Georgian side.[2085]

2222. In 1997, in a report on the situation in Somalia, the UN Secretary-General, citing violations of human rights and IHL, pointed out that the practice of kidnapping remained common.[2086]

2223. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[2087]

Other International Organisations

2224. In a resolution adopted in 1990 concerning the Gulf War, the Parliamentary Assembly of the Council of Europe condemned the taking of foreign nationals as hostages. It demanded the immediate release of third State nationals being held as hostages by the Iraqi authorities in Iraq and Kuwait.[2088]

2225. In a resolution adopted in 2000 on violations of human rights and humanitarian law in Chechnya adopted, the European Parliament called upon the Chechen authorities to take all measures in their power to locate and release all civilian hostages kidnapped before and during the current conflict.[2089]

2226. In 1989, in with a resolution on hostages in El Salvador, the Permanent Council of the OAS resolved to make an urgent appeal to safeguard the lives and persons of those being held hostage, and to call for their immediate and unconditional release.[2090]

International Conferences

2227. The 23rd International Conference of the Red Cross in 1977 adopted a resolution in which it condemned "the taking of hostages" and urged "all governments to take the necessary measures to prevent the recurrence of such acts".[2091]

2228. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all

[2085] UN Secretary-General, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/1996/284, 15 April 1996, § 33.
[2086] UN Secretary-General, Report on the situation in Somalia, UN Doc. S/1997/135, 17 February 1997, § 32.
[2087] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[2088] Council of Europe, Parliamentary Assembly, Res. 950, 1 October 1990, §§ 2 and 5(ii).
[2089] European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, § 11.
[2090] OAS, Permanent Council, Resolution on Hostages in El Salvador, 1989, § 4.
[2091] 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. VIII, §§ 1 and 2.

the parties to an armed conflict ensure that "the prohibition of taking hostages is strictly respected".[2092]

2229. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about "the number and expansion of conflicts in Africa" and alarm at "the spread of violence, in particular in the form of ... hostage-taking ... which seriously violate[s] the rules of International Humanitarian Law".[2093]

IV. Practice of International Judicial and Quasi-judicial Bodies

2230. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[2094]

2231. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with grave breaches and violations of the laws and customs of war for having seized 284 UN peacekeepers in Pale, Sarajevo, Goražde and other locations and held them as hostages in order to prevent further air strikes by NATO.[2095] In its review of the indictment in 1996, the ICTY Trial Chamber upheld the charges and stated that these acts could "be characterised as war crimes (taking UNPROFOR soldiers as hostages and using them as human shields)".[2096]

2232. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber held that:

> The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the [ICTY] Statute ... Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term "hostage" must be understood in the broadest sense. The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death.

The Trial Chamber found the accused guilty of a violation of the laws and customs of war recognised by common Article 3(1)(a) (taking of hostages) of the

[2092] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(d).
[2093] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.
[2094] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.
[2095] ICTY, *Karadžić and Mladić case*, Initial Indictment, 24 July 1995, §§ 46–48.
[2096] ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 13 and 89.

1949 Geneva Conventions and of a grave breach of the Geneva Conventions (taking civilians as hostages).[2097]

2233. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber held that "an individual commits the offence of taking civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition". The Trial Chamber found the accused guilty of a grave breach of the Geneva Conventions (taking civilians as hostages).[2098]

2234. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

> States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages.
> . . .
> In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.
> . . .
> (b) The prohibitions against taking of hostages, abductions, or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.[2099]

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

2235. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the taking of hostages is prohibited and that it constitutes a grave breach of the law of war.[2100]

2236. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the taking of hostages" is specifically prohibited.[2101]

2237. In 1992, the ICRC reminded a State party to a non-international armed conflict of the prohibition of hostage-taking.[2102]

2238. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan to ensure the protection of civilians and military victims,

[2097] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 187 and Part VI.
[2098] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V.
[2099] HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, §§ 11 and 13(b).
[2100] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 196 and 776(d).
[2101] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.
[2102] ICRC archive document.

in compliance with the basic rules of IHL and in particular "to refrain from taking hostages".[2103]

2239. In a letter to a representative of a separatist entity in 1993, the ICRC held that persons forcibly evacuated from a conflict zone where fighting is going on must be immediately released, once brought to safer areas. The ICRC further stated that "there is no doubt that those who are not going to be released unconditionally and unilaterally are hostages. We have repeatedly stated that IHL strictly prohibits hostage taking and ask you to act accordingly."[2104]

2240. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh "to refrain from taking hostages".[2105]

2241. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "hostage-taking" of civilians is, in particular, prohibited.[2106]

2242. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated, with respect to civilian persons who refrain from acts of hostility, that "the taking of hostages" is prohibited.[2107]

2243. In a press release in 1994, the ICRC urged parties to the conflict in Chechnya "to refrain from taking hostages".[2108]

2244. In a communication to the press in 1995, the ICRC stated that is was "alarmed by the dramatic events taking place in the town of Budyonnovsk, where Chechen fighters have taken hostage hundreds of civilians" and condemned "the taking of hostages in Budyonnovsk . . . which violates norms of international humanitarian law".[2109]

2245. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of "taking of hostages", when committed in an international armed conflict, together with the crime of hostage-taking, as a serious violation of IHL applicable in non-international armed conflicts, be subject to the jurisdiction of the Court.[2110]

[2103] ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.
[2104] ICRC archive document.
[2105] ICRC, Communication to the Press No. 93/25, Nagorny-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.
[2106] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.
[2107] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.
[2108] ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.
[2109] ICRC, Communication to the Press, ICRC Moscow, 17 June 1995.
[2110] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(a)(vii) and 3(iii).

VI. Other Practice

2246. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and denounced the hostage-taking of civilians.[2111]
2247. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch reported an incident in which the leader of an armed opposition group threatened to kill 23 captured soldiers unless ten Miskito prisoners were released. The report commented that this behaviour "reflects a serious disregard for the rights of prisoners under [common] Article 3" of the 1949 Geneva Conventions.[2112]
2248. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "the taking of hostages" shall remain prohibited.[2113]
2249. In 1993, a representative of a separatist entity held that the forced displacement of civilians from a specific town was only carried out after timely warning of the possibility to flee and was only justified by the concern to keep the civilians away from the combat zone. It also held that this action was not motivated by the intention to take these civilians as hostages since the authorities of the separatist entity had always refused to resort to such practices.[2114]

J. Human Shields

I. Treaties and Other Instruments

Treaties
2250. Article 19, second paragraph, GC I provides that "the responsible authorities shall ensure that [fixed establishments and mobile medical units] are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety".
2251. Article 23, second paragraph, GC III provides that "no prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations".
2252. Article 28 GC IV provides that "the presence of a protected person may not be used to render certain points or areas immune from military operations".
2253. Article 12(4) AP I provides that "under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever

[2111] ICRC archive document.
[2112] Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 43.
[2113] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(c), *IRRC*, No. 282, 1991, p. 332.
[2114] ICRC archive document.

possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety." Article 12 AP I was adopted by consensus.[2115]

2254. Article 51(7) AP I provides that:

> The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.[2116]

2255. Pursuant to Article 8(2)(b)(xxiii) of the 1998 ICC Statute, "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" constitutes a war crime in international armed conflicts.

Other Instruments

2256. Article 13 of the 1956 New Delhi Draft Rules provides that "parties to the conflict are prohibited from placing or keeping members of the civilian population subject to their authority in or near military objectives, with the idea of inducing the enemy to refrain from attacking those objectives".

2257. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(7) AP I.

2258. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxiii), "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

2259. Argentina's Law of War Manual requires that no prisoner of war nor protected person be used "to render, because of their presence, certain points, areas or regions immune from military operations".[2117]

2260. Australia's Commanders' Guide provides that civilians in enemy territory "are not to be used as a shield for combat operations or as a means of obtaining protection for military facilities".[2118]

[2115] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.
[2116] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.
[2117] Argentina, *Law of War Manual* (1989), § 4.29, see also § 3.12 (POWs).
[2118] Australia, *Commanders' Guide* (1994), § 609.

2261. Australia's Defence Force Manual states that:

> [The] requirement [to distinguish between military objects and civilian objects] imposes obligations on all parties to a conflict to establish and maintain this distinction. Inherent in this requirement, and to make it effective, is the obligation not to use civilians to protect military objectives. Civilians may not be used as shields . . . Any party who uses civilians in this manner violates international law including its obligations to protect its own civilian population.[2119]

The manual further states that the "civilian population shall not be used to attempt to render military objectives immune from attack or to shield, favour or impede military operations".[2120] It also states that "PW camps must not be located near military objectives with the intention of securing exemption from attack for those objectives".[2121]

2262. Belgium's Teaching Manual for Soldiers reiterates the prohibition on using civilians as human shields and contains an illustration of the prohibition on using civilians in order to facilitate an attack.[2122]

2263. Cameroon's Instructors' Manual prohibits the use of human shields as a method of warfare.[2123]

2264. Canada's Code of Conduct provides that prisoners of war or detainees "will not be used as 'human shields' to protect military objectives or cover military operations".[2124]

2265. Colombia's Basic Military Manual states that parties in conflict shall "abstain from using [the civilian population] as shields or barricades in order to obtain a military advantage".[2125] It further states that it is prohibited "to use the civilian population as human shields".[2126]

2266. Croatia's Commanders' Manual forbids the use of civilians or populated areas as shields for the protection of military units, movements or positions.[2127]

2267. According to the Military Manual of the Dominican Republic, soldiers "cannot use prisoners as shields to defend against attacks by enemy forces".[2128]

2268. Ecuador's Naval Manual provides that "deliberate use of non combatants to shield military objectives from enemy attacks is prohibited".[2129]

2269. France's LOAC Summary Note prohibits the use of individual civilians or inhabited areas in order to protect military formations, movements or positions.[2130]

[2119] Australia, *Defence Force Manual* (1994), § 504.
[2120] Australia, *Defence Force Manual* (1994), § 922.
[2121] Australia, *Defence Force Manual* (1994), § 1014.
[2122] Belgium, *Teaching Manual for Soldiers* (undated), p. 14, see also p. 41 and slide 1/4.
[2123] Cameroon, *Instructors' Manual* (1992), p. 30, § 131.
[2124] Canada, *Code of Conduct* (2001), Rule 6, § 12.
[2125] Colombia, *Basic Military Manual* (1995), p. 22.
[2126] Colombia, *Basic Military Manual* (1995), p. 30.
[2127] Croatia, *Commanders' Manual* (1992), Article 47, p. 7.
[2128] Dominican Republic, *Military Manual* (1980), p. 9.
[2129] Ecuador, *Naval Manual* (1989), § 11-2.
[2130] France, *LOAC Summary Note* (1992), § 4.3.

2270. France's LOAC Teaching Note provides that protected persons "cannot be used in any case as human shields". The prohibition is also stated regarding prisoners of war.[2131]

2271. France's LOAC Manual restates Article 51(7) AP I.[2132] It states that "to use protected persons as human shields to protect military objectives is strictly prohibited".[2133]

2272. Germany's Military Manual provides that "none of the parties to the conflict shall use civilians as a shield to render certain points or areas immune from military operations".[2134] It also provides that POWs "shall not be used to render certain points or areas immune from military operations".[2135]

2273. Israel's Manual on the Laws of War states that it is prohibited to exploit the presence of prisoners to render military objectives immune from attack and it is obligatory to provide the prisoners with bomb shelters as well as other means of defence.[2136]

2274. Italy's IHL Manual provides that "it is prohibited to use civilian persons to shelter, owing to their presence, a place, a military objective or a zone of military operations".[2137]

2275. Kenya's LOAC Manual provides that "neither may the presence of civilian persons be used to render certain points or areas immune from military operations".[2138]

2276. The Military Manual of the Netherlands restates the provisions of Article 51(7) AP I.[2139]

2277. New Zealand's Military Manual states, regarding restrictions on targeting, that "if the enemy is deliberately using civilians to shield military objectives the commander may take this into account in making his decision".[2140] It also restates the provisions of Article 51 AP I.[2141] The manual further states that "the presence of a protected person in a particular place or area must not be used to give that place immunity from military operations (for example by placing trainloads of protected persons in railway sidings alongside ammunition trains)".[2142] It adds that "it is forbidden to use the presence of protected persons to render certain points or areas immune from military operations".[2143]

2278. Spain's LOAC Manual states that "it is prohibited to use protected persons as shields in order to protect military objectives from enemy attacks".[2144]

[2131] France, *LOAC Teaching Note* (2000), pp. 3 and 5.
[2132] France, *LOAC Manual* (2001), pp. 33–34.
[2133] France, *LOAC Manual* (2001), p. 101.
[2134] Germany, *Military Manual* (1992), § 506.
[2135] Germany, *Military Manual* (1992), § 714.
[2136] Israel, *Manual on the Laws of War* (1998), pp. 52 and 57.
[2137] Italy, *IHL Manual* (1991), Vol. I, § 41(c).
[2138] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 2.
[2139] Netherlands, *Military Manual* (1993), p. V-5.
[2140] New Zealand, *Military Manual* (1992), § 515(3), see also § 622(3).
[2141] New Zealand, *Military Manual* (1992), § 519.
[2142] New Zealand, *Military Manual* (1992), § 1114, including footnote 28.
[2143] New Zealand, *Military Manual* (1992), § 1231.3.
[2144] Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(4).

It further states that civilians and civilian goods or protected persons and goods may suffer from the effects of an attack against a proper military object due to their proximity to it and when their presence shields the latter from attacks.[2145] It also states that combatants must position their weapons in the field in order to avoid the use of the civilian population as a shield.[2146]

2279. Switzerland's Basic Military Manual states that "no civilian person can be used to shield, by its presence, certain places or regions from military operations".[2147]

2280. The UK Military Manual provides that "it is forbidden to use the presence of protected persons to render certain points or areas immune from military operations". It also states that:

> In the past prominent inhabitants were placed on engines of trains running on the lines of communication in occupied territories to ensure the safety of the trains. Such a measure exposed innocent inhabitants to the illegitimate acts of train wrecking by private enemy individuals, and also to the lawful operations of raiding parties of the armed forces of the belligerent. It now comes within the prohibition of the [GC IV].[2148]

2281. The UK LOAC Manual states that civilians "may not be used to shield military operations".[2149]

2282. According to the US Air Force Commander's Handbook, "civilians should never be deliberately used to shield military operations or to protect objectives from attack".[2150]

2283. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . using an enemy prisoner of war as point man on patrol".[2151]

2284. The US Naval Handbook prohibits the "deliberate use of non combatants to shield military objectives from enemy attacks".[2152]

National Legislation

2285. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "using protected persons as shields", in international armed conflicts.[2153]

2286. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international

[2145] Spain, *LOAC Manual* (1996), Vol. I, § 4.4.e.
[2146] Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(1).
[2147] Switzerland, *Basic Military Manual* (1987), Article 151(1).
[2148] UK, *Military Manual* (1958), §§ 548 and 651.
[2149] UK, *LOAC Manual* (1981), Annex A, p. 48, § 20.
[2150] US, *Air Force Commander's Handbook* (1980), § 3-1(4).
[2151] US, *Instructor's Guide* (1985), p. 13.
[2152] US, *Naval Handbook* (1995), § 11-2.
[2153] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.65.

armed conflicts, using prisoners of war "as a shield in the hostilities" is prohibited.[2154]

2287. Azerbaijan's Criminal Code provides that using protected persons "for the protection of one's own Armed Forces or military objectives from military actions" is a violation of the laws and customs of war.[2155]

2288. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2156]

2289. The Criminal Code of Belarus provides that using persons who have laid down their arms or who are defenceless, the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone or other persons enjoying international protection as a cover for one's own troops and objects against the effects of hostilities is a violation of the laws and customs of war.[2157]

2290. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "using the presence of a civilian person or any other protected person to prevent certain points, zones or military forces from being military targets" is a war crime in both international and non-international armed conflicts.[2158]

2291. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[2159]

2292. Under the DRC Code of Military Justice as amended, the use of prisoners of war or of civilians as a method of protection is an offence.[2160]

2293. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[2161]

2294. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict, "uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets".[2162]

2295. Under Georgia's Criminal Code, the "use of civilians to cover the troops or objects from the hostilities" is a crime.[2163]

[2154] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 21(3).
[2155] Azerbaijan, *Criminal Code* (1999), Article 115.2.
[2156] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2157] Belarus, *Criminal Code* (1999), Article 135(2).
[2158] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(v).
[2159] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[2160] DRC, *Code of Military Justice as amended* (1972), Article 524.
[2161] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[2162] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(4).
[2163] Georgia, *Criminal Code* (1999), Article 413(b).

2296. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 19 GC I, 23 GC III and 28 GC IV, and of AP I, including violations of Articles 12(4) and 51(7) AP I, are punishable offences.[2164]

2297. Under Lithuania's Criminal Code as amended, the "use of civilians or prisoners of war as a living shield in military operations" is an offence.[2165]

2298. Mali's Penal Code provides that "using the presence of a civilian person or other protected person in order to avoid that certain zones, points or military forces become a target for military operations" constitutes a war crime in international armed conflicts.[2166]

2299. Under the International Crimes Act of the Netherlands, "utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" is a crime when committed in an international armed conflict.[2167]

2300. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxiii) of the 1998 ICC Statute.[2168]

2301. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[2169]

2302. Under Peru's Code of Military Justice, the "use of prisoners of war as . . . human shields" constitutes a violation of the law of nations.[2170]

2303. Poland's Penal Code provides for the punishment of any person who, in violation of international law, uses persons *hors de combat*, protected persons and persons enjoying international protection to "shield with their presence an area or an object or his own troops from attack".[2171]

2304. Tajikistan's Criminal Code punishes the "use of [protected persons] to cover the troops or objects from hostilities".[2172]

2305. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiii) of the 1998 ICC Statute.[2173]

2306. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiii) of the 1998 ICC Statute.[2174]

[2164] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[2165] Lithuania, *Criminal Code as amended* (1961), Article 338.
[2166] Mali, *Penal Code* (2001), Article 31(i)(23).
[2167] Netherlands, *International Crimes Act* (2003), Article 5(5)(k).
[2168] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[2169] Norway, *Military Penal Code as amended* (1902), § 108.
[2170] Peru, *Code of Military Justice* (1980), Article 95(1).
[2171] Poland, *Penal Code* (1997), Article 123(2).
[2172] Tajikistan, *Criminal Code* (1998), Article 405.
[2173] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[2174] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

2307. Under Yemen's Military Criminal Code, the "use of civilians as human shields during war operations" constitutes a war crime.[2175]

National Case-law

2308. In its judgement in the *Student case* in 1946, the UK Military Court at Lüneberg found the accused guilty of using six British prisoners of war as a screen for the advance of German troops, which resulted in the deaths of some of the prisoners.[2176]

2309. In its judgement in the *Von Leeb case (The German High Command Trial)* in 1948, the US Military Tribunal at Nuremberg held that "to use prisoners of war as a shield for the troops is contrary to international law".[2177]

Other National Practice

2310. In 1996, during a debate in the UN Security Council on the situation in Liberia, the representative of Chile said that he especially regretted the "unfortunate recurrence, in a United Nations peacekeeping operation, of the use of human shields, as a result of the fighting in Tubmanburg and Kle".[2178]

2311. The Report on the Practice of Croatia refers to a communiqué of the Ministry of Defence in 1995 which stated that the Croatian authorities had taken into custody and prosecuted the commander of a small Croatian military unit because of his alleged use of seven Danish UN peacekeepers as human shields during the August 1995 military operations.[2179]

2312. In a communiqué issued in August 1990, El Salvador vigorously condemned Iraq's actions on the basis of IHL, in particular Iraq's violation of the rule prohibiting the taking and use of hostages and the denial of an individual's basic rights to liberty and freedom of transit.[2180]

2313. The Report on the Practice of France refers to various statements in which the French President, Prime Minister and Minister of Foreign Affairs have condemned the use of civilians, prisoners of war and members of peacekeeping operations as human shields.[2181]

[2175] Yemen, *Military Criminal Code* (1998), Article 21(4).
[2176] UK, Military Court at Lüneberg, *In re Student*, Judgement, 10 May 1946.
[2177] US, Military Tribunal at Nuremberg, *Von Leeb case (The German High Command Trial)*, Judgement, 28 October 1948.
[2178] Chile, Statement before the UN Security Council, UN Doc. S/PV.3621, 25 January 1996, p. 18.
[2179] Report on the Practice of Croatia, 1997, Chapter 1.7, referring to Communiqué of the Ministry of Defence, 10 August 1995.
[2180] El Salvador, Communiqué concerning the situation between Iraq and Kuwait, annexed to Letter dated 30 August 1990 to the UN Secretary-General, UN Doc. S/21708, 5 September 1990.
[2181] Report on the Practice of France, 1999, Chapter 1.7, referring to Message of the President to parliament, 27 August 1990, *Politique étrangère de la France*, August 1990, p. 105, Communiqué of the Ministry of Foreign Affairs, 21 January 1991, *Annuaire français de droit international*, Vol. 37, 1991, p. 1019, *Politique étrangère de la France*, 21 August 1990, p. 91, Prime Minister, Answer to questions in parliament regarding Bosnia and Herzegovina, 31 May 1995, *Politique étrangère de la France*, May 1995, pp. 81–82, Minister of Foreign Affairs, Declaration before

2314. In an address to parliament in 1990, the German Minister of Foreign Affairs stated with respect to EU nationals detained in Kuwait and Iraq that "it is particularly abominable that they will be placed around military defence objects" and that such practice constituted a "breach of international law and rules governing civilised behaviour".[2182]

2315. The Report on the Practice of Iran notes that no instances were found in which the civilian population or objects were used as human shields by the Iranian authorities.[2183]

2316. According to the Report on the Practice of Israel, the IDF strictly prohibits the use of civilians to render certain points, areas or personnel immune from military operations. The report expresses regret that Israel's opponents do not always respect this obligation.[2184]

2317. In January 1991, in a letter to the President of the UN Security Council, Italy warned Iraq in the strongest terms against carrying out its alleged intention to move POWs to strategic sites and recalled Article 23 GC III.[2185]

2318. According to the Report on the Practice of Jordan, Jordan has never used civilians as shields to protect areas or installations from enemy attacks.[2186]

2319. In January 1991, in a letter to the President of the UN Security Council, Kuwait denounced Iraq's announcement that prisoners of war were to be sent to various economic and scientific installations to serve as human shields. The letter stated that such inhuman practices were in violation of GC III and GC IV.[2187]

2320. The Report on the Practice of Kuwait notes that the use of human shields by Iraq to protect certain strategic sites was condemned by Kuwait.[2188]

2321. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia states that during the communist insurgency, civilians were never used as human shields.[2189]

2322. According to the records published by the Directorate of Legal Services of the Nigerian army, cited in the Report on the Practice of Nigeria, Nigerian practice does not allow the use of human shields.[2190]

parliament, 6 June 1995, *Politique étrangère de la France*, June 1995, p. 99 and Minister of Foreign Affairs, Declaration before the Senate, 7 June 1995, *Politique étrangère de la France*, June 1995, p. 106.

2182 Germany, Statement of the Minister of Foreign Affairs, 23 August 1990, *Bulletin*, No. 102, Presse- und Informationsamt der Bundesregierung, Bonn, 25 August 1990, p. 858.

2183 Report on the Practice of Iran, 1997, Chapter 1.7.

2184 Report on the Practice of Israel, 1997, Chapter 1.7.

2185 Italy, Letter dated 23 January 1991 to the President of the UN Security Council, UN Doc. S/22137, 23 January 1991.

2186 Report on the Practice of Jordan, 1997, Chapter 1.7.

2187 Kuwait, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22128, 22 January 1991.

2188 Report on the Practice of Kuwait, 1997, Chapter 1.7.

2189 Report on the Practice of Malaysia, 1997, Interviews with members of the armed forces, Chapter 1.7.

2190 Report on the Practice of Nigeria, 1997, Chapter 1.7, referring to Records of the Directorate of Legal Services of the Nigerian army.

2323. The Report on the Practice of Rwanda includes several examples of the use of civilians as human shields by combatants of the former government during the hostilities in Kigali in 1994. On the basis of a statement of the Rwandan Minister of Justice at the 53rd Session of the UN Commission on Human Rights condemning the use of the civilian population as human shields during hostilities, the report considers that it is the *opinio juris* of Rwanda that the use of human shields in combat is prohibited.[2191]

2324. In a statement in 1992, the President of Senegal said that "Iraq has . . . used prisoners of war as human shields, in violation of the Geneva Convention on the treatment of prisoners of war. Deeply shocked and angered, the Government of Senegal has condemned this inhumane policy which runs counter to law."[2192]

2325. The Report on the Practice of Spain cites several occasions in 1990 and 1991 when the Spanish government condemned Iraq for its use of human shields.[2193]

2326. In a statement in February 1996, the Ministry of Foreign Affairs of Tajikistan denounced the opposition's use of prisoners as human shields. According to the statement, opposition forces hid behind a "living shield" of members of government forces, compelling the command of the armed forces of Tajikistan to abandon positions in order to avoid unjustified loss of life among military personnel. Such practice was qualified as a flagrant violation of the Geneva Conventions.[2194]

2327. Speaking in an emergency debate in the House of Commons at the time of the Gulf crisis in 1990, the UK Prime Minister declared that "every norm of law, of diplomatic convention and of civilised behaviour has been offended by the way in which those citizens have been rounded up . . . and used as a human shield".[2195]

2328. In an emergency debate in the House of Lords at the time of the Gulf crisis in 1990, the UK Minister of State, FCO, declared that he was shocked by the Iraqi government's decision to use human shields, such practice being "abhorrent and a further breach of humanitarian law".[2196]

[2191] Report on the Practice of Rwanda, 1997, Chapter 1.7.
[2192] Senegal, Statement by the President, annexed to Letter dated 29 January 1991 to the UN Secretary-General, UN Doc. S/22181, 31 January 1991, §§ 5–6.
[2193] Report on the Practice of Spain, 1998, Chapter 1.7, referring to Statement by the Minister of Foreign Affairs before Congress, 28 August 1990 and Press Conference by the Prime Minister on the Gulf War, 15 February 1991, Interview with the Minister of Foreign Affairs in a magazine, January/February 1991.
[2194] Tajikistan, Statement of the Ministry of Foreign Affairs, annexed to Letter dated 9 January 1996 to the UN Secretary-General, UN Doc. S/1996/95, 8 February 1996.
[2195] UK, House of Commons, Statement by the Prime Minister, *Hansard*, 6 September 1990, Vol. 177, col. 739.
[2196] UK, House of Lords, Statement by the Minister of State, FCO, *Hansard*, 6 September 1990, Vol. 521, col. 1798.

2329. In 1990, during a debate in the UN Security Council, the UK described Iraq's illegal practices of using human shields as "acts which outrage international law and international opinion".[2197]

2330. In January 1991, in a letter to the President of the UN Security Council, the UK recalled Article 13 GC III and declared that "there had also been news agency reports that the Iraqi authorities were considering sending captured POWs to strategic sites in Iraq. This would be a serious breach of Iraq's obligations under the Conventions." It added that "scrupulous compliance with the Convention was expected in respect to all British prisoners of war including British servicemen".[2198]

2331. On 21 January 1991, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq's obligations under international law in the context of the Gulf War. After the meeting, the spokesperson for the Foreign and Commonwealth Office, stated that the Minister:

> had raised press reports concerning the detention of POWs at strategic sites [and] had made it clear that if Iraq did this it would be an outrageous breach of the Geneva Conventions. The British Government would take the gravest view of any such breach. He also reminded the Iraqi Ambassador of the personal liability of those individuals who broke the Convention in this way.[2199]

2332. In 1991, during a debate in the House of Commons on the subject of the Gulf War, the UK Prime Minister stated that:

> There has been a reported threat to use captured airmen as human shields. Such action would be inhuman, illegal and totally contrary to the third Geneva convention. The convention expressly . . . prohibits the sending of a prisoner of war to an area where he may be exposed to fire, or his detention there, and forbids the use of the presence of prisoners of war to render points or areas immune from military operations. There is no doubt about Iraq's obligations under the Geneva convention.[2200]

2333. In 1950 and 1966, during the Korean and Vietnam wars respectively, the US protested against the use of civilians as human shields.[2201]

2334. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we also support the principle that the civilian population not be used to shield military objectives or operations from attack".[2202]

[2197] UK, Statement before the UN Security Council, UN Doc. S/PV.2937, 18 August 1990, p. 21.
[2198] UK, Letter to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991.
[2199] UK, Statement by FCO spokesperson, 21 January 1991, *BYIL*, Vol. 62, 1991, p. 680.
[2200] UK, House of Commons, Statement by the Prime Minister, *Hansard*, 21 January 1991, Vol. 184, col. 27.
[2201] US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, pp. 139–141; Statement by the Secretary of Defence, Robert McNamara, 2 February 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, pp. 426–428.
[2202] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International

2335. In 1990, during a debate in the UN Security Council concerning the crisis in the Gulf, the US stated that "it is contrary to international law and to all the norms of Arab hospitality to use guests as military shields".[2203]

2336. In 1991, in response to an ICRC Memorandum on the Applicability of IHL in the Gulf Region, the US emphasised the duty of a force which has control over a civilian population to ensure it is located in a safe place. It also stated that "in no case may a combatant force utilize individual civilians or the civilian population to shield a military objective from attack".[2204]

2337. In 1991, in a letter to the President of the UN Security Council concerning operations in the Gulf War, the US protested against "the announcement of the intention of the Government of Iraq ... to use [prisoners of war] as human shields in flagrant violation of the Third Geneva Convention of 1949".[2205]

2338. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that:

> Baghdad radio has reported that the Government of Iraq intends to locate United States and other coalition POWs in Iraq at likely strategic targets of coalition forces. The United States strongly protests the Government of Iraq's threat to so endanger POWs.
> ...
> If the Government of Iraq places coalition POWs at military targets in Iraq, then the Government of Iraq will be in violation of the Third Geneva Convention, and Iraqi officials ... will have committed a serious war crime.[2206]

2339. In January 1991, in a letter to the President of the UN Security Council, the US stated that "Baghdad radio has subsequently reported that the Government of Iraq intends to locate United States and other coalition POWs at strategic sites that may be subject to attack. This is a violation of the Geneva Conventions."[2207]

2340. In January 1991, in a letter to the President of the UN Security Council, the US stated that "Iraqi authorities ... have reportedly used United States and other allied POWs as 'human shields' in direct violation of the Third Geneva Convention ... Such treatment is outrageous and Iraq must understand that such actions constitute war crimes."[2208]

Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

[2203] US, Statement before the UN Security Council, UN Doc. S/PV.2937, 18 August 1990, p. 12.

[2204] US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, Report on US Practice, 1997, Chapter 1.4.

[2205] US, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991.

[2206] US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/2213022, January 1991, p. 4.

[2207] US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 2.

[2208] US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 2.

2341. In January 1991, in a letter to the President of the UN Security Council, the US denounced Iraq's disregard for the norms of the Geneva Conventions, including the deliberate exposure of prisoners of war to the dangers of combat.[2209]
2342. In March 1991, in a letter to the President of the UN Security Council, the US listed some of the practices by which the Iraqi government put civilians at risk by "moving significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets".[2210]
2343. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "US and other hostages in Iraq, including civilians forcibly deported from Kuwait, were placed in or around military targets as 'human shields', in violation of Articles 28 and 38(4) [GC IV]".[2211] It further noted some specific Iraqi war crimes including "using POWs as a shield to render certain points immune from military operations, in violation of Article 23 GPW".[2212]
2344. In 1993, in its report on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "in conflicts such as the Korean and Vietnam War, as well as the 1991 Persian Gulf War, the armed forces of the United States have faced opponents who have elected to use their civilian populations and civilian objects to shield military objectives from attack".[2213]
2345. In 2000, the US Ambassador at Large for War Crimes Issues stated that:

> Articles 51 and 58 of Protocol I quite properly articulate the principle that a party on the defensive cannot intentionally use civilian noncombatants or civilian property to shield military targets. In one sense, this is simply a refinement of the protected status that civilians and their property enjoy under the laws of armed conflict. The law has now been clear that the failure of one party to abide by the full range of the law of armed conflict does not relieve the other party of its legal obligations.[2214]

2346. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY included the following example: "During the attack on the tanks of YPA in the Rozna Dolina, the Slovenian troops had

[2209] US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991.
[2210] US, Letter dated 5 March 1991 to the President of the UN Security Council, UN Doc. S/22341, 8 March 1991.
[2211] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 10 April 1992, pp. 618 and 634.
[2212] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 10 April 1992, p. 635.
[2213] US, Department of Defense, Report to Congress on International Policies and Procedures regarding the Protection of Natural and Cultural Resources during Times of War, 19 January 1993, p. 203.
[2214] US, David J. Scheffer, Ambassador at Large for War Crimes Issues, Address to I Corps Soldiers and Commanders Fort Lewis entitled "Ambassadors for Freedom", Washington, 4 May 2000, pp. 5–6.

brought in front of their units women and children, expecting quite rightly that YPA soldiers would not open fire on them".[2215]

III. Practice of International Organisations and Conferences

United Nations

2347. In a resolution adopted in 1992, the UN Commission on Human Rights condemned the use of human shields by Iraq as an extremely serious violation of international law.[2216]

2348. In a resolution adopted in 1995, the UN Commission on Human Rights vigorously condemned the use of civilians as human shields on the front line in the conflict in the former Yugoslavia.[2217]

2349. In 1996, the UN Secretary-General reported that during the conflict in Liberia, UNOMIL was charged with carrying out investigations of major violations of human rights. In this context, UNOMIL confirmed that, during fighting in Tubmanburg on 30 December 1995, ULIMO-J fighters forced civilians out of the government hospital, where they had taken refuge, and used them as human shields to protect their position in the town. In addition, fighters generally prevented civilians from fleeing the town.[2218]

2350. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General referred to accounts of atrocities compiled by the human rights adviser (to the UN Secretary-General's Special Representative for Sierra Leone) and stated, *inter alia*, that "elements of the former junta . . . have used civilians as human shields in their military operations".[2219]

2351. The report pursuant to paragraph 5 of UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN forces in Somalia noted that:

> No principle is more central to the humanitarian law of war than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.

The report went on to say that central principles such as this one were clearly a part of contemporary customary international law and were applicable as soon as "political ends are sought through military means".[2220]

[2215] SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(iv).
[2216] UN Commission on Human Rights, Res. 1992/71, 5 March 1992, § 2(d).
[2217] UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 3.
[2218] UN Secretary-General, Fifteenth progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 24.
[2219] UN Secretary-General, First progress report on the UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 33 and 36.
[2220] Report pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia conducted on behalf of the UN Security Council, UN Doc. S/26351, 24 August 1993, Annex, §§ 8–9.

2352. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights described how civilian detainees were used as human shields to protect the army's advance. According to the report, these civilian detainees were arrested and drafted into the army and forced to dig shelters on the front line. On 14 August 1993, the Special Rapporteur wrote to the government to express his abhorrence of this practice. The Special Rapporteur also reported that the Bosnian Serbs used civilian detainees as human shields, forcing them to stand as a "living wall" on the front.[2221]

Other International Organisations

2353. In a resolution adopted in 1991 in the context of the Gulf War, the Parliamentary Assembly of the Council of Europe warned Iraq against the criminal use of prisoners of war as human shields in strategic sites, flagrantly violating GC III.[2222]

2354. In a resolution adopted in 1993 on the situation of women and children in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe urged governments of the member and non-member States grouped together in the Council of Europe "to undertake to protect children from the scourge of war and to condemn the barbaric practice in recent armed conflicts of using women and children as . . . human shields".[2223]

2355. In 1993, in a report on the situation of refugees and displaced persons in the former Yugoslavia, the Rapporteur of the Parliamentary Assembly of the Council of Europe considered "prisoners being ferried to the front line, for example for use as a human shield" as a war crime.[2224]

2356. In a declaration issued in August 1990, the 12 EC member States stated that the use of civilians as human shields was "particularly heinous as well as taken in contempt of the law of basic humanitarian principles".[2225]

2357. In 1990, during a debate in the Third Committee of the UN General Assembly, Italy stated on behalf of the EC that Iraq's "decision to use certain foreign nationals as a human shield was illegal and morally repugnant".[2226]

2358. In 1991, in a statement on the situation of the POWs detained by Iraq, the EC and its member States expressed:

[2221] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 36, 37, 39 and 84.

[2222] Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 5.

[2223] Council of Europe, Parliamentary Assembly, Res. 1011, 28 September 1993, § 7(iii).

[2224] Council of Europe, Parliamentary Assembly, Report on the situation of refugees and displaced persons in the former Yugoslavia, Doc. 6740, 19 January 1993, p. 19.

[2225] EC, Declaration on the situation of foreigners in Iraq and Kuwait, Paris, 21 August 1990, annexed to Letter dated 22 August 1990 from Italy to the UN Secretary-General, UN Doc. A/45/433-S/21590, 22 August 1990, § 2.

[2226] EC, Statement by Italy on behalf of the EC before the Third Committee of the UN General Assembly, UN Doc. A/C.3/45/SR.3, 8 October 1990, § 42.

their deep concern at the unscrupulous use of prisoners of war and at the intention announced by Iraq to concentrate them near military bases and targets. They consider these actions particularly odious because they are contrary to elementary respect for international law and humanitarian principles. They condemn these actions unreservedly.[2227]

2359. In a declaration on the Gulf crisis adopted in November 1990, the European Council denounced "the practice of holding foreign nationals as hostages and keeping some of them in strategic sites".[2228]

2360. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council urged "the Iraqi authorities to meet their established international obligations towards third-country nationals by providing them with appropriate protection, ensuring the safety of their lives and property and safeguarding them from the dangers of exposure to military operations".[2229]

2361. In a resolution adopted in August 1990, the Council of the League of Arab States urged the Iraqi authorities to preserve foreign civilians from the dangers of exposure to military operations.[2230]

2362. In a declaration on the Iraq–Kuwait conflict issued in 1990, the Nordic Foreign Ministers considered the relocation of foreign nationals in the vicinity of potential military targets as "a gross violation of international law and elementary humanitarian considerations". The declaration added that "such conduct displays such deep contempt for fundamental humanitarian principles and obligations under international law that it has aroused the abhorrence of the entire world".[2231]

International Conferences

2363. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 stated that the participants refused to accept that "civilian populations should become more and more frequently the principal victims of hostilities and acts of violence perpetrated in the course of armed conflicts, for example where they are . . . used as human shields".[2232]

[2227] EC, Statement on the situation of prisoners of war, annexed to Letter dated 23 January 1991 from Luxembourg to the UN Secretary-General, UN Doc. A/45/940-S/22140, 23 January 1991, p. 2.

[2228] EC, Declaration on the Gulf crisis, annexed to Letter dated 30 October 1990 from Italy to the UN Secretary-General, UN Doc. A/45/700-S/21920, 1 November 1990, § 3.

[2229] GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 4.

[2230] League of Arab States, Council, Res. 5039, The detention by Iraq of nationals of third countries, 31 August 1990, § 2.

[2231] Nordic Foreign Ministers, Declaration on the Iraq–Kuwait conflict, Molde, 12 September 1990, annexed to Letter dated 12 September 1990 from Norway to the UN Secretary-General, UN Doc. S/21751, 13 September 1990, § 6.

[2232] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I (3), *ILM*, Vol. 33, 1994, p. 298.

IV. Practice of International Judicial and Quasi-judicial Bodies

2364. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with grave breaches and violations of the laws and customs of war for having seized UN peacekeepers in the Pale area, having selected some of these hostages to use as "human shields" and having physically secured or otherwise held the peacekeepers against their will at potential NATO air targets, including ammunition bunkers, a radar site and a nearby communications centre in order to render these locations immune from further NATO air strikes.[2233] In its review of the indictment in 1996, the ICTY Trial Chamber upheld the charges and stated that these acts could "be characterised as war crimes (taking UNPROFOR soldiers as hostages and using them as human shields)". The Trial Chamber noted that civilians were used as human shields against other troops.[2234]

2365. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that "the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures".[2235]

2366. In its judgement in *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* in 1999, the ACiHPR stated that:

> The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the [ACHPR].[2236]

2367. In its judgement in *Demiray v. Turkey* in 2000, the ECtHR stated that:

> The text of Article 2 [of the 1950 ECHR], read as a whole, demonstrates that it covers not only intentional killing, but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual for whom they are responsible.[2237]

[2233] ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, Counts 15–16.
[2234] ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 13 and 89.
[2235] HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, § 5.
[2236] ACiHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Judgement, 2 October 1995, § 22.
[2237] ECtHR, *Demiray v. Turkey*, Judgement, 21 November 2000, § 41.

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

2368. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia not "to misuse civilians for military operations".[2238]
2369. In 1996, in a note on respect for IHL in an internal armed conflict, the ICRC stated that "the ICRC was informed on ... instances in which civilians, including women and children, were compelled to walk in front of the troops along the railway track in order to protect the soldiers from the mines possibly laid there" and that civilians "were summoned and compelled to spend the night around [a] military camp as a shield against possible ... attacks". After receiving a protest from the ICRC, the authorities issued instructions to immediately cease such practices.[2239]

VI. Other Practice

2370. No practice was found.

K. Enforced Disappearance

Note: *For practice concerning the right of the families to know the fate of their relatives, see Chapter 36.*

General

I. Treaties and Other Instruments

Treaties
2371. The preamble to the 1994 Inter-American Convention on the Forced Disappearance of Persons states that the "forced disappearance of persons is an affront to the conscience of the Hemisphere and a grave and abominable offence against the inherent dignity of the human being". The Convention also states that "forced disappearance of persons violates numerous non-derogable and essential human rights" and reaffirms that the systematic practice of disappearance "constitutes a crime against humanity". The field of application of the Convention does not include armed conflicts of an international character that are governed by the Geneva Conventions and AP I.
2372. Article 7(1)(i) of the 1998 ICC Statute provides that "enforced disappearance of persons" constitutes a crime against humanity.
2373. Article 7(2)(i) of the 1998 ICC Statute defines enforced disappearance as:

> the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or

[2238] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.
[2239] ICRC archive document.

whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

2374. The preamble to the 1998 Draft Convention on Forced Disappearance states that "any act of forced disappearance of a person constitutes a violation of the rules of international law guaranteeing the right to recognition as a person before the law, the right to liberty and security of the person".

2375. Article 1 of the 1998 Draft Convention on Forced Disappearance provides that:

> For the purposes of this Convention, forced disappearance is considered to be the deprivation of a person's liberty, in whatever form or for whatever reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person.

2376. Article 2(1) of the 1998 Draft Convention on Forced Disappearance provides that "the perpetrator of and other participants in the offence of forced disappearance or of any constituent elements of the offence, as defined in Article 1 of this Convention, shall be punished".

2377. Article 3(1) of the 1998 Draft Convention on Forced Disappearance states that "the systematic or massive practice of forced disappearance constitutes a crime against humanity".

2378. Article 4(1)(a) of the 1998 Draft Convention on Forced Disappearance provides for the obligation of States parties "not to practise, permit or tolerate forced disappearance".

Other Instruments

2379. Article 1 of the 1992 UN Declaration on Enforced Disappearance states that:

> 1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the UN and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration on Human Rights and reaffirmed and developed in international instruments in this field.
> 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

2380. Under Section III(2) of the 1994 Comprehensive Agreement on Human Rights in Guatemala, the government of Guatemala undertook to modify the Penal Code so that "enforced or involuntary disappearances . . . may be characterized as crimes of particular gravity and punished as such".

2381. Under Article 18(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "forced disappearance of persons" is a crime against humanity.
2382. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right to life, especially against involuntary disappearances.
2383. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including crimes against humanity. According to Section 5(1)(i), "enforced disappearance of persons" constitutes a crime against humanity.
2384. Section 6(2)(i) of the 2000 UNTAET Regulation No. 2000/15 defines enforced disappearance as:

> the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

II. National Practice

Military Manuals

2385. Colombia's Basic Military Manual provides that "it is prohibited to deprive [the civilian population] of its liberty (sequestration, enforced disappearances)".[2240]
2386. El Salvador's Human Rights Charter of the Armed Forces provides that "detention-disappearance" is a violation of human rights.[2241]
2387. Indonesia's Directive on Human Rights in Irian Jaya and Maluku instructs soldiers: "Do not be involved in or permit the disappearance of people".[2242]
2388. According to Peru's Human Rights Charter of the Security Forces, causing the disappearance of a detainee is one of the gravest violations of human rights.[2243]

National Legislation

2389. Under Armenia's Penal Code, "kidnapping followed by disappearance" constitutes a crime against humanity.[2244]

[2240] Colombia, *Basic Military Manual* (1995), p. 30.
[2241] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 18.
[2242] Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 8.
[2243] Peru, *Human Rights Charter of the Security Forces* (1991), p. 19.
[2244] Armenia, *Penal Code* (2003), Article 392.

2390. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including "enforced disappearances of persons".[2245]
2391. Azerbaijan's Criminal Code, in a provision entitled "Enforced disappearance of persons" provides for the punishment of "the arrest, detention or abduction of persons with the authorization, support or acquiescence of a State or a political organization, followed by a refusal to acknowledge that deprivation of liberty or to give information on the fate or whereabouts of those persons".[2246]
2392. The Criminal Code of Belarus provides that the abduction followed by the disappearance of individuals is a crime against the security of mankind.[2247]
2393. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that enforced disappearance of persons is a crime against humanity.[2248]
2394. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[2249]
2395. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "enforced disappearances", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, are crimes against humanity.[2250]
2396. El Salvador's Penal Code provides for the punishment of the crime of enforced disappearance.[2251]
2397. Under France's Penal Code, abduction of persons followed by their disappearance is a crime against humanity.[2252]
2398. Germany's Law Introducing the International Crimes Code, under the heading "Crimes against humanity", punishes anyone who:

causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,

(a) by abducting that person on behalf of or with the approval of a State or political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure to give immediately truthful information, upon inquiry, of that person's fate and whereabouts, or
(b) by refusing, on behalf of a State or political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts

[2245] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.21.
[2246] Azerbaijan, *Criminal Code* (1999), Article 110.
[2247] Belarus, *Criminal Code* (1999), Article 128.
[2248] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(i).
[2249] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[2250] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
[2251] El Salvador, *Penal Code* (1997), Article 364.
[2252] France, *Penal Code* (1994), Article 212(1).

of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon.[2253]

2399. Under Mali's Penal Code, "enforced disappearance" is a crime against humanity.[2254]

2400. Under the International Crimes Act of the Netherlands, "enforced disappearance of persons" is a crime against humanity, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[2255] Enforced disappearance is defined as:

the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.[2256]

2401. According to Niger's Penal Code as amended, "abduction of persons followed by their disappearance" is a crime against humanity.[2257]

2402. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crimes defined in Article 7(1)(i) and (2)(i) of the 1998 ICC Statute.[2258]

2403. Nicaragua's Draft Penal Code punishes the carrying out or allowing of enforced disappearances of protected persons when committed by public agents, officials or private individuals.[2259]

2404. Paraguay's Penal Code provides for the punishment of the crime of enforced disappearance.[2260]

2405. Peru's Penal Code punishes the carrying out of acts of enforced disappearance perpetrated by government agents.[2261]

2406. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(i) and (2)(i) of the 1998 ICC Statute.[2262]

2407. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(i) and (2)(i) of the 1998 ICC Statute.[2263]

[2253] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 7(1)(7).
[2254] Mali, *Penal Code* (2001), Article 29(i).
[2255] Netherlands, *International Crimes Act* (2003), Article 4(1)(i).
[2256] Netherlands, *International Crimes Act* (2003), Article 4(2)(d).
[2257] Niger, *Penal Code as amended* (1961), Article 208.2.
[2258] New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).
[2259] Nicaragua, *Draft Penal Code* (1999), Articles 457–457.
[2260] Paraguay, *Penal Code* (1997), Article 236.
[2261] Peru, *Penal Code* (1988), Article 320.
[2262] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[2263] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

National Case-law

2408. No practice was found.

Other National Practice

2409. In September 1984, Argentina's National Commission concerning Missing Persons (CONADEP) released a report containing individual chapters for different categories of victims, including disappeared children.[2264]

2410. In 1995, during a debate in the UN Security Council on violations of IHL and human rights in the former Yugoslavia, Botswana noted that numerous specific instances of disappearances had been documented and that this confirmed beyond any doubt that massive violations of IHL and human rights had taken place.[2265]

2411. On 7 January 2001, the Chilean President announced that a special Chilean panel investigating crimes committed during the military regime of General Augusto Pinochet had established the fate of about 180 prisoners who went missing between 1973 and 1990. The President said that the fate of more than 600 other prisoners who disappeared without a trace remained unknown. The data was provided by the Civilian-Military Roundtable, an investigative panel created in 1999, which included representatives of the armed forces, police and various churches. The information was handed over to the Supreme Court to enable it to investigate the disappearances and take legal action.[2266]

2412. In 1995, during a debate in the UN Security Council on violations of IHL and human rights in the former Yugoslavia, Honduras expressed grave concern at the overwhelming evidence of a consistent pattern of large-scale disappearances.[2267]

2413. In 1995, during a debate in the UN Security Council on violations of IHL and human rights in the former Yugoslavia, Indonesia described the contents of the UN Secretary-General's report on the situation as "some of the most heinous acts committed against humanity since World War II" and made specific reference to large-scale disappearances.[2268]

2414. In 1994, the President of Sri Lanka established a Commission of Inquiry into Involuntary Removal or Disappearances of Persons in certain provinces since 1 January 1988. The Commission was charged with inquiring and reporting on whether any such removals or disappearances had actually occurred; whether there existed any credible material indicating who was responsible

[2264] Argentina, Report of the National Commission concerning Missing Persons (CONADEP), 20 September 1984, reprinted in Argentina: The Truth about the Disappeared, *Review of the International Commission of Jurists*, Vol. 33, 1984, p. 4.

[2265] Botswana, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 9.

[2266] AFP, Chile: Special panel establishes the fate of 180 missing, 8 January 2001.

[2267] Honduras, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 10.

[2268] Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 12.

and identifying the legal proceedings that could be taken against the persons held to be responsible; the measures necessary to prevent repetition of occurrences; and the relief that should be afforded to the families of those removed or disappeared.[2269]

III. Practice of International Organisations and Conferences

United Nations

2415. In a resolution adopted in 1995 on violations of IHL and human rights in the former Yugoslavia, the UN Security Council condemned "in particular in the strongest possible terms the violations of international humanitarian law and of human rights ... as described in the [Secretary-General's report] ... and showing a consistent pattern of ... large-scale disappearances".[2270]

2416. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly expressed "its outrage at the instances of massive and systematic violations of human rights and humanitarian law, including ... disappearances".[2271]

2417. In a resolution on Sudan adopted in 2000, the UN General Assembly expressed its deep concern at continuing serious violations of human rights and IHL by all parties, in particular the occurrence of cases of forced and involuntary disappearance.[2272]

2418. In a resolution adopted in 1979, ECOSOC asked the UN Commission on Human Rights to consider the question of disappeared persons as a matter of priority with a view to making appropriate recommendations. It also asked the UN Sub-Commission on Human Rights to consider communications on disappeared persons.[2273]

2419. In a resolution adopted in 1994 on the question of enforced disappearances, the UN Commission on Human Rights stated that "all acts of enforced disappearances are offences punishable by appropriate penalties which take into account their extreme seriousness under criminal law ... [and that] perpetrators should be prosecuted". The resolution also noted that the Working Group on Enforced or Involuntary Disappearances considered the Vienna Declaration adopted by the World Conference on Human Rights in 1993 to be an encouraging development "especially in so far as it recognizes that the systematic practice of such acts is of the nature of a crime against humanity".[2274]

[2269] Sri Lanka, Executive order of the President of Sri Lanka on the Establishment of a Commission of Inquiry into Involuntary Removal or Disappearances of Persons in Western, Southern and Sabaragamuwa Provinces, Doc. No. SP/6/N/192/94, 30 November 1994.
[2270] UN Security Council, Res. 1034, 21 December 1995, § 2.
[2271] UN General Assembly, Res. 50/193, 22 December 1995, § 4.
[2272] UN General Assembly, Res. 55/116, 4 December 2000, § 2(ii).
[2273] ECOSOC, Res. 1979/38, 10 May 1979, § 3.
[2274] UN Commission on Human Rights, Res. 1994/39, 4 March 1994, preamble and §§ 6 and 15.

2420. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights demanded "immediate, firm and resolute action by the international community to stop all human rights violations, including . . . enforced and involuntary disappearances".[2275]
2421. In a resolution adopted in 1996, the UN Commission on Human Rights condemned all violations of human rights and IHL during the conflict in the former Yugoslavia, in particular massive and systematic violations, including disappearances, and reaffirmed that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable".[2276]
2422. In a resolution adopted in 2001 on the question of enforced or involuntary disappearances, the UN Commission on Human Rights expressed its deep concern at "the increase in enforced or involuntary disappearances in various regions of the world and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared". The Commission also welcomed "the fact that acts of enforced disappearance, as defined in the Rome Statute of the ICC, come within the jurisdiction of the Court as crimes against humanity" and reminded governments that "all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law".[2277]
2423. In 1981, following the discovery of secret graves in Argentina, the UN Sub-Commission on Human Rights recommended that the ILC be asked to include involuntary disappearances as a crime against humanity when drafting the Code of Crimes against the Peace and Security of Mankind.[2278]
2424. In 1996, in a statement on the situation of human rights in Colombia, the Chairman of the UN Commission on Human Rights noted that the Commission remained deeply preoccupied by the large number of cases of disappearance as shown in the report of the Working Group on the matter.[2279]
2425. In 1995, in his second report, the Director of MINUGUA recommended that the government of Guatemala "join in the efforts already under way in the international community, at the level of the United Nations and the Organization of American States, to ensure the recognition of enforced disappearance and extra-legal execution as crimes against humanity".[2280]

Other International Organisations
2426. In a resolution adopted in 1980 on the situation of human rights in Latin America, the Parliamentary Assembly of the Council of Europe stated that

[2275] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 5.
[2276] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.
[2277] UN Commission on Human Rights, Res. 2001/46, 23 April 2001, preamble and §§ 5–7.
[2278] UN Sub-Commission on Human Rights, Res. 15 (XXXIV), 10 September 1981, § 3.
[2279] UN Commission on Human Rights, Chairman's statement on the situation of human rights in Colombia, UN Doc. E/CN.4/1996/SR.60, 23 April 1996, p. 12, § 4.
[2280] MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 178.

it was "profoundly alarmed by the disappearance of large numbers of people in such countries [Argentina, Chile, Uruguay, Guatemala and Cuba], including many children, pregnant women and foreign nationals" and invited the member countries of the Council of Europe to "promote, in a world context within the United Nations, the conclusion of an international convention designed to prevent and abolish disappearances, in particular by defining the guilt of those responsible for them".[2281]

2427. In a resolution adopted in 1981 on refugees from El Salvador, the Parliamentary Assembly of the Council of Europe stated that it was:

> appalled by the dramatic situation of the population suffering from violent and ruthless confrontation in which violence, disappearances and murders follow one another, affecting not only the combatants, but also all those who, one way or another, are caught up in events which do not concern them.[2282]

2428. In a resolution adopted in 1982, the Parliamentary Assembly of the Council of Europe protested "in particular against the recourse by governments to emergency legislation as a means of covering up their repressive methods and against the practices of forcible disappearance".[2283]

2429. In a resolution on enforced disappearances adopted in 1984, the Parliamentary Assembly of the Council of Europe considered that "the recognition of enforced disappearance as a crime against humanity is essential if it is to be prevented and its authors punished".[2284] The Assembly called on the governments of member States of the Council of Europe:

> to support the preparation and adoption by the United Nations of a declaration setting forth the following principles:
> i. Enforced disappearance is a crime against humanity which:
> 1. cannot be considered a political offence and is therefore subject to the extradition laws;
> 2. is not subject to limitation;
> 3. may not be covered by amnesty laws.[2285]

2430. In a resolution adopted in 1985, the Parliamentary Assembly of the Council of Europe condemned "the systematic use by military governments and other totalitarian regimes in the subcontinent of brutal methods of repression, including . . . forced disappearances".[2286]

2431. In a resolution adopted in 1983 on missing persons in Argentina, the European Parliament urged Foreign Ministers to request from the Argentine

[2281] Council of Europe, Parliamentary Assembly, Res. 722, 1 February 1980, §§ 5 and 11(e).
[2282] Council of Europe, Parliamentary Assembly, Res. 751, 15 May 1981, § 7.
[2283] Council of Europe, Parliamentary Assembly, Res. 774, 29 April 1982, § 5.
[2284] Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 12.
[2285] Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 13(a).
[2286] Council of Europe, Parliamentary Assembly, Res. 835, 30 January 1985, § 11.

government detailed information on the fate of those who had disappeared, including children.[2287]

2432. In a resolution adopted in 1993, the European Parliament condemned the many serious human rights abuses in the world, including the alarming number of unresolved politically motivated disappearances, many of which had been perpetrated by paramilitary groups.[2288]

International Conferences

2433. The 24th International Conference of the Red Cross in 1981 adopted a resolution on forced or involuntary disappearances. In its preamble, the resolution stated that such disappearances implied violations of fundamental human rights such as the right to life, freedom and personal safety, the right not to be submitted to torture or cruel, inhuman or degrading treatment, the right not to be arbitrarily arrested or detained, and the right to a just and public trial. The resolution condemned "any action resulting in forced or involuntary disappearances, conducted or perpetrated by governments or with their connivance or consent" and recommended that the ICRC and the Central Tracing Agency take appropriate action to "reveal the fate of missing persons or bring their families relief".[2289]

2434. The 25th International Conference of the Red Cross in 1986 adopted a resolution on obtaining and transmitting personal data as a means of protection and of preventing disappearances in which it condemned "any act leading to the forced or involuntary disappearance of individuals or groups of individuals".[2290]

2435. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed its dismay and condemnation that "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] ... disappearances".[2291]

2436. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including ... enforced disappearances ... and threats to carry out such actions".[2292]

[2287] European Parliament, Resolution on missing persons in Argentina, 13 October 1983, p. 132, § 1(c).

[2288] European Parliament, Resolution on Human Rights in the world and Community human rights policy for the years 1991/92, 26 April 1993, Article 4.

[2289] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. II.

[2290] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 3.

[2291] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

[2292] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

IV. Practice of International Judicial and Quasi-judicial Bodies

2437. In its judgement in the *Kupreškić case* in 2000, the ICTY, in defining the constituent offences of the category of "other inhumane acts" as crimes against humanity, held that:

Less broad parameters for the interpretation of "other inhumane acts" can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity . . . Similarly, the expression at issue undoubtedly embraces . . . the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5.[2293]

2438. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

. . .

(b) The prohibitions against taking of hostages, abductions, or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.[2294]

2439. In *Quinteros v. Uruguay* in 1983, the HRC found that Elena Quinteros was arrested, held in a military detention and subjected to torture, which constituted violations of Articles 7, 9 and 10(1) of the 1966 ICCPR. The Commission further held that:

With regard to the violations alleged by the author on her own behalf, the Committee notes that, the statement of the author that she was in Uruguay at the time of the incident regarding her daughter, was not contradicted by the State party. The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the [1966 ICCPR] suffered by her daughter in particular, of article 7.[2295]

2440. In *Lyashkevich v. Belarus* in 2003, the HRC held that:

[2293] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 566.
[2294] HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 13(b).
[2295] HRC, *Quinteros v. Uruguay*, Views, 21 July 1983, §§ 12.3–14.

The Committee understands the continued anguish and mental stress caused to the author, as the mother of the condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. Complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the [1966 ICCPR].[2296]

2441. In 2001, in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, the ACiHPR stated that:

Article 5 of the [ACHPR] guarantees respect for the dignity inherent in the human person and the recognition of his legal status. This text further prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment. The guarantee of the physical integrity and security of the person is also enshrined in Article 6 of the African Charter, as well as in the Declaration on the Protection of all Persons against Forced Disappearances, adopted by the General Assembly of the United Nations in Resolution 47/133 of 18th December 1992, which stipulates in article 1(2) that "any act leading to forced disappearance excludes the victim from the protection of the law and causes grave suffering to the victim and his family. It constitutes a violation of the rules of international law, especially those that guarantee to all the right to the recognition of their legal status, the right to freedom and security of their person and the right not be subjected to torture or any other inhuman or degrading punishment or treatment. It also violates the right to life or seriously imperils it". The disappearances of persons suspected or accused of plotting against the instituted authorities, including Mr. Guillaume Sessouma and a medical student, Dabo Boukary, arrested in May 1990 by the presidential guard and who have not been seen since then constitute a violation of the above-cited texts and principles.[2297]

2442. In *Kurt v. Turkey* in 1998, the ECtHR found that, following the disappearance of her son, the applicant was victim of inhuman treatment. The Court held that she

. . . has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.

134. Having regard to the circumstances described above as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 [of the 1950 ECHR] in respect of the applicant.[2298]

[2296] HRC, *Lyashkevich v. Belarus*, Views, 3 April 2003, § 9.2.
[2297] ACiHPR, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Decision, 23 April–7 May 2001, § 44.
[2298] ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 133–134.

2443. In *Timurtas v. Turkey* in 2000, the ECtHR, considering the fact that the applicant was the father of the disappeared person, that he proceeded to make many enquiries in order to find out what had happened to his son, that the investigation lacked promptitude and efficiency, and that the applicant's anguish concerning his son's fate continued at the time of the judgement, found that the disappearance amounts to inhuman and degrading treatment contrary to Article 3 of the 1950 ECHR.[2299]

2444. In the *Cyprus case* in 2001, the ECtHR found that there had been a violation of Article 3 of the 1950 ECHR (inhuman treatment) in respect of the relatives of the Greek-Cypriot missing persons. The Court stated that:

> the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 [of the 1950 ECHR] will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie-in that context, a certain weight will attach to the parent-child bond–, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court further recalls that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.[2300]

2445. In 1980, in a report on the situation of human rights in Argentina, the IACiHR recommended that the government of Argentina hand over children who had disappeared to their natural parents or other close family members.[2301] The Commission insisted that the government give urgent priority to the investigation of cases involving disappeared children who were apprehended with their parents or who were born during the time of their detention.[2302]

2446. In 1987, in a case concerning Peru, the IACiHR declared that the disappearance of a mayor following a charge of membership of the Sendero Luminoso ("Shining Path") constituted a "very serious violation of the right to personal liberty (Article 7) and of the right to life (Article 4) set forth in the American Convention on Human Rights".[2303]

2447. In 1988, in a case concerning El Salvador, the IACiHR "energetically condemned" the official practice of government security forces involving the forced detention and disappearance of individuals.[2304]

[2299] ECtHR, *Timurtas v. Turkey*, Judgement, 13 June 2000, §§ 96–98.
[2300] ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 156–158.
[2301] IACiHR, Report on the situation of human rights in Argentina, Doc. OEA/Ser.L/V/II.49, 11 April 1980, p. 7.
[2302] IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54, 16 October 1981, p. 13.
[2303] IACiHR, *Case 9466 (Peru)*, Resolution, 30 June 1987, p. 137, § 2.
[2304] IACiHR, *Case 9844 (El Salvador)*, Resolution, 13 September 1988, p. 144, § 2.

2448. In 1988, in a case concerning Peru, the IACiHR informed the government of Peru that the forced disappearance of two persons, one by the Naval Infantry, the other by the Army Intelligence Service, constituted extremely serious violations of the right to personal freedom and the right to life.[2305]

2449. In 1999, in a report on the human rights situation in Colombia, the IACiHR noted that the forced disappearance of persons violated numerous rights protected under the 1969 ACHR and that the victims of forced disappearances were frequently civilians suspected of playing some role in the armed conflict. The IACiHR added that in any case, State agents were absolutely prohibited from causing the disappearance of combatants as well as civilians.[2306]

2450. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR stated that:

> 155. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention . . .
> 156. Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to the integrity of the person . . .
>
> In addition, investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the Convention.
> 157. The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention . . .
> 158. The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention.[2307]

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

2451. No practice was found.

[2305] IACiHR, *Case 9786 (Peru)*, Resolution, 14 September 1988, p. 35, § 2.
[2306] IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102, 26 February 1999, § 218.
[2307] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, §§ 155–158.

VI. Other Practice

2452. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (c) the murder or causing the disappearance of individuals".[2308]

2453. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "practising, permitting or tolerating the involuntary disappearance of individuals" shall remain prohibited.[2309]

Preventive measures

Note: *For practice concerning accounting for the dead, see Chapter 35, section E. For practice concerning accounting for missing persons, see Chapter 36. For practice concerning recording and notification of personal details of persons deprived of their liberty, see Chapter 37, section F. For practice concerning ICRC access to persons deprived of their liberty, see Chapter 37, section G.*

I. Treaties and Other Instruments

Treaties

2454. Article I of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that:

The State Parties . . . undertake . . . not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees, . . . to cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons [and] to take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

2455. Article XI of the 1994 Inter-American Convention on the Forced Disappearance of Persons states that:

Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay . . . The States Parties shall establish and maintain official up-to-date registries of their detainees and . . . shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.

[2308] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(c).

[2309] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 3(2)(d) and 4(1), *IRRC*, No. 282, 1991, pp. 331 and 332.

Other Instruments

2456. Article 2(2) of the 1992 UN Declaration on Enforced Disappearance provides that "States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance".

2457. Article 3 of the 1992 UN Declaration on Enforced Disappearance provides that "each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction".

2458. Article 8(1) of the 1992 UN Declaration on Enforced Disappearance provides that "no State shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance".

2459. Article 9(1) of the 1992 UN Declaration on Enforced Disappearance provides that:

> The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carry out the deprivation of liberty is required to prevent enforced disappearances under all circumstances.

2460. Article 10(1) and (3) of the 1992 UN Declaration on Enforced Disappearance provides that:

> Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.
> ...
> An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention.

2461. Article 12(2) of the 1992 UN Declaration on Enforced Disappearance provides that:

> Each State shall ... ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

2462. Article 20(1) of the 1992 UN Declaration on Enforced Disappearance provides that "States shall prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance".

II. National Practice

Military Manuals

2463. No practice was found.

National Legislation
2464. No practice was found.

National Case-law
2465. No practice was found.

Other National Practice
2466. In November 1991, Ecuador reported to the CAT that an international commission set up to look into the disappearance of two brothers had recommended, following a finding of negligence and cover-up in the investigation, that the necessary measures be adopted to prevent similar cases occurring in the future.[2310]

III. Practice of International Organisations and Conferences

United Nations
2467. In a resolution adopted in 2001 on the question of enforced or involuntary disappearances, the UN Commission on Human Rights invited States:

> to take legislative, administrative, legal and other steps, including when a state of emergency has been declared, to take action at the national and regional levels and in cooperation with the United Nations, if appropriate through technical assistance, and to provide the Working Group with concrete information on the measures taken and the obstacles encountered in preventing enforced, involuntary or arbitrary disappearances and in giving effect to the principles set forth in the [1992] Declaration [on Enforced Disappearance].[2311]

2468. In April 1996, in a statement on the situation of human rights in Colombia, the Chairman of the UN Commission on Human Rights called for the urgent adoption of more effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance.[2312]
2469. In a resolution adopted in 1985, the UN Sub-Commission on Human Rights adopted a draft Declaration against Unacknowledged Detention which stated that:

> Governments shall, (a) disclose the identity, location and condition of all persons detained by members of their police, military or security authorities or others acting with their knowledge, together with the cause of such detention, and (b) seek to locate all other persons who have disappeared. In countries where legislation does not exist to this effect, steps shall be taken to enact such legislation as soon as possible.[2313]

[2310] CAT, *Report of the Committee against Torture*, New York, 1992, UN Doc. A/47/44, § 60.
[2311] UN Commission on Human Rights, Res. 2001/46, 23 April 2001, preamble and § 7.
[2312] UN Commission on Human Rights, Chairman's statement on the situation of human rights in Colombia, UN Doc. E/CN.4/1996/SR.60, 23 April 1996, p. 12, § 4.
[2313] UN Sub-Commission on Human Rights, Res. 1985/26, 29 August 1985, § 2.

Other International Organisations

2470. No practice was found.

International Conferences

2471. The 24th International Conference of the Red Cross in 1981 adopted a resolution on forced or involuntary disappearances in which it urged governments to "endeavour to prevent forced or involuntary disappearances and to cooperate with humanitarian organizations with a view to putting an end to that phenomenon".[2314]

2472. The 25th International Conference of the Red Cross in 1986 adopted a resolution on obtaining and transmitting personal data as a means of protection and of preventing disappearances in which it urged governments "to endeavour to prevent [forced or involuntary disappearances]".[2315]

2473. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 welcomed "the adoption by the General Assembly of the Declaration on the Protection of All Persons from Enforced Disappearance" and called upon all States "to take effective legislative, administrative, judicial or other measures to prevent, terminate and punish acts of enforced disappearances".[2316]

2474. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including . . . enforced disappearances . . . and threats to carry out such actions".[2317]

IV. Practice of International Judicial and Quasi-judicial Bodies

2475. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that "States parties should . . . take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life".[2318]

2476. In *Herrera Rubio v. Colombia* in 1987, the HRC found that Colombia had violated the 1966 ICCPR, on the basis that it had failed to take appropriate measures to prevent the disappearance of two persons suspected of subversive activities.[2319]

[2314] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. II.
[2315] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 3.
[2316] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § II(62).
[2317] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).
[2318] HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, § 4.
[2319] HRC, *Herrera Rubio v. Colombia*, Views, 2 November 1987, p. 198, § 11.

2477. In its Annual Report 1980–1981, the IACiHR recommended that arrests only be made by competent and duly identified authorities and that detained persons be kept in premises designed for that purpose.[2320]

2478. In its doctrine concerning judicial guarantees and the right to personal liberty and security published in 1982, the IACiHR recommended that States take all necessary measures to prevent security forces from arresting and detaining persons without the knowledge of the competent authorities and the relatives of the prisoner. Among such measures, the Commission mentioned:

> Close vigilance by the high officials and by the Judicial Branch over the actions of the security forces; periodic visits to the places described as illegal detention centers and imposition of severe sanctions on members of these forces who give an evasive or false reply to requests for information about persons they have detained.[2321]

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

2479. According to the ICRC, in order to prevent disappearances, the identity of persons arrested must be established as soon as possible after their arrest/capture and a follow-up on their whereabouts must be carried out. Within the framework of its protection activities, the ICRC always registers and follows up on persons deprived of their liberty. The registration of persons deprived of their liberty and the repetition of visits enables the ICRC to keep track of the persons concerned until their release. In registering a person deprived of his/her liberty, the ICRC takes on the responsibility of monitoring that person's situation conscientiously. The regularity of follow-up visits is defined according to a particular person's protection needs. If, during a visit, a person turns out to be absent, the ICRC asks the authorities to explain his/her whereabouts.

VI. Other Practice

2480. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "unacknowledged detention" shall remain prohibited. It adds that "all persons deprived of their liberty shall be held in recognized places of detention".[2322]

[2320] IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, 16 October 1981, pp. 113 and 129; see also Report on the situation of human rights in Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19, 11 April 1980, p. 264, Report on the situation of human rights in Chile, Doc. OEA/Ser.L/V/II.66 Doc. 17, 9 September 1985, § 126 and Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 60.

[2321] IACiHR, Doctrine concerning judicial guarantees and the right to personal liberty and security, reprinted in *Ten years of activities (1971–1981)*, General Secretariat of the IACiHR, Washington, D.C., 1982, p. 319.

[2322] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 3(2)(d) and 4(1), *IRRC*, No. 282, 1991, pp. 331 and 332.

Investigation of enforced disappearance

I. Treaties and Other Instruments

Treaties

2481. According to Article 12 of the 1994 Inter-American Convention on the Enforced Disappearance of Persons, "the States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians".

2482. Article 4(1)(b) and (d) of the 1998 Draft Convention on Forced Disappearance states that:

> The States parties undertake: . . . to investigate immediately and swiftly any complaint of forced disappearance and to inform the family of the disappeared person about his or her fate and whereabouts . . . and to cooperate with each other and with the United Nations to contribute to the . . . investigation, punishment and eradication of forced disappearance.

2483. Article 11 of the 1998 Draft Convention on Forced Disappearance provides that:

> 2. Whenever there are grounds to believe that a forced disappearance has been committed, the State shall refer the matter to that authority without delay for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.
> 3. Each State Party shall ensure that the competent authority has the necessary powers and resources to conduct the investigation . . .
> . . .
> 7. It must be possible to conduct an investigation, in accordance with the procedures described above, for as long as the fate or whereabouts of the disappeared person has not been established with certainty.

Other Instruments

2484. Article 13 of the 1992 UN Declaration on Enforced Disappearance provides that:

> 1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.
> 2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.
4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.
5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.
6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

2485. Paragraph 2.1.1 of the Plan of Operation for the 1991 Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia states that "each party is responsible for compiling a list of its reported missing, as well as a file on each missing [person]". Paragraph 2.2.2 further adds that "the adverse party/parties shall take all possible measures (administrative steps and public appeals) to obtain information on the person reported missing".

II. National Practice

Military Manuals

2486. Colombia's Basic Military Manual provides that "in time of peace, States have the obligation to take preventive measures", *inter alia*, to "create efficient mechanisms enabling disappeared persons to be located".[2323]

National Legislation

2487. No practice was found.

National Case-law

2488. No practice was found.

Other National Practice

2489. In September 1984, the National Commission concerning Missing Persons of Argentina (CONADEP) released a report, stressing that the objective was not to pass judgement but to inquire into the fate of the people who had disappeared.[2324]

2490. The main task of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, established by the Croatian government

[2323] Colombia, *Basic Military Manual* (1995), p. 27.
[2324] Argentina, Report of the National Commission concerning Missing Persons (CONADEP), 20 September 1984, reprinted in Argentina: The truth about the disappeared, *Review International Commission of Jurists*, Vol. 33, December 1984, p. 2.

in 1991, was to collect and process the information about civil and other persons missing from the territory of Croatia during the war. In 1993, a new Commission, the Commission for Detained and Missing Persons, replaced the one established in 1991, yet with the same task.[2325]

2491. In November 1991, Ecuador reported to the CAT that an international commission set up to look into the disappearance of two brothers had recommended, following a finding of negligence and cover-up in the investigation, that the necessary measures be adopted to guarantee an investigation of other cases in the future.[2326]

2492. In 1993, the government of the Philippines created a Task Force on Involuntary Disappearances to assist relatives of the disappeared in discovering the fate of their family members.[2327]

III. Practice of International Organisations and Conferences

United Nations

2493. In a resolution adopted in 1985, the UN General Assembly requested that the government of Guatemala investigate and clarify the fate of those who had disappeared.[2328]

2494. In a resolution adopted in 1996, the UN Commission on Human Rights took note of efforts reported by the government of Sudan to begin investigation of cases of forced disappearance.[2329]

2495. In a resolution adopted in 2001 on the question of enforced or involuntary disappearances, the UN Commission on Human Rights reminded governments:

(a) that all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law;
(b) that they should ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;
(c) that, if such belief is borne out, all the perpetrators of enforced or involuntary disappearances must be prosecuted.[2330]

[2325] Croatia, Directive on the Establishment and Functioning of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, 1991; Regulations establishing the Commission for Detained and Missing Persons in Croatia, *Official Gazette*, No. 46, 17 May 1993.
[2326] CAT, *Report of the Committee against Torture*, New York, 1992, UN Doc. A/47/44, § 60.
[2327] Philippines, International Week of the Disappeared: The Desaparecidos in Our Midst, *Philippine Human Rights Update*, Vol. 10, No. 5, May–June 1996; Congress of the Republic of the Philippines, Res. Nos. 95–96, 22 July 1996.
[2328] UN General Assembly, Res. 40/140, 13 December 1985, Article 6.
[2329] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.
[2330] UN Commission on Human Rights, Res. 2001/46, 23 April 2001, preamble and §§ 5–7.

2496. In 1998, the Working Group on Enforced or Involuntary Disappearances of the UN Commission on Human Rights reported that the President of the Philippines had in 1993 set up a Fact-Finding Committee on Involuntary Missing Persons.[2331]

Other International Organisations

2497. In a recommendation adopted in June 1979, the Parliamentary Assembly of the Council of Europe expressed alarm at the dramatic situation of several hundred missing persons arrested or detained by the Chilean security forces, noted that the Chilean authorities had not given satisfactory explanations for the disappearances, nor ordered serious research into the fate of the missing persons, and regretted that the enquiries conducted by the tribunals had given no satisfactory results. It recommended that the Committee of Ministers invite member States to urge the Chilean authorities in the strongest terms to obtain information on the fate of the missing persons.[2332]

2498. In a resolution on enforced disappearances adopted in 1984, the Parliamentary Assembly of the Council of Europe urged the "governments of countries where disappearances are reported to follow the example of Bolivia and Argentina, and to set up national inquiry commissions to investigate disappearances".[2333]

2499. In a resolution adopted in November 1982, the European Parliament called on the European Council and Foreign Ministers to make formal representations and vigorous protests to the Argentine government in order to pressure it to provide detailed information concerning the fate of those who had disappeared, particularly EC citizens.[2334]

2500. In a resolution adopted in May 1983, the European Parliament expressed concern that no complete clarification had yet been given about the whereabouts of all those who had disappeared in Argentina, in spite of urgent appeals by "world public opinion". It demanded a full explanation from the Argentine government concerning the fate of all individuals reported missing in Argentina.[2335]

2501. In a resolution adopted in October 1983, the European Parliament urged Foreign Ministers to request detailed information from the Argentine government about the fate of those who had disappeared.[2336]

International Conferences

2502. The 24th International Conference of the Red Cross in 1981 adopted a resolution on forced or involuntary disappearances which urged governments

[2331] UN Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1999/622, 8 December 1998, § 246.
[2332] Council of Europe, Parliamentary Assembly, Rec. 868, 5 June 1979, p. 2.
[2333] Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 9.
[2334] European Parliament, Resolution on the events in Argentina, 18 November 1982.
[2335] European Parliament, Resolution on the statement by the Argentine military junta concerning the fate of the persons who have disappeared since the last coup d'état, 19 May 1983, p. 117.
[2336] European Parliament, Resolution on persons missing in Argentina, 13 October 1983.

"to undertake and complete thorough inquiries into every case of disappearance occurring in their territory".[2337]

2503. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 reaffirmed that "it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators".[2338]

IV. Practice of International Judicial and Quasi-judicial Bodies

2504. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that "States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life".[2339]

2505. In *Quinteros v. Uruguay* in 1983, the HRC dealt with the case of Elena Quinteros who disappeared after having been arrested, held in a military detention and subjected to torture. The Commission stated that "the Government of Uruguay has a duty to conduct a full investigation into the matter".[2340]

2506. In *Kurt v. Turkey* in 1998, the ECtHR found that there was a violation of Article 13 of the 1950 ECHR. The Court held that:

> 124. . . . Article 5 [of the 1950 ECHR] must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.
>
> . . .
>
> 128. Having regard to these considerations, the Court concludes that the authorities have failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant son after he was detained in the village and that no meaningful investigation was conducted into the applicant insistence that he was in detention and that she was concerned for his life.
>
> . . .
>
> 140. In the instant case the applicant is complaining that she has been denied an "effective" remedy which would have shed light on the whereabouts of her son. She asserted in her petitions to the public prosecutor that he had been taken into custody and that she was concerned for his life since he had not been seen since 25 November 1993. In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure . . . Seen in these terms, the requirements of Article 13 are broader than a Contracting State obligation

[2337] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. II.
[2338] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § II(62).
[2339] HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, § 4.
[2340] HRC, *Quinteros v. Uruguay*, Views, 21 July 1983, § 15.

under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.[2341]

2507. In its judgement in *Timurtas v. Turkey* in 2000, the ECtHR found that the failure to conduct an effective investigation into a disappearance and the failure to grant the relatives effective access to the investigation was a violation of Article 13 of the 1950 ECHR.[2342]

2508. In its judgement in the *Cyprus case* in 2001, the ECtHR found that there had been a continuing violation of Article 2 of the 1950 ECHR (right to life) concerning the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who had disappeared in life-threatening circumstances. The Court also found a continuing violation of Article 5 ECHR (right to liberty and security) concerning the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of the Greek-Cypriot missing persons in respect of whom there was an arguable claim that they were in Turkish custody at the time of their disappearance.[2343]

2509. In its Annual Report 1980–1981, the IACiHR stated that the problem of disappearance after detention could not be considered as having been overcome "unless a clear accounting is provided, giving all the circumstances of the status and whereabouts of the persons who have disappeared".[2344]

2510. In its Annual Report 1987–1988, the IACiHR proposed an amendment to the Guatemalan *habeas corpus* procedure whereby, until the whereabouts of the missing person had been established, the magistrate was required to continue to investigate and the case could not be declared closed.[2345]

2511. In 1991, in a case concerning El Salvador, the IACiHR, finding that the investigations into two disappearances were insufficient, asked the Salvadoran government to accept the jurisdiction of the IACtHR in respect of these cases.[2346]

2512. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the

[2341] ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 124, 128 and 140.
[2342] ECtHR, *Timurtas v. Turkey*, Judgement, 13 June 2000, §§ 111–113.
[2343] ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 136 and 150 .
[2344] IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/VIII.54 Doc. 9 rev. 1, 16 October 1981, p. 12.
[2345] IACiHR, *Annual Report 1987–1988*, Doc. OEA/Ser.L/V/II.74 Doc. 10 rev. 1, 16 September 1988, p. 302.
[2346] IACiHR, *Case 10.000 (El Salvador)*, Report, 13 February 1991, p. 99, § 2; *Case 10.001 (El Salvador)*, Report, 13 February 1991, p. 103, § 2.

State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the [1969 ACHR] are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

. . .

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.[2347]

2513. In its judgement in the *Bámaca Velásquez case* in 2002, the IACtHR found that the government of Guatemala had failed to investigate the disappearance of the victim and stated that:

Whenever a violation of human rights occurs, it is an obligation of the State to investigate the facts and punish those responsible, and such an obligation must be seriously respected and not be a mere formality.

. . .

The State has an obligation to investigate the facts that generate violations of the American Convention on Human Rights and identify and punish those responsible, as well as publicly reveal the results of such investigation.[2348]

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

2514. Following the Gulf War in 1991, a Tripartite Commission was established under ICRC auspices to trace people reported missing. The Commission is made up of representatives of Iraq, on the one hand, and of France, Kuwait, Saudi Arabia, UK and US, on the other.

VI. Other Practice

2515. In 1994, in report on an insurrection in the Mexican state of Chiapas, the International Commission of Jurists noted that many involuntary disappearances might have occurred and that the competent State authorities and national NGOs were attempting to collect the relevant information.[2349]

[2347] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, §§ 177 and 181.

[2348] IACtHR, *Bámaca Velásquez case*, Judgement, 22 February 2002, §§ 74 and 106(2), see also §§ 73, 75 and 78.

[2349] International Commission of Jurists, Mexico: Preliminary report of the ICJ mission to Mexico with regard to the insurrection of indigenous peoples in Chiapas, 1–10 February 1994, *Review of the International Commission of Jurists*, No. 52, 1994, p. 14.

L. Deprivation of Liberty

Note: *This section does not include practice on the detention of members of the armed forces as prisoners of war in accordance with Article 3 of the 1907 HR, Article 4(A) GC III and Article 44(1) AP I.*

General

I. Treaties and Other Instruments

Treaties

2516. Article 42 GC IV provides that "the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary".

2517. According to Article 147 GC IV, "unlawful confinement of a protected person" is a grave breach of this instrument.

2518. Article 5(1) of the 1950 ECHR provides that "everyone has the right to liberty and security of person".

2519. Article 9(1) of the 1966 ICCPR provides that "every one has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."

2520. Article 7(1) ACHR provides that "every person has the right to personal liberty and security". Article 7(3) provides that "no one shall be subject to arbitrary arrest or imprisonment".

2521. Article 6 of the 1981 ACHPR provides that "every individual shall have the right to liberty and to the security of his person . . . In particular, no one may be arbitrarily arrested or detained."

2522. Article 37 of the 1989 Convention on the Rights of the Child provides that "no child shall be deprived of his or her liberty unlawfully or arbitrarily".

2523. Pursuant to Article 8(2)(a)(vii) of the 1998 ICC Statute, "unlawful confinement" constitutes a war crime in international armed conflicts.

2524. Article 55(1)(d) of the 1998 ICC Statute provides that "in respect of an investigation under this statute, a person . . . shall not be subjected to arbitrary arrest or detention".

Other Instruments

2525. Article II(1)(c) of the 1945 Allied Control Council Law No. 10 provides that "imprisonment . . . or other inhumane acts committed against any civilian population" is a crime against humanity.

2526. Article 3 of the 1948 UDHR provides that "everyone has the right to life, liberty and security of person". Article 9 provides that "no one shall be subjected to arbitrary arrest, detention or exile".

2527. According to Article I of the 1948 American Declaration on the Rights and Duties of Man, "every Human Being has the right to . . . liberty and the security of his person".

2528. Article 20 of the 1990 Cairo Declaration on Human Rights in Islam provides that "it is not permitted without legitimate reason to arrest an individual or to restrict his freedom".
2529. Article 2(g) of the 1993 ICTY Statute gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions, expressly including the unlawful confinement of civilians.
2530. Under Article 18(j) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "arbitrary imprisonment" constitutes a crime against humanity.
2531. Article 20(a)(vii) 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "unlawful confinement of protected persons" is a war crime.
2532. Article 2(5) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right to liberty, particularly against unwarranted and unjustified arrest and detention, and to effectively avail of the privilege of the writ of *habeas corpus*.
2533. Article 6 of the 2000 EU Charter of Fundamental Rights provides that "everyone has the right to liberty and security of person".
2534. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vii), "unlawful confinement" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

2535. Argentina's Law of War Manual provides that illegal detention of protected persons is a grave breach of the Geneva Conventions and of AP I.[2350]
2536. Australia's Commanders' Guide states that unlawful confinement of a protected person is a grave breach of the Geneva Conventions and warrants the institution of criminal proceedings.[2351]
2537. Canada's LOAC Manual states that it is a grave breach of the Geneva Conventions to "unlawfully confine a protected person".[2352]
2538. Colombia's Basic Military Manual provides that "it is prohibited to deprive [the civilian population] of its liberty (sequestration, enforced disappearances)".[2353]
2539. Croatia's LOAC Compendium provides that "unlawful confinement" is a grave breach of IHL and a war crime.[2354]

[2350] Argentina, *Law of War Manual* (1989), § 8.03.
[2351] Australia, *Commanders' Guide* (1994), § 1305(d).
[2352] Canada, *LOAC Manual* (1999), p. 16-3, § 14(b).
[2353] Colombia, *Basic Military Manual* (1995), p. 30.
[2354] Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.

2540. El Salvador's Human Rights Charter of the Armed Forces states that "any person has the right to liberty".[2355] It further provides that "lengthy detention" is a violation of human rights.[2356]
2541. France's LOAC Summary Note provides that "illegal detention" is a grave breach of the Geneva Conventions.[2357]
2542. France's LOAC Teaching Note provides that "protected persons shall not be detained arbitrarily".[2358]
2543. Germany's Military Manual states that "illegal ... confinement of protected civilians" is a grave breach of IHL.[2359]
2544. Hungary's Military Manual states that "unlawful confinement" is a grave breach of IHL and a war crime.[2360]
2545. The Military Manual of the Netherlands provides that "unlawful confinement" is a grave breach of the Geneva Conventions and their Additional Protocols.[2361]
2546. New Zealand's Military Manual provides that unlawful confinement of a protected civilian is a grave breach of the Geneva Conventions.[2362]
2547. Nicaragua's Military Manual provides that "any person has the right to individual liberty".[2363]
2548. Nigeria's Manual on the Laws of War states that "unlawful confinement" of persons protected under GC IV is a grave breach of the Geneva Conventions.[2364]
2549. South Africa's LOAC Manual provides that "unlawful confinement of a protected person" is a grave breach of the Geneva Conventions.[2365]
2550. Switzerland's Basic Military Manual provides that "illegal detention" of protected civilians is a grave breach of the Geneva Conventions.[2366]
2551. Uganda's National Resistance Army Statute provides for the punishment of a person subject to military law who unnecessarily detains any other person without bringing him or her to trial.[2367]
2552. The UK Military Manual provides that "unlawful confinement" of persons protected by GC IV is a grave breach of the Convention.[2368]

[2355] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 8.
[2356] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 18.
[2357] France, *LOAC Summary Note* (1992), § 3.4.
[2358] France, *LOAC Teaching Note* (2000), p. 5.
[2359] Germany, *Military Manual* (1992), § 1209.
[2360] Hungary, *Military Manual* (1992), p. 90.
[2361] Netherlands, *Military Manual* (1993), p. IX-5.
[2362] New Zealand, *Military Manual (*1992), § 1702(3)(b).
[2363] Nicaragua, *Military Manual* (1996), Article 4.
[2364] Nigeria, *Manual on the Laws of War* (undated), § 6(c).
[2365] South Africa, *LOAC Manual* (1996), § 40.
[2366] Switzerland, *Basic Military Manual* (1987), Article 192(1)(c).
[2367] Uganda, *National Resistance Army Statute* (1992), Article 45(b).
[2368] UK, *Military Manual* (1958), § 625(c).

2553. The US Field Manual states that "unlawful confinement of a protected person" is a grave breach of the Geneva Conventions.[2369]

National Legislation

2554. Argentina's Draft Code of Military Justice punishes any soldier who illegally detains any protected person.[2370]

2555. Under Armenia's Penal Code, "unlawful . . . confinement of a protected person, or any other unlawful deprivation of freedom", during an armed conflict, constitutes a crime against the peace and security of mankind.[2371]

2556. Under Australia's War Crimes Act as amended, the internment of a person in a death camp or a slave labour camp is a serious war crime.[2372]

2557. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[2373]

2558. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "unlawful confinement" in international armed conflicts.[2374]

2559. Azerbaijans Criminal Code provides that "the arrest or deprivation of liberty of people contrary to the norms of international law" as well as "deprivation of procedural rights" is a war crime.[2375]

2560. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2376]

2561. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[2377]

2562. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that unlawful detention of a civilian person constitutes a crime under international law.[2378]

[2369] US, *Field Manual* (1956), § 502.
[2370] Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(4) in the *Code of Military Justice as amended* (1951).
[2371] Armenia, *Penal Code* (2003), Article 390.2(4), see also Article 392 (illegal arrest as a crime against humanity).
[2372] Australia, *War Crimes Act as amended* (1945), Section 6.
[2373] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[2374] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.33.
[2375] Azerbaijan, *Criminal Code* (1999), Articles 112 and 116.0.18.
[2376] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2377] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[2378] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(1)(6), see also Article 1(2)(5)(crime against humanity).

2563. The Criminal Code of the Federation of Bosnia and Herzegovina provides that "illegal arrests and detention" are war crimes.[2379] The Criminal Code of the Republika Srpska contains the same provision.[2380]

2564. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[2381]

2565. Bulgaria's Penal Code as amended provides that ordering and committing unlawful detention is a war crime.[2382]

2566. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that illegal detention of persons protected by the Geneva Conventions is a war crime in both international and non-international armed conflicts.[2383]

2567. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 ... which were committed during the period from 17 April 1975 to 6 January 1979".[2384]

2568. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] ... is guilty of an indictable offence".[2385]

2569. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[2386]

2570. China's Law Governing the Trial of War Criminals provides that "making indiscriminate mass arrests" constitutes a war crime.[2387]

2571. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, carries out or orders the illegal detention of a protected person.[2388]

2572. The DRC Code of Military Justice as amended provides for the punishment of anyone who, in the course of hostilities, without order from the authorities and except when the law so provides, arrests, detains or confines any person.[2389]

[2379] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).
[2380] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).
[2381] Botswana, *Geneva Conventions Act* (1970), Section 3(1).
[2382] Bulgaria, *Penal Code as amended* (1968), Article 412(c).
[2383] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(g) and (d), see also Article 3(e) (crimes against humanity).
[2384] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.
[2385] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[2386] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[2387] China, *Law Governing the Trial of War Criminals* (1946), Article 3(32).
[2388] Colombia, *Penal Code* (2000), Article 149.
[2389] DRC, *Code of Military Justice as amended* (1972), Article 527.

2573. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[2390]

2574. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".[2391]

2575. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, systematic detention of the civilian population in concentration camps constitutes a "crime against the civilian population".[2392]

2576. Croatia's Criminal Code provides that unlawful confinement of civilians is a war crime.[2393]

2577. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".[2394]

2578. The Draft Amendments to the Penal Code of El Salvador provides for the punishment of any civil servant or public employee, agent of the authorities or individual who detains or orders to detain lawfully or unlawfully a person and does not give any reason for detention.[2395] It also punishes the deprivation of liberty of civilians.[2396]

2579. Ethiopia's Penal Code provides that illegal detention in concentration camps is a war crime against the civilian population.[2397]

2580. Under Georgia's Criminal Code, the unlawful confinement of a protected person constitutes a crime in both international and non-international armed conflicts.[2398]

2581. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international armed conflict, unlawfully holds a protected person as prisoner.[2399]

2582. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the

[2390] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[2391] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[2392] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(3).
[2393] Croatia, *Criminal Code* (1997), Article 158(1).
[2394] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).
[2395] El Salvador, *Draft Amendments to the Penal Code* (1998), Articles entitled "Desparición forzada de personas" and "Desparición forzada cometida por particular", see also Article entitled "Desparición de personas permitida culposamente".
[2396] El Salvador, *Draft Amendments to the Penal Code* (1998), Articles entitled "Privación de libertad de personas civiles".
[2397] Ethiopia, *Penal Code* (1957), Article 282(c).
[2398] Georgia, *Criminal Code* (1999), Article 411(2)(f).
[2399] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(1).

commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[2400]

2583. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.[2401]

2584. Jordan's Draft Military Criminal Code provides that the illegal detention of persons protected by GC IV is a war crime.[2402]

2585. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[2403]

2586. Kenya's Constitution provides that "no person may be deprived of his personal liberty save as may be authorised by law".[2404]

2587. Under the Draft Amendments to the Code of Military Justice of Lebanon, the illegal detention of civilian persons protected by GC IV is a war crime.[2405]

2588. Under Luxembourg's Law on the Punishment of Grave Breaches, the detention of a protected person contrary to the provisions of GC III and GC IV is a grave breach of these instruments.[2406]

2589. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[2407]

2590. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[2408]

2591. Under Mali's Penal Code, "illegal detention of protected persons is a war crime".[2409]

2592. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[2410]

2593. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".[2411]

[2400] India, *Geneva Conventions Act* (1960), Section 3(1).
[2401] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[2402] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(7).
[2403] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[2404] Kenya, *Constitution* (1992), Article 72.
[2405] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(7).
[2406] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(7).
[2407] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[2408] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[2409] Mali, *Penal Code* (2001), Article 31(g), see also Article 29(e) (illegal imprisonment as a crime against humanity).
[2410] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[2411] Moldova, *Penal Code* (2002), Article 391.

2594. Myanmar's Defence Service Act provides for the punishment of "any person subject to this law who . . . unnecessarily detains a person in arrest or confinement".[2412]

2595. Under the International Crimes Act of the Netherlands, it is a crime to commit in an international armed conflict grave breaches of the 1949 Geneva Conventions, including "unlawful confinement" of persons protected by the Geneva Conventions.[2413]

2596. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[2414]

2597. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(vii) of the 1998 ICC Statute.[2415]

2598. Nicaragua's Military Penal Code provides for the punishment of "illegal detention of civilians".[2416]

2599. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, deprives civilian persons of their liberty".[2417]

2600. According to Niger's Penal Code as amended, the illegal detention of a person protected by GC IV or the 1977 Additional Protocols is a war crime.[2418]

2601. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".[2419]

2602. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[2420]

2603. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[2421]

2604. Under Paraguay's Military Penal Code, abduction is a crime.[2422]

2605. Paraguay's Penal Code punishes anyone who, in violation of the international laws of war, armed conflict or military occupation, deprives members

[2412] Myanmar, *Defence Services Act* (1959), Section 49(a).
[2413] Netherlands, *International Crimes Act* (2003), Article 5(1)(g), see also Article 4(1)(e) (imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law as a crime against humanity).
[2414] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[2415] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[2416] Nicaragua, *Military Penal Code* (1996), Article 58.
[2417] Nicaragua, *Draft Penal Code* (1999), Article 461.
[2418] Niger, *Penal Code as amended* (1961), Article 208.3(6).
[2419] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[2420] Norway, *Military Penal Code as amended* (1902), § 108(a).
[2421] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).
[2422] Paraguay, *Military Penal Code* (1980), Articles 287–288.

of the civilian population, the wounded and sick or prisoners of war of their freedom.[2423]

2606. Poland's Penal Code provides for the punishment of any person who, in violation of international law, deprives persons *hors de combat*, protected persons and persons enjoying international protection of their liberty.[2424]

2607. Under Portugal's Penal Code, in times of war, armed conflict or occupation, prolonged and unjustified restriction of the liberty of the civilian population, the wounded and sick or prisoners of war is a war crime.[2425]

2608. Romania's Penal Code provides for the punishment of the illegal detention of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or of all persons in the hands of the adverse party.[2426]

2609. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".[2427]

2610. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[2428]

2611. Slovenia's Penal Code provides that unlawful confinement of civilian persons is a war crime.[2429]

2612. Spain's Military Criminal Code states that the illegal detention of protected persons of a State with which Spain is at war is an offence against the laws and customs of war.[2430]

2613. Spain's Penal Code provides for the punishment of the "illegal detention of any protected person".[2431]

2614. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[2432]

2615. Sweden's Penal Code as amended provides that "depriving civilians of their liberty in contravention of international law" is a crime against international law.[2433]

[2423] Paraguay, *Penal Code* (1997), Article 320(5).
[2424] Poland, *Penal Code* (1997), Article 124.
[2425] Portugal, *Penal Code* (1996), Article 241(1)(g).
[2426] Romania, *Penal Code* (1968), Article 358(d).
[2427] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[2428] Singapore, *Geneva Conventions Act* (1973), Section 3(1).
[2429] Slovenia, *Penal Code* (1994), Article 374(1).
[2430] Spain, *Military Criminal Code* (1985), Article 77(6).
[2431] Spain, *Penal Code* (1995), Article 611(4).
[2432] Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).
[2433] Sweden, *Penal Code as amended* (1962), Article 22(6).

2616. Tajikistan's Criminal Code provides for the punishment of the "unlawful confinement of protected persons".[2434]
2617. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vii) of the 1998 ICC Statute.[2435]
2618. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[2436]
2619. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".[2437]
2620. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vii) of the 1998 ICC Statute.[2438]
2621. Under the US War Crimes Act as amended, grave breaches of the Geneva Conventions are war crimes.[2439]
2622. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[2440]
2623. Under Yemen's Military Criminal Code, the "unlawful detention of civilians" is a war crime.[2441]
2624. The Penal Code as amended of the SFRY (FRY) provides that "unlawful confinement of civilian persons is a war crime".[2442]
2625. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".[2443]

National Case-law
2626. With regard to unlawful confinement, several post-Second World War trials found army officers and, occasionally, industrialists guilty of war crimes because of their participation in the wrongful internment of civilians, their illegal detention and internment under inhumane conditions. Examples are

[2434] Tajikistan, *Criminal Code* (1998), Article 403(2)(f).
[2435] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[2436] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[2437] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[2438] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[2439] US, *War Crimes Act as amended* (1996), Section 2441(c).
[2440] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[2441] Yemen, *Military Criminal Code* (1998), Article 21(4).
[2442] SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).
[2443] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

the Dutch *Motomura case* and the *Notomi Sueo case* before the Temporary Court-Martial at Makassar in 1947, the *Rauter case* before the Special Court at The Hague and Special Court of Cassation in 1948 and 1949, and the *Zühlke case* before the Special Court in Amsterdam and the Special Court of Cassation in 1948.[2444] Other examples are the *Auschwitz and Belsen case* before the UK Military Court at Lüneburg in 1945 and the *Pohl case* before the US Military Tribunal at Nuremberg in 1947.[2445]

Other National Practice

2627. In 1988, the Human Rights Commission of the Philippines declared that all people residing in the Philippines had the right not to be detained unlawfully and when detained, they could not be held in secret detention places, in solitary confinement or *incommunicado* or be subjected to other similar forms of detention.[2446]

III. Practice of International Organisations and Conferences

United Nations

2628. In a number of resolutions on South Africa adopted between 1976 and 1985, the UN Security Council condemned mass arbitrary arrests and detentions and described the use of detention without trial as totally unacceptable.[2447]

2629. In two resolutions adopted in 1995, the UN Security Council expressed grave concern at and condemned in the strongest possible terms violations of IHL and human rights in Bosnia and Herzegovina, including evidence of a consistent pattern of arbitrary detentions.[2448]

2630. In a resolution adopted in 1996, the UN Security Council expressed deep concern at the deterioration in security and in the humanitarian situation in Burundi, including arbitrary detention.[2449]

2631. In a resolution adopted in 1974 on the protection of women and children in emergency and armed conflict, the UN General Assembly stated that

[2444] Netherlands, Temporary Court-Martial at Makassar, *Motomura case*, Judgement, 18 July 1947; Temporary Court Martial at Makassar, *Notomi Sueo case*, Judgement, 4 January 1947; Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948, and Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949; Special Court in Amsterdam *Zühlke case* Judgement, 3 August 1948, and Special Court of Cassation, *Zühlke case*, Judgement, 6 December 1948.

[2445] UK, Military Court at Lüneberg, *Auschwitz and Belsen case*, Judgement, 17 November 1945; US, Military Tribunal at Nuremberg, *Pohl case* Judgement, 3 November 1947.

[2446] UN Secretary-General, Report on information submitted by Governments pursuant to Sub-Commission Res. 7 (XXVII) of 20 August 1974, UN Doc. E/CN.4/Sub.2/1990/20, 19 July 1990, §§ 2, 11 and 15.

[2447] UN Security Council, Res. 392, 19 June 1976, preamble and § 1; Res. 417, 31 October 1977, preamble and § 3; Res. 473, 13 June 1980, preamble; Res. 556, 23 October 1984, preamble and § 2; Res. 560, 12 March 1985, § 2; Res. 569, 26 July 1985, preamble and § 2.

[2448] UN Security Council, Res. 1019, 9 November 1995, preamble; Res. 1034, 21 December 1995, preamble and § 2.

[2449] UN Security Council, Res. 1072, 30 August 1996, preamble.

all forms of repression "including imprisonment . . . shall be considered criminal".[2450]

2632. In several resolutions adopted between 1981 and 1985, the UN General Assembly condemned, on the basis of Articles 1 and 49 GC IV, the imprisonment of the mayors of towns in the Israeli-occupied territories as an "illegal measure".[2451]

2633. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and SFRY, the UN General Assembly expressed its grave concern at reports of "grave violations of international humanitarian law and of human rights . . . including . . . unlawful detention".[2452]

2634. In a resolution on Sudan adopted in 2000, the UN General Assembly expressed its deep concern at continuing serious violations of human rights and IHL by all parties, in particular arbitrary detention.[2453]

2635. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned "in the strongest terms all violations of human rights and [IHL] . . . in particular massive and systematic violations, including . . . detentions".[2454]

2636. In a resolution on Sudan adopted in 1996, the UN Commission on Human Rights called upon all parties to the hostilities to protect all civilians from violations of human rights and IHL, including arbitrary detention.[2455]

2637. In a resolution adopted in 1998, the UN Commission on Human Rights called for the immediate and unconditional release and safe return of all children abducted from northern Uganda and held by the LRA.[2456]

2638. In resolutions adopted in 1988 and 1989 on the situation in the Israeli-occupied territories, the UN Sub-Commission on Human Rights, after reaffirming that GC IV was applicable, considered that the administrative detention of thousands of Palestinians was a war crime under international law.[2457]

Other International Organisations

2639. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that "arbitrary arrests represent a total

[2450] UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 5.
[2451] UN General Assembly, Res. 36/147 D, 16 December 1981, § 1; Res. 37/88 D, 10 December 1982, § 1; Res. 38/79 E, 15 December 1983, § 1; Res. 39/95, 14 December 1984, § 1; Res. 40/161, 16 December 1985, § 1.
[2452] UN General Assembly, Res. 50/193, 22 December 1995, preamble.
[2453] UN General Assembly, Res. 55/116, 4 December 2000, § 2(ii).
[2454] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.
[2455] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.
[2456] UN Commission on Human Rights, Res. 1998/75, 22 April 1998, § 5.
[2457] UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.

contravention of all the Charters, Laws and Conventions of the International Community of Nations".[2458]

2640. In a resolution adopted in 1997, the Council of the League of Arab States decided "to denounce Israel's persistent violations of human rights in the occupied areas of South Lebanon and the Western Beka', exemplified by the kidnapping and arbitrary imprisonment of civilians".[2459]

International Conferences

2641. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . arbitrary detentions".[2460]

2642. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about "the number and expansion of conflicts in Africa" and alarm at "the spread of violence, in particular in the form of arbitrary detention . . . which seriously violate[s] the rules of International Humanitarian Law".[2461]

IV. Practice of International Judicial and Quasi-judicial Bodies

2643. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber considered the issue of legality of the confinement of civilians and held that:

> Clearly, internment is only permitted when absolutely necessary. Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.
>
> . . .
>
> The mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures, the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.[2462]

[2458] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 6.

[2459] League of Arab States, Council, Res. 5635, 31 March 1997, § 1.

[2460] World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I (30).

[2461] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

[2462] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 576–577.

The Tribunal also stated that:

The judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security. Thus, if these measures were inspired by other considerations, the reviewing body would be bound to vacate them. Clearly, the procedures established in Geneva Convention IV itself are a minimum and the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands.
...
The confinement of civilians during armed conflict may be permissible in limited cases, but has in any event to be in compliance with the provisions of articles 42 and 43 of Geneva Convention IV.[2463]

The ICTY Trial Chamber found the accused guilty of grave breaches of GC IV (unlawful confinement of civilians).[2464]

2644. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that:

The Committee points out that paragraph 1 [of Article 9 of the 1966 ICCPR] is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.... and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.
...
Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).[2465]

2645. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance ... through arbitrary deprivations of liberty.
...
It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural

[2463] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 580 and 583.
[2464] ICTY, *Delalić case*, Judgement, 16 November 1998, Part IV.
[2465] HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, §§ 1 and 4.

safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.[2466]

2646. In 1980, in *García Lanza de Netto v. Uruguay*, the HRC held that there was a violation of Article 9(1) of the ICCPR "because [the applicants] were not released, in the case of Alcides Lanza Perdomo, for five months and, in the case of Beatriz Weismann de Lanza, for 10 months, after their sentences of imprisonment had been fully served".[2467]

2647. In 1980, in *Torres Ramírez v. Uruguay*, the HRC held that there was a violation of Article 9(1) ICCPR "because [the victim] was not released for six weeks after his release was ordered by the military judge".[2468]

2648. In its decision in *Krishna Achutan v. Malawi* in 1994, the ACiHPR held that detention of a political figure "at the pleasure of the Head of State", for 12 years without charge or trial, was "arbitrary" and violated the right to liberty and security of person. The fact that the victim had no access to the courts also violated Article 6 of the 1981 ACHPR.[2469]

2649. In its decision in *Pagnoulle v. Cameroon* in 1997 concerning the five-year imprisonment of a Cameroonian citizen by a military tribunal, the ACiHPR held that his continued detention and house arrest after a five-year sentence had been served was arbitrary and in violation of Article 6 of the 1981 ACHPR.[2470]

2650. In its decision in *International Pen and Others v. Nigeria* in 1998, the ACiHPR held that the detention of individuals under a decree that permitted the government "to arbitrarily hold people critical of the government for up to three months without having to explain themselves and without the opportunity for the complainant to challenge the arrest and detention before a court of law" was a violation of Article 6 of the 1981 ACHPR.[2471]

2651. In its decision in *Constitutional Rights Project v. Nigeria (148/96)* in 1999, the ACiHPR stated that "(although it was unnecessary because they were found innocent of any crime), the soldiers were granted state pardons, but still not freed. This constitutes a further violation of Article 6 of the [ACHPR]".[2472]

2652. In the *Lawless case* in 1961 involving the detention of a suspected IRA activist for five months in a military detention camp under a statute that permitted the internment of persons engaged in activities prejudicial to the security of a State and public order, the ECtHR found no breach of Article 5 of the 1950 ECHR because of Ireland's derogation under Article 15 according to

[2466] HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, §§ 11 and 15.
[2467] HRC, *García Lanza de Netto v. Uruguay*, Views, 3 April 1980, § 16.
[2468] HRC, *Torres Ramírez v. Uruguay*, Views, 23 July 1980, § 18.
[2469] ACiHPR, *Krishna Achutan v. Malawi*, Decision, 25 October–30 November 1994.
[2470] ACiHPR, *Pagnoulle v. Cameroon*, Decision, 15–24 April 1997, § 17.
[2471] ACiHPR, *International Pen and Others v. Nigeria*, Decision, 22–31 October 1998.
[2472] ACiHPR, *Constitutional Rights Project v. Nigeria (148/96)*, Decision, 15 November 1999, § 16.

which it found that the detention was strictly required by the exigencies of the situation.[2473]

2653. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

> The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:
>
> . . .
>
> e. When it does not in any manner presuppose the suspension of the right to life, liberty or personal security, the right to protection against arbitrary detention . . .[2474]

2654. In its Annual Report 1980–1981, the IACiHR stated that the deprivation of personal liberty for prolonged or indefinite periods of time without due process or formal charges violated human rights. The Commission thus urged the member states of the OAS that "the detentions carried out under the state of emergency be for brief periods and always subject to review by the judiciary, in cases of abuses committed by the authorities who have ordered them".[2475]

2655. In its doctrine concerning judicial guarantees and the right to personal liberty and security published in 1982, the IACiHR stated that:

> No domestic or international legal norm justifies . . . the holding of detainees in prison for long and unspecified periods, . . . [especially] without any charges being brought against them for violation of the Law of National Security or another criminal law, and without their being brought to trial so that they might exercise the right to a fair trial and to due process of law.[2476]

2656. In its Annual Report 1983–1984, the IACiHR noted in relation to El Salvador that the 1969 ACHR "does not authorise suspension of the judicial guarantees necessary to protect fundamental rights" during emergency situations.[2477]

2657. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

> As a result of the disappearance, Manfredo Velásquez was the victim of an arbitrary detention, which deprived him of his physical liberty without legal cause and without a determination of the lawfulness of his detention by a judge or competent

[2473] ECtHR, *Lawless case*, Judgement, 1 July 1961, §§ 35–37; see also Ireland v. UK, Judgement, 18 January 1978, §§ 214–220 and *Brannigan and McBride v. UK*, Judgement, 26 May 1993, §§ 43 and 66.

[2474] IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59–61.

[2475] IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, 16 October 1981, p. 119.

[2476] IACiHR, Doctrine concerning judicial guarantees and the right to personal liberty and security, reprinted in *Ten years of activities (1971–1981)*, General Secretariat of the IACiHR, Washington, D.C., 1982, p. 337.

[2477] IACiHR, *Annual Report 1983–1984*, Doc. OEA/Ser.L/V/II.63 Doc. 10, 24 September 1984, p. 98.

tribunal. Those acts directly violate the right to personal liberty recognized by Article 7 of the [1969 ACHR] and are a violation imputable to Honduras of the duties to respect and ensure that right under Article 1(1).[2478]

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

2658. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "unlawful confinement" constitutes a grave breach of the law of war.[2479]

2659. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (e) prolonged arbitrary detention".[2480]

2660. In a note on respect for IHL in an internal armed conflict, the ICRC recommended that "the commanding officers . . . exercise stronger control over the units in order to put an end to unofficial and unacknowledged detention".[2481]

2661. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of "unlawful confinement of a protected person", when committed in an international armed conflict, be subject to the jurisdiction of the Court.[2482]

VI. Other Practice

2662. No practice was found.

Deprivation of liberty in accordance with legal procedures

I. Treaties and Other Instruments

Treaties

2663. Article 78, second paragraph, GC IV provides that "decisions regarding such assigned residence or internment [for imperative reasons of security] shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention".

2664. Article 5(1) of the 1950 ECHR provides that "no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law".

[2478] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 186.
[2479] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776(e).
[2480] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(e).
[2481] ICRC archive document.
[2482] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(vi).

2665. Article 9(1) of the 1966 ICCPR provides that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law".
2666. Article 7(2) of the 1969 ACHR provides that "no one shall be deprived of his physical liberty except for reasons and under the conditions established beforehand by the constitution of the State Party concerned or by law established pursuant thereto".
2667. Article 6 of the 1981 ACHPR provides that "no one may be deprived of his freedom except for reasons and conditions previously laid down by law".
2668. Article 37 of the 1989 Convention on the Rights of the Child provides that "the arrest, detention or imprisonment of a child shall be in conformity with the law".
2669. Article 7(2) of the 1998 Draft Convention on Forced Disappearance provides, concerning the custody of persons suspected of having committed a forced disappearance, that "such detention and measures shall be exercised in conformity with the legislation of that State, and may be continued only for the period necessary to enable any criminal or extradition proceedings to be instituted".
2670. Article 21(3) of the 1998 Draft Convention on Forced Disappearance provides that "arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by the competent authorities or persons authorized for that purpose".
2671. Article 55(1)(d) of the 1998 ICC Statute provides that "in respect of an investigation under this statute, a person . . . shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute".

Other Instruments
2672. According to Article XXV of the 1948 American Declaration on the Rights and Duties of Man, "no person may be deprived of his liberty except in the cases and according to the procedure established by pre-existing law".
2673. Principle 2 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose".

II. National Practice

Military Manuals
2674. According to the UK Military Manual, "the decisions regarding such assigned residence or internment [for imperative reasons of security] can only be

made in accordance with a regular procedure to be prescribed by the Occupant in accordance with the obligations of [GC IV]".[2483]

National Legislation

2675. Countless pieces of national legislation require that arrest be carried out in accordance with legal procedures. For instance, India's Code of Criminal Procedure contains elaborate rules regarding arrest by law enforcement agencies and the protection of human rights while arrest is being executed.[2484]

2676. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2485]

2677. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 78 GC IV, is a punishable offence.[2486]

2678. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[2487]

National Case-law

2679. No practice was found.

Other National Practice

2680. According to the Report on the Practice of Ethiopia, during the Mengistu regime in Ethiopia, unlawful detention and internment were widely practised. The report also states that "the law seems to allow deprivation of one's liberty on mere suspicion. The individual may also lose his liberty in circumstances where formal arrest is not justified for lack of evidence."[2488]

2681. In 1969, in the context of derogation under Article 15 of the 1950 ECHR, Greece informed the Secretary-General of the Council of Europe that it was beginning to restore application of the Constitution. The Constitution considered personal liberty to be inviolable, so that no one should be arrested or detained without a guarantee of constitutional forms and procedures. However, Greece added that this did not apply to persons charged with crimes against public order, who could be arrested without formalities if necessary.[2489]

[2483] UK, *Military Manual* (1958), § 555.
[2484] India, *Code of Criminal Procedure* (1973), Sections 41–60.
[2485] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2486] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[2487] Norway, *Military Penal Code as amended* (1902), § 108(a).
[2488] Report on the Practice of Ethiopia, 1998, Chapter 5.3 and 5.7.
[2489] Greece, Letter to the Secretary-General of the Council of Europe, Doc. 2199, 4 October 1969, § A.

2682. In a memorandum order issued in 1988, the President of the Philippines required the armed and police forces to strictly comply with the required legal processes in all cases of arrest and detention, for which they were given specific instructions.[2490]

III. Practice of International Organisations and Conferences

2683. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

2684. In *McVeigh, O'Neill and Evans v. UK* in 1981, the ECiHR did not condemn the UK Arrest under Prevention of Terrorism Act, which allows detention based on the "examining officer's appreciation" of the information available to him.[2491]

2685. In its judgement in *Fox, Campbell and Hartley* in 1990, the ECtHR, when considering the notion of "reasonable suspicion" when conducting an arrest of a person, stated that:

> The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c) . . . The Court agrees . . . that having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.
> . . .
> As the Government pointed out, in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences in Northern Ireland, the "reasonableness" of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) (art. 5-1-c) is impaired.[2492]

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

2686. No practice was found.

VI. Other Practice

2687. No practice was found.

[2490] Philippines, Memorandum Order 209, 13 December 1988, § 1.
[2491] ECiHR, *McVeigh, O'Neill and Evans v. UK*, Report, 18 March 1981, §§ 195 and 205.
[2492] ECtHR, *Fox, Campbell and Hartley*, Judgement, 30 August 1990, § 32.

Prompt information of the reasons for deprivation of liberty

I. Treaties and Other Instruments

Treaties

2688. Article 41, first paragraph, GC III provides that "in every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners' own language, at places where all may read them".

2689. Article 99, second paragraph, GC IV provides that "the text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee".

2690. According to Article 5(2) of the 1950 ECHR, "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him".

2691. Article 9(2) of the 1966 ICCPR provides that "anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him".

2692. Article 7(4) of the 1969 ACHR states that "anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him".

2693. Article 75(3) AP I provides that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken". Article 75 AP I was adopted by consensus.[2493]

Other Instruments

2694. Principle 10 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "anyone who is arrested shall be informed at the time of his arrest of the reasons for his arrest and shall be promptly informed of any charges against him".

2695. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

2696. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

[2493] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

II. National Practice

Military Manuals

2697. Canada's LOAC Manual provides that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language that person understands, of the reasons why these measures have been taken".[2494]

2698. India's Police Manual states that the reasons for a detention order should be communicated as soon as possible, but ordinarily not later than five days after arrest, and in exceptional circumstances, for reasons to be recorded in writing, not later than ten days. For Punjab and Chandigarh, this period was extended to 15 days.[2495]

2699. New Zealand's Military Manual provides that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken".[2496]

2700. Sweden's IHL Manual considers that any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he or she understands, of the reasons why these measures have been taken. The manual considers Article 75 AP I to be part of customary international law.[2497]

2701. Switzerland's Basic Military Manual provides that "every person arrested, detained or interned for acts committed in connection with the conflict shall be informed, without delay, in a language he or she understands, of the reasons why the measures have been taken".[2498]

National Legislation

2702. Countless pieces of domestic legislation provide for prompt information of the reasons of detention. For instance, preventive detention is permitted by India's Constitution subject to a number of safeguards, namely that detainees have a right to be informed of the reasons for the detention order.[2499]

2703. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 75(3) AP I, is a punishable offence.[2500]

2704. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

[2494] Canada, *LOAC Manual* (1999), p. 11-8, § 64.
[2495] India, *Police Manual* (1986), pp. 21, 27 and 29.
[2496] New Zealand, *Military Manual* (1992), § 1137(3).
[2497] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[2498] Switzerland, *Basic Military Manual* (1987), Article 175.
[2499] India, *Constitution* (1950), Article 22.
[2500] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[2501]

2705. Spain's Penal Code provides for the punishment of anyone who in the case of an armed conflict, fails to fulfil his or her obligation to inform protected persons clearly and without delay about their situation.[2502]

2706. The Revised Edition of Zimbabwe's Constitution provides that all arrested persons have the right to be informed of the reasons for their detention as soon as reasonably practicable after the commencement of detention, and in any case not later than seven days thereafter.[2503]

National Case-law

2707. No practice was found.

Other National Practice

2708. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[2504]

III. Practice of International Organisations and Conferences

2709. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

2710. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that "if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. . . . information of the reasons must be given (para. 2)".[2505]

2711. In numerous cases, the HRC has found a violation of Article 9(2) of the 1966 ICCPR because no or insufficient information was given on the reasons of detention, or the information was not given promptly.[2506]

2712. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "Persons who are arrested shall be informed at the time of arrest, in a language

[2501] Norway, *Military Penal Code as amended* (1902), § 108(b).
[2502] Spain, *Penal Code* (1995), Article 612(3).
[2503] Zimbabwe, *Constitution Revised Edition* (1996), Section 2, Schedule 2.
[2504] Report on the Practice of Jordan, 1997, Chapter 5.
[2505] HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, § 4.
[2506] See, e.g., HRC, *Hernández Valentini de Bazzano v. Uruguay*, Views, 15 August 1979, § 10, see also *Buffo Carballal v. Uruguay*, Views, 27 March 1981, § 13; *Pietraroia v. Uruguay*, Views, 27 March 1981, § 14; *Drescher Caldas v. Uruguay*, Views, 21 July 1983, §§ 13.2 and 14; *Luyeye Magana ex-Philibert v. Zaire*, Views, 21 July 1983, § 8; *Hiber Conteris v. Uruguay*, Views, 17 July 1985, § 10; *Kelly v. Jamaica*, Views, 8 April 1991, § 5(8); *Harward v. Norway*, Views, 15 July 1994, § 9(4)–(5).

which they understand, of the reason for their arrest and shall be informed promptly of any charges against them."[2507]

2713. In its admissibility decision in *X v. Austria* in 1975, the ECiHR held that all persons arrested shall be informed of the reasons for the arrest and notified of the charges against them in a language they understand.[2508]

2714. In *Fox, Campbell and Hartley* in 1990, the ECtHR decided that an applicant must be told in "simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness".[2509]

2715. In *Van der Leer v. Netherlands* in 1990, dealing with a case in which a court authorised the applicant's confinement for six months without holding any hearings and in which the applicant was not informed for ten days of the confinement order and the reasons for it, the ECtHR held the delay to be unacceptable and in breach of Article 5 of the 1950 ECHR.[2510]

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

2716. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly in a language understandable to him of the reasons for the measure taken".[2511]

2717. The ICRC Commentary on the Additional Protocols states that:

> Legal practice in most countries recognises preventive custody, i.e., a period during which the police or the public prosecutor can detain a person in custody without having to charge him with a specific accusation; in peacetime this period is no more than two or three days, but sometimes it is longer for particular offences (acts of terrorism) and in time of armed conflict it is often prolonged. Useful indications can be found in national legislation. In any case, even in time of armed conflict, detaining a person for longer than, say, ten days without informing the detainee of the reasons for his detention would be contrary to [Article 75(3) AP I].[2512]

VI. Other Practice

2718. No practice was found.

[2507] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(b).
[2508] ECiHR, *X v. Austria*, Admissibility Decision, 29 May 1975, p. 70.
[2509] ECtHR, *Fox, Campbell and Hartley*, Judgement, 30 August 1990, § 40.
[2510] ECtHR, *Van der Leer v. Netherlands*, Judgement, 21 February 1990, § 31.
[2511] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 201.
[2512] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3073.

Prompt appearance before a judge or judicial officer

I. Treaties and Other Instruments

Treaties

2719. Article 5(3) of the 1950 ECHR provides that:

> Everyone lawfully arrested or detained [for the purpose of being brought before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.

2720. Article 9(3) of the 1966 ICCPR provides that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power".

2721. Article 7(5) of the 1969 ACHR provides that "any person detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power".

2722. Article XI of the 1994 Inter-American Convention on the Forced Disappearance of Persons states that "every person deprived of liberty shall be . . . brought before a competent judicial authority without delay, in accordance with applicable domestic law".

2723. Article 59(2) of the 1998 ICC Statute provides that:

> A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
> (a) The warrant applies to that person;
> (b) The person has been arrested in accordance with the proper process; and
> (c) The person's rights have been respected.

Other Instruments

2724. Principle 11 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority".

2725. Principle 37 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest".

2726. According to Article 10 of the 1992 UN Declaration on Enforced Disappearance, "any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention".

2727. Article 22(1) of the 1998 Draft Convention on Forced Disappearance provides that "States Parties guarantee that any person deprived of liberty

shall . . . be brought before a judge or other competent judicial authority without delay, who will also be informed of the place where the person is being deprived of liberty".

II. National Practice

Military Manuals

2728. Colombia's Instructors' Manual provides that "persons in preventive detention shall be brought before a judge in the 36 hours following [arrest]".[2513]

National Legislation

2729. Countless pieces of domestic legislation contain provisions on the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power. For instance, India's Constitution provides fundamental guarantees for arrested persons, including the right to be produced before a magistrate.[2514]

2730. Myanmar's Defence Service Act provides for the punishment of "any person subject to this law who . . . fails to bring [the case of a detained or confined person] before the proper authority for investigation".[2515]

2731. Uganda's National Resistance Army Statute provides for the punishment of the person subject to military law who fails to bring a detained person's case before the proper authority for investigation.[2516]

National Case-law

2732. No practice was found.

Other National Practice

2733. No practice was found.

III. Practice of International Organisations and Conferences

2734. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

2735. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that:

Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by

[2513] Colombia, *Instructors' Manual* (1999), p. 10.
[2514] India, *Constitution* (1950), Article 22.
[2515] Myanmar, *Defence Services Act* (1959), Section 49(a).
[2516] Uganda, *National Resistance Army Statute* (1992), Article 45(b).

law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days . . .

Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement "to trial within a reasonable time or to release" under paragraph 3. Pre-trial detention should be an exception and as short as possible.[2517]

2736. On numerous occasions, the HRC has found violations of Article 9(3) of the 1966 ICCPR because of the delay in bringing arrested persons before a judge.[2518] In *Martínez Portorreal v. the Dominican Republic* in 1987, however, the HRC ruled that 50 hours of detention did not justify a finding as to the alleged violation of Article 9(3) ICCPR.[2519]

2737. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released."[2520]

2738. In its judgement in *Schiesser v. Switzerland* in 1979, the ECtHR held that the function of the judicial officer must be that of "reviewing the circumstances militating for and against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons".[2521]

2739. In its judgement in the *De Jong, Baljet and Van den Brink case* in 1984, the ECtHR held that detention without access to a court for a period exceeding six days was incompatible with Article 5(4) of the 1950 ECHR, which required that "the lawfulness of his detention shall be decided speedily".[2522]

2740. In its judgement in the *Brogan and Others case* in 1988, the ECtHR held that the delay in bringing the arrested person before a judge under Article 5(3) must not exceed three days. It stated that while it accepted that the context of terrorism in Northern Ireland may, subject to the existence of adequate safeguards, have the effect of prolonging the period during which the authorities could lawfully keep persons suspected of serious terrorist offences in custody before bringing them before a judge, the circumstances could not justify dispensing with prompt judicial control altogether. The flexibility in the

[2517] HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, §§ 2 and 3.
[2518] See, e.g., HRC, *García Lanza de Netto v. Uruguay*, Views, 3 April 1980, § 8; *Buffo Carballal v. Uruguay*, Views, 27 March 1981, § 13; *Lafuente Peñarrieta and Others v. Bolivia*, Views, 2 November 1987, § 16; *Terán Jijón v. Ecuador*, Views, 26 March 1992, § 5(3); *Stephens v. Jamaica*, Views, 18 October 1995, § 9(6); *P. Grant v. Jamaica*, Views, 22 March 1996, § 8(2).
[2519] HRC, *Martínez Portorreal v. the Dominican Republic*, Views, 5 November 1987, § 10(2).
[2520] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(c).
[2521] ECtHR, *Schiesser v. Switzerland*, Judgement, 4 December 1979, § 31.
[2522] ECtHR, *De Jong, Baljet and Van den Brink case*, Judgement, 22 May 1984, § 58.

interpretation of "promptness" in Article 5(3) of the 1950 ECHR was very limited according to the Court. To attach such importance to the special features of the case as to justify so lengthy a period of detention without appearance before a judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly", according to the Court.[2523]

2741. In its judgement in *Brannigan and McBride v. UK* in 1993, the ECtHR held that the UK had not exceeded its margin of appreciation by derogating from its obligations under Article 5 of the 1950 ECHR to the extent that individuals suspected of terrorist offences were allowed to be held for up to seven days without judicial control because there were real guarantees against abuse and incommunicado detention.[2524]

2742. In its judgement in *Aksoy v. Turkey* in 1996, concerning the derogation by Turkey from numerous articles of the of the 1950 ECHR, including Article 5, on account of the threat to national security in the south-east of the country, the ECtHR held that it was for each contracting State to determine whether life was threatened by a public emergency and how far it was necessary to go in attempting to overcome the emergency. However, the national authorities did not enjoy an unlimited discretion and it was for the Court to rule whether States had gone beyond the extent strictly required by the exigencies of the situation. It held that although the investigation of terrorist offences undoubtedly presented the authorities with special problems, it could not accept that it was necessary to hold a suspect for 14 days without judicial intervention.[2525]

2743. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR held that "those Peruvian laws that allow the authorities to hold a person suspected of the crime of treason in preventive custody for 15 days, with the possibility of a 15-day extension, without bringing that person before a judicial authority", were contrary to Article 7(5) of the 1969 ACHR. It consequently found that "the period of approximately 36 days that elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority is excessive and contrary to the provisions of the [1969 ACHR]".[2526]

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

2744. No practice was found.

VI. Other Practice

2745. No practice was found.

[2523] ECtHR, *Brogan and Others case*, Judgement, 29 November 1988, §§ 55–62.
[2524] ECtHR, *Brannigan and McBride v. UK*, Judgement, 26 May 1993, §§ 61–66.
[2525] ECtHR, *Aksoy v. Turkey*, Judgement, 18 December 1996, §§ 78 and 83–84.
[2526] IACiHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, §§ 110–111.

Decision on the lawfulness of deprivation of liberty

I. Treaties and Other Instruments

Treaties

2746. Article 43, first paragraph, GC IV provides that:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

2747. Article 78 GC IV provides that the occupying power may take a decision to apply safety measures (such as assigned residence or to internment) with regard to protected persons. It adds that such a decision shall be made under a regular procedure and that "it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power".

2748. Article 5(4) of the 1950 ECHR stipulates that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

2749. Article 9(4) of the 1966 ICCPR provides that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide on the lawfulness of his detention and order his release if the detention is not lawful".

2750. Article 7(6) of the 1969 ACHR provides that "anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful".

2751. Article 37 of the 1989 Convention on the Rights of the Child provides that "every child deprived of his or her liberty shall have . . . the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action".

Other Instruments

2752. According to Article XXV of the 1948 American Declaration on the Rights and Duties of Man, "every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court without undue delay or, otherwise, to be released".

2753. Principle 32 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a detained

person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful".
2754. Article 5 of Part II of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that all persons have the right to effectively avail of the privilege of the writ of *habeas corpus*.

II. National Practice

Military Manuals

2755. Argentina's Law of War Manual (1969) provides that:

> Any protected person who has been interned or placed in assigned residence shall have the right to obtain that a court or an administrative board, created by the [Detaining Power] for this purpose, reconsider within a brief time limit the decision taken against him. If it maintains the internment or assigned residence, the court or administrative board shall proceed periodically, and at least twice a year, to the examination of the case of the concerned person in order to modify in his favour the initial decision, if circumstances permit.[2527]

2756. Argentina's Law of War Manual (1989) provides that:

> Any protected person who has been subjected to [enforced residence or internment] will have the right that a competent tribunal or administrative council, especially created by the Detaining Power, reconsider, as promptly as possible, the decision adopted.
>
> If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.[2528]

2757. Canada's LOAC Manual provides that:

> A person who has been interned or placed in an assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board of the belligerent. If the internment or placing in assigned residence is maintained, the court or administrative board must periodically, and at least twice yearly, reconsider the case with a view to the favourable amendment of the initial decision if circumstances permit.[2529]

2758. Colombia's Basic Military Manual provides that "the work undertaken by persons who cooperate with those who are deprived of their liberty in order to invoke the right to *habeas corpus*, or who invoke this right directly in their name, finds its legal basis in their status as human rights defenders".[2530]

[2527] Argentina, *Law of War Manual* (1969), § 4.017(3).
[2528] Argentina, *Law of War Manual* (1989), § 4.30(6).
[2529] Canada, *LOAC Manual* (1999), p. 11.5, § 43.
[2530] Colombia, *Basic Military Manual* (1995), p. 62.

2759. Germany's Military Manual provides, regarding aliens placed in assigned residence or internment, that "it shall be possible to have the measures reconsidered by an appropriate court or administrative board".[2531]

2760. New Zealand's Military Manual provides that:

A person who has been interned or placed in an assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board of the belligerent. If the internment or placing in assigned residence is maintained, the court or administrative board must periodically, and at least twice yearly, reconsider the case with a view, if circumstances permit, to the favourable amendment of the initial decision.[2532]

2761. The UK Military Manual provides that:

A person who has been interned or placed in an assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board of the belligerent. If the internment or placing in assigned residence is maintained, the court or administrative board must periodically, and at least twice yearly, reconsider the case with a view to the favourable amendment of the initial decision if circumstances permit.[2533]

The manual further specifies that, in occupied territories,

the decisions regarding such assigned residence or internment can only be made in accordance with regular procedure . . . If the decision to intern, or to assign a special place of residence to, a protected person is upheld on appeal, such decision must be subject to periodical review – if possible every six months – by a competent body set up by the Occupant.[2534]

2762. The US Field Manual reproduces Article 43 GC IV.[2535] With respect to situations of occupation, the manual uses the same wording as Article 78 GC IV and specifies that "'competent bodies' to review the internment or assigned residence of protected persons may be created with advisory functions only, leaving the final decision to a high official of the Government".[2536]

2763. The US Air Force Pamphlet provides, regarding the internment or placing in assigned residence of protected persons, that if such internment is maintained, the internee is entitled to a periodic review of his or her case by an appropriate court or administrative board at least twice yearly.[2537] It further states that "persons placed in internment or assigned residence in occupied territory are entitled to a review or reconsideration by a 'competent body'".[2538]

National Legislation

2764. Countless pieces of domestic legislation contain provisions on the right to have the lawfulness of detention reviewed by a court and the release ordered

[2531] Germany, *Military Manual* (1992), § 587.
[2532] New Zealand, *Military Manual* (1992), § 1120(3).
[2533] UK, *Military Manual* (1958), § 51.
[2534] UK, *Military Manual* (1958), § 555.
[2535] US, *Field Manual* (1956), § 282.
[2536] US, *Field Manual* (1956), § 433.
[2537] US, *Air Force Pamphlet* (1976), § 14-5.
[2538] US, *Air Force Pamphlet* (1976), § 14-7.

in case it is not lawful (so-called writ of *habeas corpus*). For instance, Russia's Constitution provides that "arrest, detention and keeping in custody shall be allowed only by an order of a court of law. No person may be detained for more than 48 hours without an order of a court of law including the right to make a representation against the order of arrest".[2539]

2765. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2540]

2766. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 43 and 78 GC IV, is a punishable offence.[2541]

2767. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... is liable to imprisonment".[2542]

National Case-law

2768. No practice was found.

Other National Practice

2769. In 1989, in a statement before the HRC, Uruguay reported that *habeas corpus* definitely continued to apply in emergency situations.[2543]

III. Practice of International Organisations and Conferences

United Nations

2770. In 1996, in a report to the UN Sub-Commission on Human Rights, the Special Rapporteur on States of Emergency stated that the remedy of *habeas corpus* "is not derogable at any time or under any circumstances".[2544]

Other International Organisations

2771. No practice was found.

International Conferences

2772. No practice was found.

[2539] Russia, Constitution (1993), Article 22(2).
[2540] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2541] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[2542] Norway, *Military Penal Code as amended* (1902), § 108(a).
[2543] Uruguay, Statement before the HRC, UN Doc. CCPR/C/SR.877, 30 March 1989, §§ 44 and 49.
[2544] UN Sub-Commission on Human Rights, Special Rapporteur on States of Emergency, Report, UN Doc. E/CN.4/Sub.2/1996/19, 18 June 1996, § 13.

IV. Practice of International Judicial and Quasi-judicial Bodies

2773. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that:

As Geneva Convention IV leaves a great deal to the discretion of the detaining party in the matter of the original internment or placing in assigned residence of an individual, the party's decision that such measures of detention are required must be "reconsidered as soon as possible by an appropriate court or administrative board".[2545]

2774. In its judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber held that:

The involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful. Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[2546]

2775. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that "if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. . . . court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5)".[2547]

2776. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".[2548]

2777. In numerous cases concerning Uruguay between 1979 and 1981, the HRC found a violation of the right to *habeas corpus* particularly with regard to a large number of persons who had been imprisoned without court supervision under emergency legislation during the period of military rule.[2549] The HRC has also found a violation of Article 9(4) of the 1966 ICCPR in numerous other cases.[2550]

[2545] ICTY, *Delalić case*, Judgement, 16 November 1998, § 581.
[2546] ICTY, *Delalić case*, Judgement on Appeal, 20 February 2001, § 320.
[2547] HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, § 4.
[2548] HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 16.
[2549] HRC, *Torres Ramírez v. Uruguay*, Views, 23 July 1980, § 18; *Hernández Valentini de Bazzano v. Uruguay*, Views, 15 August 1979, § 10; *Sequeria v. Uruguay*, Views, 29 July 1980, § 16; *García Lanza de Netto v. Uruguay*, Views, 3 April 1980, § 16; *Santullo Valcada v. Uruguay*, Views, 26 October 1979, § 12; *Altesor v. Uruguay*, Views, 29 March 1982, § 15; *Buffo Carballal v. Uruguay*, Views, 27 March 1981, § 13; *Soriano de Bouton v. Uruguay*, Views, 27 March 1981, § 12; *Pietraroia v. Uruguay*, Views, 27 March 1981, § 17; *Sala de Tourón v. Uruguay*, Views, 31 March 1981, § 6.
[2550] See, e.g., HRC, *Dermit Barbato v. Uruguay*, Views, 21 October 1982, § 10 (incommunicado detention); *Tshitenge Muteba v. Zaire*, Views, 24 July 1984, § 12 (incommunicado detention);

2778. In 1998, in its concluding observations on Israel, the HRC stressed that even where there had been a derogation from the 1966 ICCPR, a State party to the Covenant could not depart from the requirement of effective judicial review of detention.[2551]

2779. In 1996, in a communication alleging the expulsion from Zambia of over 500 west Africans after they had been administratively detained, the ACiHPR referred to its decision finding the case admissible as evidence that it had already established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation, which was a violation of Article 7 of the 1981 ACHPR as well as of national law.[2552]

2780. In a number of judgements, the ECtHR held that the court charged with making the decision as to the legality of the detention must function in accordance with procedural guarantees,[2553] such as an oral hearing,[2554] adversarial proceedings[2555] and time and facilities to prepare application.[2556] The ECtHR has specified that the tribunal making the determination as to the legality of the detention must have the power to release the person.[2557] The Court has specified, however, that due consideration must be given to the diligence of the national authorities and any delays brought about by the conduct of the detained person, as well as other factors responsible for delays that might be beyond the power of the State organs.[2558]

2781. In its advisory opinion in the *Habeas Corpus case* in 1987, the IACtHR stated that:

> In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.[2559]

Kelly v. Jamaica, Views, 8 April 1991, § 5(6) (detention of five weeks without access to a judge); *Berry v. Jamaica*, Views, 7 April 1994, § 11.1 (two and half months without court ruling on legality of detention).

2551 HRC, Concluding observations on Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998, § 21.

2552 ACiHPR, *RADDH v. Zambia*, Decision, 21–31 October 1996.

2553 ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, Judgement, 18 June 1971, § 76; *Ireland v. UK*, Judgement, 18 January 1978, §§ 84 and 200.

2554 ECtHR, *Sánchez-Reisse case*, Judgement, 21 October 1986, § 51; *Hussain v. UK*, Judgement, 21 February 1996, § 59; *Singh v. UK*, Judgement (Chamber), 21 February 1996, §§ 69–70.

2555 ECtHR, *Toth v. Austria*, Judgement, 12 December 1991, § 84; *Lamy case*, Judgement, 30 March 1989, § 29; *Hussain v. UK*, Judgement, 21 February 1996, § 59; *Singh v. UK*, Judgement, 21 February 1996, §§ 65, 68 and 70.

2556 ECtHR, *K v. Austria*, Judgement, 2 June 1993, § 64; *Farmakopoulos v. Belgium*, Judgement, 27 March 1992, § 53.

2557 ECtHR, *X. v. UK*, Judgement, 5 November 1981, § 58; *Van Droogenbroeck case*, Judgement, 24 June 1982, § 49.

2558 ECtHR, *Sánchez-Reisse case*, Judgement, 21 October 1986, § 56; *Navarra v. France*, Judgement, 23 November 1993, § 29; *Kolompar v. Belgium*, Judgement, 24 September 1992, §§ 42–43.

2559 IACtHR, *Habeas Corpus case*, Advisory Opinion, 30 January 1987, § 35.

The Court concluded that "writs of habeas corpus and of 'amparo' are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) [1969 ACHR] and that serve, moreover, to preserve legality in a democratic society".[2560]

2782. In its advisory opinion in the *Judicial Guarantees case* in 1987, the IACtHR interpreted the scope of the prohibition on the suspension of judicial guarantees essential for the protection of non-derogable rights. The Court found that:

> The "essential" judicial guarantees which are not subject to derogation, according to Article 27(2) [1969 ACHR], include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the [1969 ACHR].[2561]

2783. In its judgement in the *Neira Alegría and Others case* in 1995, the IACtHR found that the principles it had established in the two advisory opinions on *habeas corpus* and human rights during states of emergency applied equally in a case where the control and jurisdiction over a prison had been delegated to the armed forces as the result of a riot. The Court found that there had been a consequent violation of the right to *habeas corpus*.[2562]

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

2784. No practice was found.

VI. Other Practice

2785. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that:

> The right to an effective remedy, including habeas corpus, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.[2563]

The Declaration also provides that:

[2560] IACtHR, *Habeas Corpus case*, Advisory Opinion, 30 January 1987, § 42.
[2561] IACtHR, *Judicial Guarantees case*, Advisory Opinion, 6 October 1987, § 41(1).
[2562] IACtHR, *Neira Alegría and Others case*, Judgement, 19 January 1995, §§ 82–84 and 91(2).
[2563] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4(3), *IRRC*, No. 282, 1991, p. 331.

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.[2564]

M. Fair Trial Guarantees

General

Note: *For practice concerning executions, see section C of this chapter. For practice concerning the status of spies, see Chapter 33, section B.*

I. Treaties and Other Instruments

Treaties

2786. Article 16 of the 1945 IMT Charter (Nuremberg), entitled "Fair trial for defendants", provides a list of procedures to be followed "in order to ensure fair trial for the Defendants".

2787. Common Article 3 of the 1949 Geneva Conventions prohibits "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

2788. Article 49, fourth paragraph, GC I and Article 50, fourth paragraph, GC II provide that:

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

2789. Articles 102–108 GC III contain detailed provisions to ensure a fair trial in any judicial proceedings against POWs.

2790. According to Article 130 GC III, "if committed against persons or property protected by the Convention . . . wilfully depriving a prisoner of war of the rights of fair and regular trial" is a grave breach of the Convention.

2791. Article 5 GC IV provides that an individual protected person suspected of or engaged in activities hostile to the security of the State in the territory of a party to the conflict or an individual protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the occupying power "shall nevertheless be treated with humanity,

[2564] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 11, *IRRC*, No. 282, 1991, p. 334.

and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention".

2792. Article 66 GC IV provides that "in case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country". Articles 67–75 GC IV contain more detailed provisions concerning the procedure which must be followed.

2793. Article 78, second paragraph, GC IV provides that "decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention".

2794. According to Article 147 GC IV "wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention" is a grave breach of the Convention.

2795. Article 6(1) of the 1950 ECHR provides that "in the determination of his civil rights and obligations or for any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Article 6(3) lists the minimum rights to which everyone charged with a criminal offence is entitled.

2796. Article 14(1) of the 1966 ICCPR provides that "in the determination of any criminal charge . . . or . . . rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Article 14(3) then lists the minimum guarantees to which everyone charged with a criminal offence is entitled "in full equality".

2797. Article 8(1) of the 1969 ACHR provides that "every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent . . . tribunal, previously established by law". Article 8(2) lists the minimum guarantees to which everyone is entitled "with full equality".

2798. Article 71(1) AP I provides that "no sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial".

2799. Article 75(4) AP I provides that:

> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.

Article 75 AP I was adopted by consensus.[2565]

2800. Article 85(4)(e) AP I states that "depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and

[2565] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

regular trial" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.[2566]

2801. Article 7 of the 1981 ACHPR provides that "every individual shall have the right to have his cause heard".

2802. Article 40(2)(b)(iii) of the 1989 Convention on the Rights of the Child states that "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iii) to have the matter determined without delay by a competent . . . authority or judicial body in a fair hearing according to law".

2803. Under Article 8(2)(a)(vi) of the 1998 ICC Statute, "wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" constitutes a war crime in international armed conflicts. Under Article 8(2)(c)(iv), "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable," constitutes a war crime in non-international armed conflicts.

2804. Article 64(2) of the 1998 ICC Statute provides that "the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused". Article 64(3)(a) adds that "the Trial Chamber assigned to deal with the case shall . . . confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings". Article 64(8)(b) states that "at the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner".

2805. Article 67(1) of the 1998 ICC Statute provides that "in the determination of any charge, the accused shall be entitled to a . . . fair hearing conducted impartially".

2806. Article 69 of the 1998 ICC Statute states with regard to evidence that:

> The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

2807. Article 17(2) of the 1999 Second Protocol to the 1954 Hague Convention provides that "any person . . . shall be guaranteed . . . a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law".

2808. Article 3(g) of the 2002 Statute of the Special Court for Sierra Leone states that:

[2566] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.

These violations include "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

2809. Article 17(2) of the 2002 Statute of the Special Court for Sierra Leone, entitled "Rights of the accused", provides that "the accused shall be entitled to a fair and public hearing".

Other Instruments

2810. Article 148 of the 1863 Lieber Code provides that "the law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the law of peace allows such intentional outlawry".

2811. Article 9 of the 1946 IMT Charter (Tokyo), entitled "Fair trial for accused", provides a list of procedures to be followed "in order to insure fair trial for the accused".

2812. Article 10 of the 1948 UDHR provides that "everyone is entitled in full equality to a fair and public hearing".

2813. Article XVIII of the 1948 American Declaration on the Rights and Duties of Man, entitled "Right to a fair trial", states that "every person may resort to the courts to ensure respect for his legal rights".

2814. Principle V of the 1950 Nuremberg Principles adopted by the ILC provides that "any person charged with a crime under international law has the right to a fair trial on the facts and law".

2815. Article 19 of the 1956 New Delhi Draft Rules provides that:

The accused persons shall be tried only by a regular civil or military court; they shall, in all circumstances, benefit by the safeguards of proper trial and defence at least equal to those provided under Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

2816. Paragraph 6 of the 1985 Basic Principles on the Independence of the Judiciary states that "the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected".

2817. Paragraph 1 of the 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that:

Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions.

2818. Article 19(e) of the 1990 Cairo Declaration on Human Rights in Islam provides that "a defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence".
2819. Article 8(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, "in the determination of any charge against him, to have a fair and public hearing".
2820. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
2821. Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that the parties commit themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.
2822. Under Article 2(f) of the 1993 ICTY Statute, the Tribunal is competent to prosecute wilful deprivation of a POW or a civilian of the rights of fair and regular trial.
2823. Article 20(1) of the 1993 ICTY Statute provides that "the Trial Chambers shall ensure that a trial is fair".
2824. Article 21(2) of the 1993 ICTY Statute provides that "in the determination of charges against him, the accused shall be entitled to a fair and public hearing".
2825. Under Article 4(g) of the 1994 ICTR Statute, the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".
2826. Article 19(1) of the 1994 ICTR Statute states that "the Trial Chambers shall ensure that a trial is fair".
2827. Article 20(2) of the 1994 ICTR Statute provides that "in the determination of charges against him or her, the accused shall be entitled to a fair and public hearing".
2828. Under Section III (2) of the 1994 Comprehensive Agreement on Human Rights in Guatemala, the government of Guatemala undertook to modify the

Penal Code so that "summary or extra-judicial executions may be characterized as crimes of particular gravity and punished as such".

2829. Article 11(1)(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, "in the determination of any charge against him, to have a fair and public hearing".

2830. Article 20(a)(vi) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "wilfully depriving a protected person or other protected persons of the rights of fair and regular trial" is as a war crime. Article 20(f)(vii) states that "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable", committed in violation of international humanitarian law applicable in armed conflict not of an international character, is a war crime.

2831. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines prohibits "summary executions (salvagings)". Article 2(9) provides that the Agreement seeks to protect and promote "the right to substantive and procedural due process".

2832. Article 3(2) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "punishing anyone without complying with all the requisites of due process" shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

2833. Article 47 of the 2000 EU Charter of Fundamental Rights provides that "everyone is entitled to a fair and public hearing within a reasonable period of time by . . . [a] tribunal previously established by law".

2834. According to Article 8(2)(a)(vi) and (c)(iv) of the 2000 ICC Elements of Crime, "denying a fair trial" is defined by reference to the Geneva Conventions (III and IV in particular), while "sentencing or execution without due process" is defined by reference to the requirements of independence and impartiality and to "all other judicial guarantees generally recognized as indispensable under international law".

2835. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vi), "wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" constitutes a war crime in international armed conflicts. According to Section 6(1)(c)(iv), "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable," constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

2836. Argentina's Law of War Manual (1969) provides that protected persons arrested on suspicion of performing acts prejudicial to the occupying power cannot be "deprived . . . of a fair and regular trial".[2567] It further states that a "competent tribunal of the Occupying Power cannot impose any sentence without having proceeded to a regular trial".[2568] With respect to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[2569]

2837. Argentina's Law of War Manual (1989) states that "depriving [a protected person] of his right to a regular and impartial trial" is a grave breach of the Geneva Conventions.[2570]

2838. Australia's Commanders' Guide provides that "wilfully depriving PWs or other protected persons of the right of a fair and regular trial as prescribed by the Geneva Conventions" is a grave breach of the Geneva Conventions.[2571]

2839. Australia's Defence Force Manual states that "wilfully depriving PWs or other protected persons of the right of a fair and regular trial as prescribed by the Geneva Conventions" is a grave breach of the Geneva Conventions.[2572]

2840. Belgium's Law of War Manual refers to common Article 3 of the 1949 Geneva Conventions and prohibits the conviction of protected persons without a prior fair trial.[2573] It further states that depriving a POW or other protected persons of the right to be tried by a regular court is a grave breach of the Geneva Conventions.[2574]

2841. Benin's Military Manual provides that every person shall benefit from fundamental judicial guarantees.[2575]

2842. Burkina Faso's Disciplinary Regulations states that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".[2576]

2843. Under Cameroon's Disciplinary Regulations, it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".[2577]

2844. Canada's LOAC Manual provides that:

[2567] Argentina, *Law of War Manual* (1969), § 4.003.
[2568] Argentina, *Law of War Manual* (1969), § 5.029(5).
[2569] Argentina, *Law of War Manual* (1969), § 8.001.
[2570] Argentina, *Law of War Manual* (1989), § 8.03.
[2571] Australia, *Commanders' Guide* (1994), § 1305(f).
[2572] Australia, *Defence Force Manual* (1994), § 1315.
[2573] Belgium, *Law of War Manual* (1983), p. 17.
[2574] Belgium, *Law of War Manual* (1983), p. 55.
[2575] Benin, *Military Manual* (1995), Fascicule II, p. 5.
[2576] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[2577] Cameroon, *Disciplinary Regulations* (1975), Article 32.

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure.[2578]

The manual also provides that "sentences may be pronounced only after a regular trial".[2579] It further specifies that it is a grave breach of GC III to "deprive a PW of the right to a fair and regular trial"[2580] and that it is a grave breach to "wilfully deprive a protected person of the rights of a fair and regular trial prescribed by [GC IV]".[2581] According to the manual, "denial of a fair and regular trial to any person protected by the Geneva Conventions or AP I" is a grave breach of AP I.[2582] The manual further states that the "Geneva Conventions provide that all persons accused of grave breaches enjoy the safeguards of a proper trial and defence in accordance with international standards". With regard to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[2583]

2845. Colombia's Basic Military Manual states that "to protect [non-combatants] means ... to offer the necessary conditions for a fair trial before a competent tribunal, so that the requirement of due process is guaranteed".[2584]

2846. Colombia's Instructors' Manual provides that "whoever is deprived of his liberty has the right to a legal trial".[2585] It adds that "nobody can be tried except in conformity with laws in force before the imputed act and by a judge or a competent tribunal, and in full compliance with all rules for each trial".[2586]

2847. Colombia's Soldiers' Manual provides that "whoever is deprived of liberty has the right to a legal trial".[2587]

2848. Colombia's Circular on Fundamental Rules of IHL provides that "each person shall benefit from the fundamental judicial guarantees".[2588]

2849. Under Congo's Disciplinary Regulations, it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".[2589]

2850. Ecuador's Naval Manual provides that "offences against prisoners of war, including ... denying the right to a fair trial for committed offences" and "offences against civilian inhabitants of the occupied territory, including ... denying the right to a fair trial for committed offences" constitute war

[2578] Canada, *LOAC Manual* (1999), p. 11-8, § 65.
[2579] Canada, *LOAC Manual* (1999), p. 12-6, § 54.
[2580] Canada, *LOAC Manual* (1999), p. 16-2, § 13.
[2581] Canada, *LOAC Manual* (1999), p. 16-2, § 14.
[2582] Canada, *LOAC Manual* (1999), p. 16-3, § 17.
[2583] Canada, *LOAC Manual* (1999), p. 17-2, § 10(a)(iv) and p. 17-4, § 28.
[2584] Colombia, *Basic Military Manual* (1995), p. 21.
[2585] Colombia, *Instructors' Manual* (1999), p. 9.
[2586] Colombia, *Instructors' Manual* (1999), p. 10.
[2587] Colombia, *Soldiers' Manual* (1999), p. 11.
[2588] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.
[2589] Congo, *Disciplinary Regulations* (1986), Article 32(2).

crimes.[2590] It further provides that "individuals captured as spies or as illegal combatants . . . may not be summarily executed" and that they "have the right to be fairly tried for violations of the law of armed conflict".[2591]

2851. El Salvador's Human Rights Charter of the Armed Forces lists as one of the ten basic rules that "any person has the right to be heard" in trial.[2592]

2852. El Salvador's Soldiers' Manual provides that "only a fairly constituted tribunal can pronounce and impose a judgement or a sentence against captured enemy combatants".[2593]

2853. France's Disciplinary Regulations as amended provides that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".[2594]

2854. France's LOAC Summary Note provides that "every person, whether combatant or non-combatant, shall benefit from the fundamental judicial guarantees".[2595] It further states that "deprivation of the fundamental judicial guarantees" is a grave breach of GC III.[2596]

2855. France's LOAC Teaching Note states that "violations of the fundamental judicial guarantees" are grave breaches of the law of armed conflict.[2597]

2856. France's LOAC Manual provides that "practices of massive and systematic summary executions" constitute war crimes.[2598] It further states that one of the three main principles common to IHL and human rights is the "principle of inviolability" which guarantees to every human being the fundamental judicial guarantees.[2599] The manual refers to common Article 3 of the 1949 Geneva Conventions and stipulates that the "passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" is prohibited.[2600]

2857. Germany's Military Manual provides that civilians "shall have the right to a regular and fair judicial procedure".[2601] It further states that "prevention of a fair and regular trial" is a grave breach of IHL.[2602]

2858. According to Indonesia's Directive on Human Rights in Trikora, "the protection of personal integrity consists of: the protection of the civil and political rights of citizens from cruel treatment and punishment without judicial procedure" and "due process of law . . . and fair trial guarantees".[2603]

[2590] Ecuador, *Naval Manual* (1989), § 6.2.5(1)–(2).
[2591] Ecuador, *Naval Manual* (1989), §§ 11.7 and 11.8.
[2592] El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 3 and 15.
[2593] El Salvador, *Soldiers' Manual* (undated), p. 10.
[2594] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[2595] France, *LOAC Summary Note* (1992), § III.
[2596] France, *LOAC Summary Note* (1992), § 3.4.
[2597] France, *LOAC Teaching Note* (2000), p. 7.
[2598] France, *LOAC Manual* (2001), p. 44.
[2599] France, *LOAC Manual* (2001), p. 52.
[2600] France, *LOAC Manual* (2001), p. 101.
[2601] Germany, *Military Manual* (1992), § 518.
[2602] Germany, *Military Manual* (1992), § 1209.
[2603] Indonesia, *Directive on Human Rights in Trikora* (1995), §§ 1(b) and 4(a).

2859. Italy's IHL Manual provides that the violation "of the right to a regular and impartial trial for acts committed in connection with an armed conflict" constitutes a grave breach of the Geneva Conventions and their Additional Protocols.[2604]

2860. Kenya's LOAC Manual refers to common Article 3 of the 1949 Geneva Conventions and states that persons *hors de combat* "may not be sentenced without proper trial".[2605]

2861. South Korea's Military Regulation 187 states that "executing the death penalty for spies and persons who have taken part in hostilities through summary trial not full trial" is an "unjustifiable crime".[2606]

2862. Madagascar's Military Manual refers to one of the "seven fundamental rules of IHL" which states that "every person shall benefit from the fundamental judicial guarantees".[2607]

2863. Mali's Army Regulations provides that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".[2608]

2864. Morocco's Disciplinary Regulations provides that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".[2609]

2865. The Military Manual of the Netherlands provides that spies caught in *flagrante delicto* cannot, in any circumstances, be punished without due process.[2610] It prohibits punishments "without a previous judgement . . . through a fair trial".[2611] It further states that "wilfully depriving a protected person of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions and their Additional Protocols.[2612] With respect to non-international armed conflicts, the manual restates the fundamental requirement of fair trial found in common Article 3 of the 1949 Geneva Conventions and Article 6 AP II.[2613]

2866. New Zealand's Military Manual states that:

> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court, respecting the generally recognized principles of regular judicial procedure.[2614]

[2604] Italy, *IHL Manual* (1991), Vol. I, § 85.
[2605] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 6.
[2606] South Korea, *Military Regulation 187* (1991), Article 4.2; see also *Military Operations Law of War Compliance Regulation* (1993), § D.
[2607] Madagascar, *Military Manual* (1994), p. 91, Rule 5.
[2608] Mali, *Army Regulations* (1979), Article 36.
[2609] Morocco, *Disciplinary Regulations* (1974), Article 25.
[2610] Netherlands, *Military Manual* (1993), p. III-6.
[2611] Netherlands, *Military Manual* (1993), p. VII-2.
[2612] Netherlands, *Military Manual* (1993), pp. IX-5 and IX-6.
[2613] Netherlands, *Military Manual* (1993), p. XI-1 and XI-5.
[2614] New Zealand, *Military Manual* (1992), § 1137(4).

The manual further provides that it is a grave breach "to deprive [a POW] of his rights to a fair and regular trial" and to "wilfully deprive a protected civilian of the rights of fair and regular trial".[2615] It also states that depriving "any person protected by the Conventions or the Protocol of a fair and regular trial" and "punishment of a spy without a proper trial" is a grave breach of AP I.[2616] With regard to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[2617]

2867. Nicaragua's Military Manual states that "in no case may summary executions be carried out".[2618]

2868. Nigeria's Manual on the Laws of War provides that "wilfully depriving prisoners of war and civilians of the rights to a fair and regular trial" is a grave breach of the Geneva Conventions and is considered as a serious war crime.[2619] It further states that "in any case, it must be ensured that no punishment is imposed on a prisoner of war without a fair trial".[2620]

2869. Peru's Human Rights Charter of the Security Forces lists the right of a detainee to a fair trial as one of the ten basic rules.[2621]

2870. Peru's Human Rights Charter of the Armed Forces states that the right to judicial guarantees is one of the main civil rights which must be respected by armed forces.[2622]

2871. Russia's Military Manual prohibits the punishment of war victims, namely the wounded, sick and shipwrecked, POWs and civilian population, "without a previous judgement pronounced by a regularly constituted court, with all the judicial guarantees which are recognised as indispensable by civilised nations".[2623]

2872. Senegal's Disciplinary Regulations provides that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".[2624]

2873. Senegal's IHL Manual restates common Article 3 of the 1949 Geneva Conventions.[2625]

2874. South Africa's LOAC Manual provides that depriving a "protected person of the rights to a fair and regular trial" constitutes a grave breach of the Geneva Conventions.[2626]

2875. Spain's LOAC Manual provides that "the guarantee of judicial proceedings" is one of the minimum guarantees provided to prisoners of war.[2627]

[2615] New Zealand, *Military Manual* (1992), §§ 1702(2) and 1702(3)(d).
[2616] New Zealand, *Military Manual* (1992), §§ 1703(4)(e) and 1704(4).
[2617] New Zealand, *Military Manual* (1992), § 1807(1)(d).
[2618] Nicaragua, *Military Manual* (1996), Article 3.
[2619] Nigeria, *Manual on the Laws of War* (undated), § 6(b) and (c).
[2620] Nigeria, *Manual on the Laws of War* (undated), § 44.
[2621] Peru, *Human Rights Charter of the Security Forces* (1991), Rule 8.
[2622] Peru, *Human Rights Charter of the Armed Forces* (1994), § 27(4).
[2623] Russia, *Military Manual* (1990), §§ 7 and 8(e).
[2624] Senegal, *Disciplinary Regulations* (1990), Article 34(2).
[2625] Senegal, *IHL Manual* (1999), p. 4.
[2626] South Africa, *LOAC Manual* (1996), § 40.
[2627] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.

2876. Sweden's Military Manual provides that in occupied territories, POWs or civilians shall be granted all fundamental judicial guarantees.[2628]

2877. Sweden's IHL Manual considers that the principle of the right to have a sentence pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure as contained in Article 75 AP I is part of customary international law.[2629] It further states that "wilfully depriving [a protected person] of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions.[2630]

2878. Switzerland's Basic Military Manual provides that "a spy caught in *flagrante delicto* shall not be punished without previous judgement".[2631] It also provides that when captured, "saboteurs . . . cannot be punished without prior judgement".[2632] The manual notes that "in judicial proceedings, some minimum guarantees in accordance with the regime of the rule of law shall be granted to those accused of possible war crimes and who no longer benefit from prisoner-of-war status".[2633] It adds that "Article 75 AP I contains a series of provisions that guarantee to the accused a fair trial".[2634] It further provides that:

> A person found guilty of a criminal offence committed in connection with the armed conflict shall be sentenced only in accordance with a judgement . . . This judgement shall be rendered by an impartial and regularly constituted tribunal which follows the generally recognised principles of a regular judicial procedure.[2635]

According to the manual, it is a grave breach of the Geneva Conventions to deprive POWs and civilians of "their right to be tried by an impartial and regularly constituted tribunal, in accordance with the conventions".[2636] In an article entitled "Judicial guarantees", the manual states that "prisoners of war prosecuted for war crimes shall benefit from the rights prescribed by [GC III]".[2637]

2879. Togo's Military Manual provides that every person shall benefit from fundamental judicial guarantees.[2638]

2880. The UK Military Manual provides that if civil inhabitants "commit or attempt to commit hostile acts, they are liable to punishment, after a proper trial".[2639] It further provides that "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as

[2628] Sweden, *Military Manual* (1976), pp. 16 and 26.
[2629] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[2630] Sweden, *IHL Manual* (1991), Section 4.2, p. 93.
[2631] Switzerland, *Basic Military Manual* (1987), Article 43.
[2632] Switzerland, *Basic Military Manual* (1987), Article 46.
[2633] Switzerland, *Basic Military Manual* (1987), Article 66.
[2634] Switzerland, *Basic Military Manual* (1987), Article 153.
[2635] Switzerland, *Basic Military Manual* (1987), Article 175.
[2636] Switzerland, *Basic Military Manual* (1987), Article 192(b), see also § 193(2)(e).
[2637] Switzerland, *Basic Military Manual* (1987), Article 201.
[2638] Togo, *Military Manual* (1996), Fascicule II, p. 5.
[2639] UK, *Military Manual* (1958), § 88.

indispensable by civilised peoples" is prohibited at any time.[2640] The manual specifies that "wilfully depriving a prisoner of war of the rights to a fair and regular trial prescribed in the Convention" is a grave breach of GC III".[2641] In cases of occupation, the manual states that "sentences may be pronounced only after a regular trial".[2642] The manual further emphasises that wilfully depriving a prisoner of war or persons protected under GC IV of the rights of fair and regular trial required by GC III and GC IV is a grave breach of those instruments.[2643] The manual also states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, ... the following are examples of punishable violations of the laws of war, or war crimes: ... killing without trial of spies, saboteurs, partisans and others who have committed hostile acts".[2644]

2881. The UK LOAC Manual recalls that "Protocol I contains fundamental guarantees to ... ensure that persons are not punished without properly conducted trials".[2645] With respect to non-international armed conflicts, the manual refers to common Article 3 of the 1949 Geneva Conventions and states that persons *hors de combat* "may not be sentenced without proper trial".[2646]

2882. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions and Articles 102 and 108 GC III.[2647] With respect to occupied territories, it uses the same wording as Articles 5, 66 and 71 GC IV.[2648] The manual provides that "wilfully depriving a prisoner of war or a protected person of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions.[2649] It also provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): ... killing without trial spies or other persons who have committed hostile acts".[2650]

2883. The US Air Force Pamphlet states that GC III "provides specific safeguards and guarantees of fair judicial proceedings".[2651] It further states that "protected persons in occupied territory who are detained for spying or sabotage ... are guaranteed the right to a fair trial".[2652] The manual specifies that "wilfully killing without trial persons in custody who have committed hostile acts" and "deliberate deprivation of fair trial rights to any protected persons" are acts involving individual criminal responsibility.[2653]

2884. The US Air Force Commander's Handbook provides that "a prisoner of war must be tried by the same courts as try members of the armed forces of the detaining power, and must be given the same procedural rights as members

[2640] UK, *Military Manual* (1958), § 131(1)(d). [2641] UK, *Military Manual* (1958), § 282.
[2642] UK, *Military Manual* (1958), § 570. [2643] UK, *Military Manual* (1958), § 625(b)–(c).
[2644] UK, *Military Manual* (1958), § 626(l).
[2645] UK, *LOAC Manual* (1981), Section 9, p. 35, § 10.
[2646] UK, *LOAC Manual* (1981), Section 12, p. 42, § 2(a)(4).
[2647] US, *Field Manual* (1956), §§ 11, 178 and 184.
[2648] US, *Field Manual* (1956), §§ 248, 436 and § 441.
[2649] US, *Field Manual* (1956), § 502. [2650] US, *Field Manual* (1956), § 504(l).
[2651] US, *Air Force Pamphlet* (1976), § 13-8. [2652] US, *Air Force Pamphlet* (1976), § 14-2.
[2653] US, *Air Force Pamphlet* (1976), § 15–3(c)(10)–(11).

of that state's armed forces".[2654] It adds that "even terrorists, spies, and illegal partisans have the right to be tried and cannot be summarily executed".[2655] With respect to war crimes trials, the manual states that "these trials must meet certain minimum standards of fairness and due process, now set out in detail in the 1949 Geneva Conventions" and that the "failure to accord captured personnel the right to a fair trial is itself a serious violation of the law of armed conflict".[2656]

2885. The US Soldier's Manual prohibits sentencing protected persons without a proper trial.[2657]

2886. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: ... killing, without proper legal trial, spies or other captured persons who have committed hostile acts".[2658]

2887. The US Naval Handbook provides that "the following acts are representative war crimes ... denial of a fair trial" for prisoners of war and civilian inhabitants of an occupied territory.[2659] It adds that the "failure to provide a fair trial for the alleged commission of a war crime is itself a war crime".[2660] The manual specifies that "individuals captured as spies or as illegal combatants ... may not be summarily executed" and that they "have the right to be fairly tried for violations of the law of armed conflict".[2661]

National Legislation

2888. Argentina's Draft Code of Military Justice punishes any soldier who deprives a prisoner of war or a civilian of "his or her right to a regular and impartial trial".[2662]

2889. Under Armenia's Penal Code, "depriving a protected person or a prisoner of war of the right to a fair and regular trial", during an armed conflict, constitutes a crime against the peace and security of mankind.[2663]

2890. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".[2664]

2891. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including

[2654] US, *Air Force Commander's Handbook* (1980), § 4-2(c).
[2655] US, *Air Force Commander's Handbook* (1980), § 4-2(e).
[2656] US, *Air Force Commander's Handbook* (1980), §§ 8-3(a) and(b).
[2657] US, *Soldier's Manual* (1984), pp. 5 and 20.
[2658] US, *Instructor's Guide* (1985), pp. 13 and 14.
[2659] US, *Naval Handbook* (1995), § 6.2.5(1) and (2).
[2660] US, *Naval Handbook* (1995), § 6.2.5(2) and (3).
[2661] US, *Naval Handbook* (1995), § 11.7.
[2662] Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(3) in the *Code of Military Justice as amended* (1951).
[2663] Armenia, *Penal Code* (2003), Article 390.2(3).
[2664] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

"denying a fair trial" in international armed conflicts and "sentencing or execution without due process" in non-international armed conflicts.[2665]

2892. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War prohibits, with regard to civilian persons and prisoners of war, the "passing of sentences and carrying out of executions without a previous judgement pronounced by a regularly constituted court affording all the judicial guarantees provided by international law".[2666]

2893. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2667]

2894. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[2668]

2895. The Criminal Code of Belarus provides that depriving persons who have laid down their arms or are defenceless, the wounded, sick and shipwrecked, sanitary and religious personnel, prisoners of war, civilian population in an occupied territory or in the conflict zone, or other persons enjoying international protection of their right to be judged by a regular and impartial tribunal is a violation of the laws and customs of war.[2669]

2896. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "denying a prisoner of war [or] a protected civilian person the right to a fair and impartial trial" constitutes a crime under international law.[2670]

2897. The Criminal Code of the Federation of Bosnia and Herzegovina provides that "depriving civilians and prisoners of war of their right to a fair and impartial trial" is a war crime.[2671] The Criminal Code of the Republika Srpska contains the same provision.[2672]

2898. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[2673]

[2665] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.31 and 268.76.
[2666] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17 and 21(4).
[2667] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2668] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[2669] Belarus, *Criminal Code* (1999), Article 135(1).
[2670] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(5).
[2671] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1) and 156.
[2672] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1) and 435.
[2673] Botswana, *Geneva Conventions Act* (1970), Section 3(1).

2899. Bulgaria's Penal Code as amended provides that depriving a captive or a civilian person of his or her "right to be tried by a regular court and under a regular procedure" is a war crime.[2674]

2900. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "wilfully depriving a prisoner of war or any other protected persons of their right to a regular and impartial trial" is a war crime in both international and non-international armed conflicts.[2675]

2901. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 ... which were committed during the period from 17 April 1975 to 6 January 1979".[2676]

2902. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions or of AP I] is guilty of an indictable offence".[2677]

2903. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[2678]

2904. Colombia's Penal Code provides for the punishment of anyone who during an armed conflict "orders or deprives protected persons of their right to a fair and regular trial".[2679]

2905. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[2680]

2906. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I]".[2681]

2907. Croatia's Criminal Code provides that denying the civilian population and prisoners of war their "rights to a fair and impartial trial" is a war crime.[2682]

2908. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".[2683]

[2674] Bulgaria, *Penal Code as amended* (1968), Articles 411(c) and 412(e).
[2675] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(f) and (C)(d).
[2676] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.
[2677] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[2678] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[2679] Colombia, *Penal Code* (2000), Article 149.
[2680] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[2681] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[2682] Croatia, *Criminal Code* (1997), Articles 158 and 160.
[2683] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

2909. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".[2684]

2910. Under the Draft Amendments to the Penal Code of El Salvador, anyone who, "in the context of an international or internal armed conflict, deprives a protected person of the right to a regular and impartial trial" is punishable.[2685]

2911. Estonia's Penal Code provides, with respect to civilians, prisoners of war and interned civilians, that the "deprivation of the right to a fair trial" is a war crime.[2686]

2912. Ethiopia's Penal Code provides that denying civilians, wounded and sick, prisoners of war or internees of their "right to a fair trial" constitutes a crime.[2687]

2913. Under Georgia's Criminal Code, it is a crime in both international and non-international armed conflicts to "wilfully deprive a prisoner of war or any other protected person of their right to a fair trial".[2688]

2914. Germany's Law Introducing the International Crimes Code provides a punishment for anyone who, in connection with an international or non-international armed conflict:

> imposes on or enforces against a person protected under international humanitarian law a severe punishment, particularly the death penalty or imprisonment, without such person having been convicted by an impartial and regularly constituted court affording the judicial guarantees required under international law.[2689]

2915. Under Hungary's Criminal Code as amended, the person who deprives "the civilian population and prisoners of war of their right to be tried in a regular and impartial procedure" is guilty, upon conviction, of a war crime.[2690]

2916. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[2691]

2917. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions and of AP I are punishable offences.[2692] In addition, any "minor breach" of the Geneva Conventions, including violations of common Article 3, Articles 49 GC I, 50 GC II, 102–108 GC III and 5 GC IV,

[2684] Cyprus, *AP I Act* (1979), Section 4(1).
[2685] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Incumplimiento del debido proceso".
[2686] Estonia, *Penal Code* (2001), §§ 97 and 99.
[2687] Ethiopia, *Penal Code* (1957), Article 292.
[2688] Georgia, *Criminal Code* (1999), Article 411(2)(e).
[2689] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(7).
[2690] Hungary, *Criminal Code as amended* (1978), Article 158(3)(b).
[2691] India, *Geneva Conventions Act* (1960), Section 3(1).
[2692] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

and of AP I, including violations of Articles 71(1), 75(4) and 78(2) AP I, are also punishable offences.[2693]

2918. Italy's Wartime Military Penal Code punishes any "commander who, with the exception of the cases of imminent danger for the security of the armed force or for the military defence of the State, orders that, without prior regular judgement, a person caught in the act of spying shall be immediately executed".[2694]

2919. Jordan's Draft Military Criminal Code provides that "depriving protected persons of their right to a fair trial" is a war crime.[2695]

2920. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[2696]

2921. Kenya's Constitution provides that "if a person is charged with a criminal offence, the case shall be afforded a fair hearing".[2697]

2922. Under the Draft Amendments to the Code of Military Justice of Lebanon, "depriving protected persons of their right to a fair trial" constitutes a war crime.[2698]

2923. Under Lithuania's Criminal Code as amended, the imposition of "criminal penalties without a previous judgement by an independent court or guarantees of defence during the trial" constitutes a war crime.[2699]

2924. Under Luxembourg's Law on the Punishment of Grave Breaches, depriving a person protected by GC III and GC IV of the right to a fair and regular trial is a grave breach of these instruments.[2700]

2925. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[2701]

2926. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[2702]

2927. Mali's Penal Code provides that "wilfully depriving a prisoner of war or any other protected person of his/her right to a fair and impartial trial" is a war crime.[2703]

[2693] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[2694] Italy, *Wartime Military Penal Code* (1941), Article 183.
[2695] Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(19).
[2696] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[2697] Kenya, *Constitution* (1992), Article 77(1).
[2698] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(19).
[2699] Lithuania, *Criminal Code as amended* (1961), Article 336.
[2700] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(5).
[2701] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[2702] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[2703] Mali, *Penal Code* (2001), Article 31(f).

2928. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[2704]

2929. Moldova's Penal Code punishes the "passing of sentences without a trial by a regularly constituted court not affording all the judicial guarantees provided by law".[2705]

2930. Under the International Crimes Act of the Netherlands, it is a crime to commit in an international armed conflict one of the following: grave breaches of the 1949 Geneva Conventions, including "intentionally depriving a prisoner of war or other protected person of the right to a fair and regular trial"; and "intentionally . . . depriving a person protected by the Geneva Conventions or Article 85, paragraph 2, of Additional Protocol (I) of the right to a fair and regular trial".[2706] Furthermore, it is also a crime to commit, "in the case of an armed conflict not of an international character, a violation of Article 3 common to all the Geneva Conventions", including "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognised as indispensable".[2707]

2931. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".[2708]

2932. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(vi) and (c)(iv) of the 1998 ICC Statute.[2709]

2933. Nicaragua's Military Penal Code provides for the punishment of denying prisoners of war and civilians their right to a regular and impartial trial.[2710]

2934. Nicaragua's Draft Penal Code punishes anyone who "during an international or internal armed conflict, deprives a protected person of the right to a regular and impartial trial".[2711]

2935. According to Niger's Penal Code as amended, depriving a prisoner of war, a civilian person protected by GC IV or a person protected by the Additional Protocols of 1977 of "the right to a regular and impartial trial" constitutes a war crime.[2712]

2936. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets

[2704] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[2705] Moldova, *Penal Code* (2002), Article 137(2)(d).
[2706] Netherlands, *International Crimes Act* (2003), Articles 5(1)(f) and 5(2)(d)(v).
[2707] Netherlands, *International Crimes Act* (2003), Article 6(1)(d).
[2708] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[2709] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[2710] Nicaragua, *Military Penal Code* (1996), Articles 55(5) and 58.
[2711] Nicaragua, *Draft Penal Code* (1999), Article 462.
[2712] Niger, *Penal Code as amended* (1961), Article 208.3(5).

or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".[2713]

2937. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[2714]

2938. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[2715]

2939. Poland's Penal Code provides for the punishment of "any person who, in violation of international law, deprives persons *hors de combat*, protected persons and persons enjoying international protection of their right to a fair and impartial trial".[2716]

2940. Under Romania's Penal Code, the "imposition of sanctions on wounded, sick and shipwrecked, members of civil medical services, Red Cross or similar organisations, prisoners of war, or all persons in the hands of the adverse party without a previous judgment by a regular court affording all judicial guarantees" constitutes a crime.[2717]

2941. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".[2718]

2942. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[2719]

2943. Slovenia's Penal Code provides that "depriving civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel of their right to a fair and regular trial" is a war crime.[2720]

2944. Spain's Military Criminal Code provides for the punishment of military personnel who deprive prisoners of war and civilians of their right to a regular and impartial trial.[2721]

2945. Under Spain's Penal Code, depriving a prisoner of war or a civilian person of his/her right to a regular and impartial trial is an offence.[2722]

[2713] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[2714] Norway, *Military Penal Code as amended* (1902), § 108.
[2715] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).
[2716] Poland, *Penal Code* (1997), Article 124.
[2717] Romania, *Penal Code* (1968), Article 358(e).
[2718] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[2719] Singapore, *Geneva Conventions Act* (1973), Section 3(1).
[2720] Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.
[2721] Spain, *Military Criminal Code* (1985), Article 77(5)–(6).
[2722] Spain, *Penal Code* (1995), Article 611(3).

2946. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence".[2723]

2947. Tajikistan's Criminal Code provides for the punishment of "wilfully depriving a prisoner of war or any other protected person of the rights of a fair and regular trial".[2724]

2948. Thailand's Prisoners of War Act punishes whoever deprives a prisoner of war of "an impartial trial or a trial according to the rules set up in the Convention" in both international and non-international armed conflicts.[2725]

2949. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (c)(iv) of the 1998 ICC Statute.[2726]

2950. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[2727]

2951. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions or of [AP I]".[2728]

2952. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (c)(iv) of the 1998 ICC Statute.[2729]

2953. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.[2730]

2954. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[2731]

2955. The Penal Code as amended of the SFRY (FRY) states that "depriving civilians and prisoners of war of their right to a regular and fair trial" is a war crime.[2732]

[2723] Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).
[2724] Tajikistan, *Criminal Code* (1998), Article 403(2)(e).
[2725] Thailand, *Prisoners of War Act* (1955), Sections 16 and 18.
[2726] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[2727] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[2728] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[2729] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[2730] US, *War Crimes Act as amended* (1996), Section 2441(c).
[2731] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[2732] SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1) and 144.

2956. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions or [AP I]".[2733]

National Case-law

2957. In the *Ohashi case* before the Australian Military Court at Rabaul in 1946, the Judge Advocate stated that the notion of "fair trial" supposed the following:

- consideration by a tribunal comprised of one or more persons who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him/her;
- the accused should know the exact nature of the charge against him/her;
- the accused should know what is alleged against him/her by way of evidence;
- he should have full opportunity to give his own version of the case and produce evidence to support it;
- the court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty;
- the punishment should not be one which outrages the sentiments of humanity.[2734]

2958. In its judgement in the *Videla case* in 1994, which concerned the abduction, torture and murder of Lumi Videla in 1974, Chile's Appeal Court of Santiago held that the Geneva Conventions "protect the human rights of the contestants in the event of external war or a conflict between organized armed forces within the State, which latter situation effectively prevailed in the country in 1974". The Court stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place . . . the passing of summary sentences". The Court found that the acts charged constituted grave breaches under Article 147 GC IV and upheld the prison order issued against the accused.[2735]

2959. In its judgement in the *Almelo case* in 1945, the UK Military Court at Almelo held that "killing captured members of the opposing forces or civilian inhabitants of occupied territories suspected of espionage or treason unless their guilt had been established by a court of law" amounts to a war crime. On

[2733] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).
[2734] Australia, Military Court at Rabaul, *Ohashi case*, Statement by the Judge Advocate, 23 March 1946.
[2735] Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994, §§ 6–20.

this basis, it found the accused guilty of the killing without trial of a British soldier who was alleged to be a spy.[2736]

2960. In the *Dostler case* before the US Military Commission at Rome in 1945, the accused, the commander of a German army corps, was found guilty of having ordered the shooting of 15 American prisoners of war in violation of the 1907 HR and of long-established laws and customs of war. The Defence submitted that the US soldiers had worn no distinctive emblem and that their mission had been undertaken for the purpose of sabotage. The Defence considered, therefore, that they were not entitled to the privileges of a lawful belligerent, though it was admitted that they were entitled to a lawful trial even if they were treated as spies.[2737]

2961. In the *Sawada case* before the US Military Commission at Shanghai in 1946, the accused was charged with "knowingly, unlawfully and wilfully" denying the status of prisoner of war to eight members of the US forces who were "tried and sentenced by a Japanese Military Tribunal in violation of the laws of war". The Military Commission considered that "false and fraudulent charges" and "false and fraudulent evidence" contributed to the criminal character of the trial.[2738]

2962. In the *Isayama case* in 1946, the US Military Commission at Shanghai tried Lieutenant-General Harukei Isayama and other members of the Japanese Military Tribunal on charges that members of the Japanese Military Tribunal did "permit, authorize and direct an illegal, unfair, unwarranted and false trial [of prisoners of war] . . . upon false and fraudulent evidence and without affording said prisoners of war a fair hearing". The Commission found that the accused had falsified the records of interrogation of 14 US airmen, that the US airmen were not afforded the opportunity to obtain evidence or to call witnesses on their own behalf, that they were not permitted to be represented by legal counsel and that they were executed in violation of international law. The Commission found Lieutenant-General Isayama and the seven other accused guilty of all counts alleged.[2739]

2963. In its judgement in the *Rhode case* in 1947, the UK Military Court at Wuppertal found that "executions in the absence of a fair trial" amounted to war crimes.[2740]

2964. In its judgement in the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg held that:

> The trials of the accused . . . did not approach a semblance of fair trial or justice. The accused . . . were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied

[2736] UK, Military Court at Almelo, *Almelo case*, Judgement, 24–26 November 1945.
[2737] US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945.
[2738] US, Military Commission at Shanghai, *Sawada case*, Judgement, 15 April 1946.
[2739] US, Military Commission at Shanghai, *Isayama case*, Judgement, 25 July 1946.
[2740] UK, Military Court at Wuppertal, *Rhode case*, Judgement, 1 June 1946.

the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses on their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from the beginning to end were secret and no public record was allowed to be made of them.

The Tribunal concluded that the trial was "unfair".[2741]

Other National Practice

2965. It is reported that, during the Algerian war of independence, the ALN stated that prisoners were only executed after having been tried and found guilty of violating the laws and customs of war.[2742]

2966. At the CDDH, Belgium stated that the guarantees contained in Article 6 AP II were based on customary international law and human rights law.[2743]

2967. During the Chinese civil war, the Chinese Communist Party issued instructions concerning the treatment of captured combatants which provided that "those must-be-killed notorious criminals shall be executed by shooting after being tried and convicted by court, and shall not be beaten to death or by other illegal manners which would make us lose the sympathy of the society". According to Deng Xiaoping, POWs considered "notorious criminals" were executed, but only following trial and conviction by a court.[2744]

2968. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that " every person has the right to a fair trial by a regularly constituted tribunal respecting the fundamental judicial guarantees".[2745]

2969. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[2746]

2970. The Report on the Practice of Syria asserts that Syria considers Article 85 AP I to be part of customary international law.[2747]

2971. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . no sentence be passed and penalty

[2741] US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.
[2742] Le problème des prisonniers de guerre, *El Moudjahid*, Vol. 1, p. 474.
[2743] Belgium, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.33, 19 March 1975, p. 323, § 41.
[2744] China, Instruction on Implementing the Works of Land Reform and Consolidation of the Party by Deng Xiaoping, 6 June 1948, *Selected Works of Deng Xiaoping*, Vol. 1, The People's Press, Beijing, p. 122.
[2745] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 64.
[2746] Report on the Practice of Jordan, 1997, Chapter 5.
[2747] Report on the Practice of Syria, 1997, Chapter 5.6.

executed except pursuant to conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure". He added that "the basic core of Protocol II is, of course, reflected in common article 3 of the 1949 [Geneva] Conventions and therefore is, and should be a part of generally accepted customary law. This specifically includes its prohibitions on . . . punishment without due process."[2748]

2972. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of "summary executions" perpetrated by the parties to the conflict.[2749]

2973. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular summary executions of many US military and civilian prisoners.[2750]

2974. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[2751]

2975. In 1990, an ICRC report on the army's activities in one region of a State concluded that the army behaved in an alarming way towards its detainees, by engaging in summary executions.[2752]

III. Practice of International Organisations and Conferences

United Nations

2976. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the UN Security Council condemned:

> in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions.[2753]

[2748] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427–428 and 430–431.

[2749] US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 4.

[2750] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON.RES. 357, 106th Congress, 2nd Session, 19 June 2000.

[2751] Report on US Practice, 1997, Chapter 5.3.

[2752] ICRC archive document.

[2753] UN Security Council, Res. 1034, 21 December 1995, preamble and § 2.

2977. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon the government of the FRY (Serbia and Montenegro) "to respect all human rights and fundamental freedoms fully ... especially in regard to respect for ... free and fair trials".[2754] It also strongly condemned "the overwhelming number of human rights violations ... including summary executions".[2755]

2978. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly called upon the government of Sudan "to ensure that all accused persons are held in ordinary custody and receive prompt, just and fair trials under internationally recognized standards".[2756]

2979. In numerous resolutions, the UN Commission on Human Rights has denounced summary executions and/or extra-judicial killings committed during the armed conflicts in Afghanistan,[2757] El Salvador,[2758] Georgia,[2759] Guatemala,[2760] Sudan,[2761] former Yugoslavia[2762] and Zaire.[2763]

2980. In resolutions adopted in 1991 and 1992 in the context of the Iraqi occupation of Kuwait, the UN Commission on Human Rights strongly condemned Iraq for not treating prisoners of war and detained civilians according to recognised IHL principles and insisted that it abstain from acts of violence against them, including summary executions.[2764]

2981. In a resolution adopted in 1996, the UN Commission on Human Rights called upon the government of Croatia "to pursue vigorously prosecutions against those suspected of past violations of international humanitarian law and human rights, while ensuring that the rights to a fair trial ... are afforded to all persons suspected of such crimes".[2765]

2982. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon all parties to hostilities to protect all civilians from violations of human rights and IHL, including summary executions.[2766]

[2754] UN General Assembly, Res. 53/164, 9 December 1998, § 5.
[2755] UN General Assembly, Res. 53/164, 9 December 1998, § 8.
[2756] UN General Assembly, Res. 55/116, 4 December 2000, § 4(d).
[2757] UN Commission on Human Rights, Res. 1986/40, 12 March 1986, § 6; Res. 1987/58, 11 March 1987, § 6.
[2758] UN Commission on Human Rights, Res. 1990/77, 7 March 1990, § 2; Res. 1991/75, 6 March 1991, § 5.
[2759] UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 1.
[2760] UN Commission on Human Rights, Res. 1985/36, 13 March 1985, § 2; Res. 1991/51, 6 March 1991, §§ 5 and 7.
[2761] UN Commission on Human Rights, Res. 1993/60, 10 March 1993, § 1; Res. 1994/79, 9 March 1994, § 2; Res. 1996/73, 23 April 1996, § 2.
[2762] UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 10.
[2763] UN Commission on Human Rights, Res. 1997/58, 15 April 1997, § 2.
[2764] UN Commission on Human Rights, Res. 1991/67, 6 March 1991, § 5; Res. 1992/60, 3 March 1992, § 3.
[2765] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 22.
[2766] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.

2983. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[2767]

2984. In 1991, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that he had received reports alleging that armed opposition groups had carried out mass executions of soldiers and civilians after the surrender of a garrison in 1990. Other instances of summary executions of militia members and governmental troops had also been reported. The Special Rapporteur made reference to common Article 3 of the 1949 Geneva Conventions and GC III.[2768]

2985. In 1996, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that "those captured have been and are . . . summarily executed".[2769]

2986. In 1991, in the context of the conflict in El Salvador, ONUSAL examined the case of the summary execution of a member of the rural police a few days after his capture by the FMLN. The local FMLN Command argued that it had to carry out such an extreme measure at the request of the community that feared his release. ONUSAL considered the case to be a violation of the guarantees offered by AP II, in particular Articles 4(2)(a), 5 and 6.[2770]

2987. In its report in 1993, the UN Commission on the Truth for El Salvador stated that:

> When punishing persons accused of crimes, it is necessary to observe the basic elements of due process. International humanitarian law does not in any way exempt the parties to a conflict from that obligation, and international human rights law does not exempt the party which has effective control of a territory from that obligation with respect to persons within its jurisdiction. On the contrary, those two sources of law expressly prohibit the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted independent and impartial tribunal attaching all the judicial guarantees generally recognized as indispensable . . . In none of the cases mentioned above is there any evidence that a proper trial was held prior to the execution.[2771]

Other International Organisations

2988. With respect to the drafting of the 1950 ECHR, the Committee of Experts of the Council of Europe stated that the right to recognition before the law could

[2767] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

[2768] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1991/31, 28 January 1991, §§ 61 and 65–66.

[2769] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 9.

[2770] ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/658-S/23222, 15 November 1991, Annex, §§ 62–63.

[2771] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 152–153.

be deduced from the other Articles and therefore did not need to be expressly indicated.[2772]

2989. In 2000, the Rapporteur of the Council of Europe reported an account by a Russian soldier of the summary execution of captured combatants "because they were snipers". In the report's recommendations, the Rapporteur asked the Russian federal authorities to treat captured fighters in accordance with IHL and in particular to stop summary executions of captured snipers.[2773]

International Conferences

2990. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it called upon all authorities involved in armed conflicts "to ensure that every prisoner of war is given the treatment and full measure of protection prescribed by the Geneva Convention of 1949 on the protection of prisoners of war, including the judicial safeguards afforded to every prisoner of war charged with any offence".[2774]

2991. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993, expressed dismay and condemnation that "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] ... summary and arbitrary executions".[2775]

2992. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including ... summary executions ... and threats to carry out such actions".[2776]

IV. Practice of International Judicial and Quasi-judicial Bodies

2993. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".[2777]

2994. In the *Karadžić and Mladić case* before the ICTY in 1996, the accused were charged with genocide, crimes against humanity and violations of the

[2772] Council of Europe, Committee of Experts, CE Doc. H(70)7, § 41.f.
[2773] Council of Europe, Parliamentary Assembly, Opinion on Russia's request for membership in the light of the situation in Chechnya, Doc. 7231, 2 February 1995, § 75.
[2774] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIV.
[2775] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).
[2776] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).
[2777] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

laws and customs of war for the summary executions of Bosnian Muslims who were *hors de combat* because of injury, surrender or capture.[2778] In its review of the indictments, the ICTY Trial Chamber confirmed all counts.[2779]

2995. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić case* in 1995, the ICTY Appeals Chamber held that Article 3 of the 1993 ICTY Statute also covered violations of common Article 3 of the 1949 Geneva Conventions.[2780]

2996. In the *Erdemović case* in 1998, the accused pleaded guilty to the charge of a violation of the laws and customs of war for his participation in the summary executions of Bosnian Muslims who, *inter alia*, had surrendered following the fall of Srebrenica. He was sentenced to five years' imprisonment.[2781]

2997. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

> 3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice . . .
> 4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.[2782]

[2778] ICTY, *Karadžić and Mladić case*, Second Indictment, 16 November 1995, §§ 6, 19–20, 21–23 and 51.
[2779] ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 21–41 and 86–95.
[2780] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, p. 51, § 89 and p. 73, §§ 134 and 136.
[2781] ICTY, *Erdemović case*, Sentencing Judgement *bis*, 5 March 1998, Part X (Disposition). (The accused originally pleaded guilty to the charge of a crime against humanity. The Appeals Chamber held that the plea was not informed and ordered a new trial.)
[2782] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, §§ 3–4.

2998. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC stated that:

> 11. ... States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance ... by deviating from fundamental principles of fair trial.
> ...
> 16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.[2783]

2999. In its views in *Bahamonde v. Equatorial Guinea* in 1993, the HRC stated that one of the guarantees contained in Article 14(1) of the 1966 ICCPR was the general right of the accused to be granted access to a court.[2784]

3000. In *Äärelä and Näkkäläjärvi v. Finland* in 2001, the HRC stated that:

> It is the fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.... These circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.[2785]

3001. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations."[2786]

3002. In its decision in *Union Inter-Africaine des Droits de l'Homme et al. v Angola* in 1997, concerning deportations of "illegal immigrants", the ACiHPR stated that "it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the [1981 ACHPR] and international law".[2787]

[2783] HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, §§ 11 and 16.
[2784] HRC, *Bahamonde v. Equatorial Guinea*, Views, 20 October 1993, § 9.4.
[2785] HRC, *Äärelä and Näkkäläjärvi v. Finland*, Views, 24 October 2001, § 7.4, see also *Wolf v. Panama*, Views, 26 March 1992, § 6.6 (equality of arms requires an adversarial procedure).
[2786] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(a).
[2787] ACiHPR, *Union Inter-Africaine des Droits de l'Homme and Others v. Angola*, Decision, 11 November 1997, § 20.

3003. In its decision in *Media Rights Agenda v. Nigeria (224/98)* in 2000, the ACiHPR, referring to Article 7(1)(d) of the 1981 ACHPR, stated that:

> 60. ... The Commission finds the selection of serving military officers, with little or no knowledge of law, as members of the Tribunal in contravention of Principle 10 of the Basic Principles on the Independence of Judges. The said Principle states: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".
> 61. In the same vein, the Commission considers the arraignment, trial and conviction of Malaolu [i.e. the editor of an independent Nigerian newspaper], a civilian, by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, prejudicial to the basic principles of fair hearing guaranteed by Article 7 of the [1981 ACHPR].
> 62. ... [Military tribunals] should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts.[2788]

3004. In its decision in *Civil Liberties Organisation v. Nigeria (129/94)* in 1995, concerning the revocation of the jurisdiction of the Court to review the legality of decrees, the ACiHPR stated that:

> 13. The ousting of jurisdiction of the courts ... constitutes an attack of incalculable proportions on Article 7 [1981 ACHPR] ... An attack of this sort is especially invidious, because, while it is a violation of human rights in itself, it permits other violations of rights to go unredressed.
> 14. Article 26 [1981 ACHPR] ... clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of State power.[2789]

3005. In its decision in *Civil Liberties Organisation v. Nigeria (151/96)* in 1999, relating to the setting up of special military tribunals by decree to try persons accused of plotting to overthrow the government and thereby excluding ordinary courts from taking up cases placed before the special tribunals ("ouster clauses"), the ACiHPR stated that:

> 17. ... The ouster clauses ... were found to constitute violations of Article 7 [1981 ACHPR]. The Commission must take this opportunity, not only to reiterate the conclusions made before, that the constitution and procedures of the special tribunals violate Articles 7(1)(a) and (c) and 26, but to recommend an end to the practice of removing entire areas of law from the jurisdiction of the ordinary courts.
> ...
> 21. [A] Commission's previous decisions found that the special tribunals violated the Charter because their judges were specially appointed for each case by the executive branch, and would include on the panel at least one, and

[2788] ACiHPR, *Media Rights Agenda v. Nigeria (224/98)*, Decision, 23 October–6 November 2000, §§ 60–62.
[2789] ACiHPR, *Civil Liberties Organisation v. Nigeria (129/94)*, Decision, 13-22 March 1995, §§ 13–14.

often a majority, of military or law enforcement officers, in addition to a sitting or retired judge. The Commission here reiterates its previous decisions and declares that the trial of these persons before a special tribunal violates Article 7(1)(d) and Article 26.

...

23. ... The setting up of a parallel system has the danger of undermining the court system and creates the likelihood of unequal application of the laws.[2790]

3006. In its decision in *Avocats Sans Frontières v. Burundi (231/99)* in 2000, the ACiHPR stated that:

The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner.[2791]

3007. In its decision in *Civil Liberties Organisation and Others v. Nigeria* in 2001, the ACiHPR stated that:

It is our view that the provisions of Article 7 [1981 ACHPR] should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike ... The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.[2792]

3008. In its report in *Ofner and Hopfinger v. Austria* in 1962, the ECiHR stated that:

Article 6 of the Convention does not define the notion of a "fair trial" in a criminal case. Paragraph 3 of the Article enumerates certain specific rights which constitute essential elements of that general notion, and paragraph 2 may be considered to add another element. The words "minimum rights", however, clearly indicate that the five rights specifically enumerated in paragraph (3) are not exhaustive ... The Commission is of the opinion that what is generally called "the equality of arms", that is the procedural equality of the accused with the public prosecutor, is an inherent element of a "fair trial".[2793]

3009. In its judgement in the *Golder v. UK case*, the ECtHR stated that Article 6(1) of the 1950 ECHR:

[2790] ACiHPR, *Civil Liberties Organisation v. Nigeria (151/96)*, Decision, 15 November 1999, §§ 17, 21 and 23.
[2791] ACiHPR, *Avocats sans Frontières v. Burundi (231/99)*, Decision, 23 October-6 November 2000, § 27.
[2792] ACiHPR, *Civil Liberties Organisation and Others v. Nigeria (218/98)*, Decision, 23 April–7 May 2001, § 27.
[2793] ECiHR, *Ofner and Hopfinger v. Austria*, Report, 23 November 1962, § 46.

28. . . . does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.
. . .
31. The terms of [Article 6(1)] of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.
. . .
35. . . . It would be inconceivable, in the opinion of the Court, that [Article 6(1)] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.
36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by [Article 6(1)] . . . The Court thus reaches the conclusion . . . that [Article 6(1)] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6–1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.[2794]

3010. In its judgement in *Engel v. Netherlands* in 1976, concerning procedures for breaches of military discipline, the ECtHR stated that the right to fair trial is not limited to cases categorised as "criminal" by the State. It added that:

If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal . . . the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending this far might lead to results incompatible with the purpose and object of the Convention.

The Court further stated that "the criteria to be taken into account when deciding whether a 'disciplinary accusation' is in fact a criminal matter are: 'the very nature of the offence' and 'the degree of severity of the penalty that the person concerned risks incurring'".[2795]

3011. In its judgement in the *Deweer case* in 1980, the ECtHR stated that one of the elements contained in Article 6(1) of the 1950 ECHR was the general right of persons to access a court.[2796]

3012. In its judgement in *Borgers v. Belgium* in 1991, the ECtHR found that:

[2794] ECtHR, *Golder v. UK*, Judgement, 21 February 1975, §§ 28–36.
[2795] ECtHR, *Engel v. Netherlands*, Judgement, 8 June 1976, §§ 81–82.
[2796] ECtHR, *Deweer case*, Judgement, 27 February 1980, § 49.

27. In the present case the hearing on 18 June 1985 before the Court of Cassation concluded with the avocat général's submissions to the effect that Mr Borger's appeal should not be allowed . . . At no time could the latter reply to those submissions: before hearing them, he was unaware of their contents because they had not been communicated to him in advance; thereafter he was prevented from doing so by statute . . .

    The Court cannot see the justification for such restrictions on the rights of the defence. Once the avocat général had made submissions unfavourable to the applicant, the latter had a clear interest in being able to submit his observations on them before argument was closed. The fact that the Court of Cassation's jurisdiction is confined to questions of law makes no difference in this respect.
28. Further and above all, the inequality was increased even more by the avocat général's participation, in an advisory capacity, in the Court's deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is however hard to see how such assistance can remain limited to stylistic considerations, which are in any case often indissociable from substantive matters, if it is in addition intended . . . to contribute towards maintaining the consistency of the case-law . . .
29. In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6 para. 1 [1950 ECHR].[2797]

3013. In its judgement in *Bulut v. Austria* in 1996, the ECtHR stated that "under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent".[2798]

3014. In its judgement in *Belziuk v. Poland* in 1998, the ECtHR, recalling "the fundamental principles which emerge from its jurisprudence relating to Article 6 § 1 in conjunction with paragraph 3 (c)" of the 1950 ECHR, stated that:

The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party is aware that observations have been filed and gets a real opportunity to comment thereon.[2799]

[2797] ECtHR, *Borgers v. Belgium*, Judgement, 30 October 1991, §§ 27–29.
[2798] ECtHR, *Bulut v. Austria*, Judgement, 22 February 1996, § 47.
[2799] ECtHR, *Belziuk v. Poland*, Judgement, 25 March 1998, § 37.

3015. In its judgement in *McElhinney v. Ireland* in 2001, relating to non-access because of the principle of sovereign immunity, the ECtHR stated that:

The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation . . . [The ECtHR] must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 [1950 ECHR] if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[2800]

3016. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:

. . .

e. When it does not in any manner presuppose the suspension of . . . the right to due process of law.[2801]

3017. In 1981, in a report on the situation of human rights in Colombia, the IACiHR recommended that Colombia issue legal regulations so that persons arrested or detained were guaranteed the right to a fair trial.[2802]

3018. In its doctrine concerning judicial guarantees and the right to personal liberty and security published in 1982, the IACiHR stated that replacing regular courts with military courts, the judges in which are beholden to the political power and less well trained in law, undermines the guarantees to which all accused persons are entitled.[2803]

3019. In 2002, in its report on terrorism and human rights, the IACiHR stated that:

Where an emergency situation is involved that threatens the independence or security of a state, the fundamental components of the right to due process and to a fair trial must nevertheless be respected . . . The basic components of the right to a fair trial cannot be justifiably suspended. These protections include, in particular, the right to a fair trial by a competent, independent and impartial court for persons charged with criminal offenses, the presumption of innocence, the right to be informed promptly and intelligibly of any criminal charge, the right to adequate time

[2800] ECtHR, *McElhinney v. Ireland*, Judgement, 21 November 2001, § 34.

[2801] IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59-61.

[2802] IACiHR, Report on the situation of human rights in Colombia, Doc. OEA/Ser.L/V/II.53 Doc. 22, 30 June 1981, p. 221.

[2803] IACiHR, Doctrine concerning judicial guarantees and the right to personal liberty and security, reprinted in *Ten years of activities (1971–1981)*, General Secretariat of the IACiHR, Washington, D.C., 1982, p. 331.

and facilities to prepare a defense, the right to legal assistance of one's choice for free legal counsel where the interests of justice require, the right not to testify against oneself and protection against coerced confessions, the right to attendance of witnesses, the right of appeal, as well as respect for the principle of non-retroactive application of penal laws.[2804]

3020. In its advisory opinion in the *Judicial Guarantees case* in 1987, the IACtHR stressed that the "concept of due process" in Article 8 of the 1969 ACHR "should be understood as applicable, in the main, to all judicial guarantees referred to in the American Convention", even where there had been legitimate derogations from certain rights under Article 27 of the 1969 ACHR. It further noted that:

Reading Article 8 together with Articles 7(6), 25, and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees.[2805]

3021. In its judgement in several cases concerning Argentina in 1992, the IACiHR, referring to the judgement of the IACtHR in the *Velásquez Rodríguez case* of 1988, stated that:

36. Under Article 1.1 of the [1969 ACHR], the States Parties are obliged "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . ."
37. The laws and the Decree [granting general amnesty] sought to, and effectively did obstruct the exercise of the petitioners' right under Article 8.1 [1969 ACHR] cited earlier. With enactment and enforcement of the laws and the Decree, Argentina has failed to comply with its duty to guarantee the rights to which Article 8.1 [1969 ACHR] refers, has abused those rights and has violated the Convention.[2806]

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

3022. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict without trial. The conviction must be pronounced by an impartial and regularly constituted court respecting the

[2804] IACiHR, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, §§ 245 and 247.
[2805] IACtHR, *Judicial Guarantees case*, Advisory Opinion, 6 October 1987, §§ 29–30.
[2806] IACiHR, *Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina)*, Report, 2 October 1992, §§ 36–37.

generally recognized principles of regular judicial procedure, which include . . . the right to fair trial.[2807]

Delegates also teach that depriving a person of the rights of fair and regular trial constitutes a grave breach of the law of war.[2808]

3023. The ICRC Commentary on the Additional Protocols underlines the relevance of Article 6(2) AP II for the interpretation of common Article 3(1)(d) of the 1949 Geneva Conventions, stating that:

> Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect. It supplements and develops common Article 3, paragraph 1, subparagraph (1) (d), which prohibits "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." This very general rule required clarification to strengthen the prohibition of summary justice and of convictions without trial, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions, and for the rest is largely based on the International Covenant on Civil and Political Rights, particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation.[2809]

3024. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the following principles in particular must be respected . . . the passing of sentences and carrying out of executions without fair trial are specifically prohibited".[2810]

3025. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated, in relation to civilians, that "summary executions" and "sentencing without a fair trial" are prohibited.[2811]

3026. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised, in relation to civilian persons who refrain from acts of hostility, that "the passing of sentences without a fair trial in particular" is prohibited.[2812]

[2807] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(a).

[2808] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776(h).

[2809] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4597.

[2810] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

[2811] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

[2812] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War!*, ICRC, Geneva, 1999, p. 1308.

3027. In a summary note on respect for IHL in an internal armed conflict, the ICRC stated that "the ICRC urges the authorities to take all necessary measures to put an end to ... the extra-judicial killings that are feared to occur in some cases".[2812]

3028. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court: "wilfully depriving a prisoner of war or another protected person of the rights to fair and regular trial". The working paper also proposed that the crime of "passing sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees recognized as indispensable", as a serious violation of IHL applicable in non-international armed conflicts, be subject to the jurisdiction of the Court.[2813]

3029. In a communication to the press issued in 2000 in the context of the conflict in Colombia, the ICRC condemned two separate incidents

> in which wounded combatants being evacuated by its delegates were seized and summarily executed by men belonging to enemy forces. These acts, which constitute grave breaches of international humanitarian law, have obliged the organization to suspend all medical evacuations of wounded combatants within Colombia.[2814]

VI. Other Practice

3030. In 1979, in a meeting with the ICRC, the leader of an armed opposition group stated that he was in favour of executing POWs who attempted to escape.[2815]

3031. In 1984 and 1988, an armed opposition group told the ICRC that it generally refrained from executing prisoners in reprisal and only pronounced death sentences on the basis of at least three witness accounts.[2816]

3032. In 1985, in a meeting with the ICRC, an armed opposition group stated that it had changed its policy from executing captured combatants immediately to giving them a choice between joining the movement and being transferred to party authorities.[2817]

3033. In 1987, in a meeting with the ICRC, an armed opposition group stated that prisoners were given the chance to repent and that detainees were not

[2812] ICRC archive document.
[2813] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(a)(v) and 3(v).
[2814] ICRC, Communication to the Press No. 00/35, Colombia: ICRC condemns grave breaches of IHL, suspends medical evacuations of wounded combatants, 3 October 2000.
[2815] ICRC archive document.
[2816] ICRC archive documents.
[2817] ICRC archive document.

mistreated. It maintained, however, that if a prisoner admitted to having killed civilians or combatants, the prisoner should be put to death. When the ICRC protested against the sentencing of combatants as criminals, the group stated that religious law had precedence over IHL.[2818]

3034. In 1988, in a meeting with the ICRC, an armed opposition group justified the execution of captured combatants for reasons of security, as a means of avoiding reprisals, or simply as revenge.[2819]

3035. In 1990, Amnesty International condemned summary executions ordered by the Iraqi authorities in the context of the Gulf War.[2820]

3036. In 1994, in a report entitled "Medical Practice in the Context of Internal Armed Conflict", the Peruvian Medical Federation for Human Rights documented the practice of trying civilian persons accused of being involved in insurgent activities by military courts, and alleged that the trials were frequently conducted by "faceless judges" and that the courts were not impartial.[2821]

3037. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that:

> No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations.[2822]

Trial by an independent, impartial and regularly constituted court

I. Treaties and Other Instruments

Treaties

3038. Common Article 3 of the 1949 Geneva Conventions provides that, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties:

> (1) . . . the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause]:
> . . .

[2818] ICRC archive document. [2819] ICRC archive document.
[2820] Amnesty International, News Release No. MDE 14/15/90, 3 October 1990.
[2821] Peru, Federación Médica Peruana Asociación Pro Derechos Humanos, Medical Practice in the Context of Internal Armed Conflict, August 1994.
[2822] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9, *IRRC*, No. 282, 1991, p. 333.

(b) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

3039. Article 84, second paragraph, GC III provides that "in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized".

3040. Article 66 GC IV provides that:

In case of breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

3041. Article 6(1) of the 1950 ECHR provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal".

3042. Article 14(1) of the 1966 ICCPR provides that "everyone shall be entitled to a . . . hearing by a competent, independent and impartial tribunal".

3043. Article 8(1) of the 1969 ACHR provides that "every person has the right to a hearing . . . by a competent, independent, and impartial tribunal".

3044. Article 75(4) AP I provides that "no sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court". Article 75 AP I was adopted by consensus.[2823]

3045. Article 6(2) AP II provides that "no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality". Article 6 AP II was adopted by consensus.[2824]

3046. Article 7(1)(d) of the 1981 ACHPR provides that "every individual shall have the right to have his cause heard. This comprises: . . . (d) the right to be tried within a reasonable time by an impartial court or tribunal."

3047. Article 26 of the 1981 ACHPR provides that "States parties to the present Charter shall have the duty to guarantee the independence of the Courts".

3048. Article 40(2)(b)(iii) of the 1989 Convention on the Rights of the Child provides that "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body".

[2823] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[2824] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3049. Article 67(1) of the 1998 ICC Statute provides that "in the determination of any charge, the accused shall be entitled to a . . . fair hearing conducted impartially".

Other Instruments

3050. Article 10 of the 1948 UDHR states that "everyone is entitled in full equality to a . . . hearing by an independent and impartial tribunal".

3051. Article XXVI of the 1948 American Declaration on the Rights and Duties of Man provides that "every person accused of an offense has the right to be given an impartial . . . hearing".

3052. The 1985 Basic Principles on the Independence of the Judiciary provide that:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, based on facts and according to law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

. . .

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must a national of the country concerned, shall not be considered discriminatory.

Paragraphs 11–12 and 17–20 of the Basic Principles add conditions that ensure security of tenure of judges so that they will not be under pressure to decide a case in a way that is not impartial.

3053. Article 8(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, "in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty".
3054. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
3055. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.
3056. Article 11(1)(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind states that an individual charged with a crime against the peace and security of mankind has the right, "in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law".
3057. Article 47 of the 2000 EU Charter of Fundamental Rights provides that "everyone is entitled to a . . . hearing by an independent and impartial tribunal".

II. National Practice

Military Manuals

3058. Argentina's Law of War Manual (1969) provides that "in any case, a prisoner of war shall not appear in front of a tribunal, whatever its nature, if it does not offer essential guarantees of independence and impartiality".[2825]
3059. Argentina's Law of War Manual (1989) provides that in non-international armed conflicts, "only a tribunal offering the essential guarantees of independence and impartiality can pronounce a sentence".[2826]
3060. Belgium's Law of War Manual provides that depriving a POW or other protected persons of the right to be judged by an impartial court is a grave breach of the Geneva Conventions.[2827]
3061. Canada's LOAC Manual provides for the necessity that "the tribunal offers the essential guarantees of independence and impartiality generally recognized as compatible with the rule of law".[2828] It also contains the requirement of "an impartial and regularly constituted tribunal" for internees in occupied territories.[2829] With respect to non-international armed conflicts, the manual states that "no sentences shall be passed or penalties executed for offences

[2825] Argentina, *Law of War Manual* (1969), § 2.074.
[2826] Argentina, *Law of War Manual* (1989), § 7.10.
[2827] Belgium, *Law of War Manual* (1983), p. 55.
[2828] Canada, *LOAC Manual* (1999), p. 10-6, § 56.
[2829] Canada, *LOAC Manual* (1999), p. 11-8, § 65.

related to the conflict except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality".[2830]

3062. Croatia's Instructions on Basic Rules of IHL states that judicial independence and impartiality are essential guarantees that may not be suspended even in situations of armed conflict.[2831]

3063. The Military Manual of the Netherlands prohibits punishments "without a previous judgement by an impartial tribunal".[2832] It also provides with regard to protected persons that "no one may be sentenced and punished without a previous judgement by an impartial and independent tribunal".[2833] With respect to non-international armed conflicts, the manual prohibits sentences pronounced by a tribunal that does not fulfil "the essential requirements of independence and impartiality".[2834]

3064. New Zealand's Military Manual provides that "prisoners may only be tried by a civil court if the Detaining Power's Forces may be so tried for the offence involved, and provided the tribunal offers the essential guarantees of independence and impartiality generally recognised as compatible with the rule of law".[2835] It further specifies that "no sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court".[2836]

3065. Spain's LOAC Manual states that "any tribunal shall offer guarantees of independence and impartiality" and that "depriving a person of his right to be tried impartially" is a grave breach of the Geneva Conventions.[2837]

3066. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[2838]

3067. Switzerland's Basic Military Manual provides that "only an impartial and regularly constituted tribunal can judge and sentence an accused person".[2839] It further states that "a person found guilty of a criminal offence committed in connection with the armed conflict shall be sentenced only in accordance with a judgement . . . This judgement shall be pronounced by an impartial and regularly constituted tribunal."[2840] According to the manual, it is a grave breach of the Geneva Conventions to deprive POWs and civilians of "their right to be

[2830] Canada, *LOAC Manual* (1999), p. 17-3, § 28.
[2831] Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.
[2832] Netherlands, *Military Manual* (1993), p. VII-2.
[2833] Netherlands, *Military Manual* (1993), p. VIII-3.
[2834] Netherlands, *Military Manual* (1993), p. XI-54.
[2835] New Zealand, *Military Manual* (1992), § 930(1).
[2836] New Zealand, *Military Manual* (1992), § 1137(4), see also § 1815(1).
[2837] Spain, *LOAC Manual* (1996), Vol. I, §§ 8.7.c.(2) and 11.8.b.(1).
[2838] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[2839] Switzerland, *Basic Military Manual* (1987), Article 153, commentary.
[2840] Switzerland, *Basic Military Manual* (1987), Article 175.

tried by an impartial and regularly constituted tribunal, in accordance with the conventions".[2841]

3068. The UK Military Manual states that "in no circumstances whatsoever may [POWs] be tried by a court which does not afford the essential guarantees of independence and impartiality". It explains that POWs, under certain conditions, may be tried by civil courts and that "such courts must in any case comply with the requirement of independence and impartiality".[2842]

3069. The US Field Manual reproduces Article 84 GC III.[2843]

3070. The US Air Force Pamphlet emphasises that "in no event may [a POW] be tried by any court not offering the [generally recognized] essential guarantees of independence and impartiality".[2844]

National Legislation

3071. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2845]

3072. The Czech Republic's Criminal Code as amended provides for the punishment of anyone who deprives civilians or prisoners of war of their right to be tried by an impartial tribunal.[2846]

3073. Georgia's Code of Criminal Procedure states that the right of the accused to be tried by an independent and impartial tribunal cannot be suspended in situations of emergency.[2847]

3074. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, imposes a severe punishment, particularly the death penalty or imprisonment, without such person having been convicted by an impartial and regularly constituted court.[2848]

3075. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 84 GC III, and of AP I, including violations of Article 75(5) AP I, as well as any "contravention" of AP II, including violations of Article 6(2) AP II, are punishable offences.[2849]

3076. Kenya's Constitution provides that, if a person is charged with a criminal offence, the case shall be tried by an independent and impartial court established by law.[2850]

[2841] Switzerland, *Basic Military Manual* (1987), Article 192(b), see also § 193(2)(e).
[2842] UK, *Military Manual* (1958), § 202.
[2843] US, *Field Manual* (1956), § 160.
[2844] US, *Air Force Pamphlet* (1976), § 13-8.
[2845] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2846] Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(c).
[2847] Georgia, *Code of Criminal Procedure* (1998), Article 8.
[2848] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(7).
[2849] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[2850] Kenya, *Constitution* (1992), Article 77(1).

3077. Kuwait's Constitution specifies that the right to be tried by an independent judge is both fundamental and non-derogable.[2851]
3078. Kyrgyzstan's Criminal Code states that emergency situations do not abrogate the right of the accused to be tried by an independent and impartial tribunal.[2852]
3079. Lithuania's Criminal Code as amended punishes the imposition of criminal penalties without a previous judgement by an independent court.[2853]
3080. Under the International Crimes Act of the Netherlands, it is a crime to commit, "in the case of an armed conflict not of an international character, a violation of Article 3 common to all the Geneva Conventions", including "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognised as indispensable".[2854]
3081. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[2855]
3082. Slovakia's Criminal Code as amended provides for the punishment of anyone who deprives civilians or prisoners of war of their right to be tried by an impartial tribunal.[2856]

National Case-law
3083. In the *Ohashi case* in 1946 before the Australian Military Court at Rabaul, the judge advocate stated that one of the fundamental principles of justice was:

> Consideration by a tribunal comprised of one or more men who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived believe in the guilt of [the] accused or any prejudice against him.[2857]

Other National Practice
3084. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[2858]
3085. Country reports on human rights practices issued by the US Department of State in 1983 and 1996 stress that the right to be tried by a trained, impartial

[2851] Kuwait, *Constitution* (1962), Articles 162–163.
[2852] Kyrgyzstan, *Criminal Code* (1997), Article 17.
[2853] Lithuania, *Criminal Code as amended* (1961), Article 336.
[2854] Netherlands, *International Crimes Act* (2003), Article 6(1)(d).
[2855] Norway, *Military Penal Code as amended* (1902), § 108.
[2856] Slovakia, *Criminal Code as amended* (1961), Article 263(a)(2)(c).
[2857] Australia, Military Court at Rabaul, *Ohashi case*, Judgement, 23 March 1946.
[2858] Report on the Practice of Jordan, 1997,Chapter 5.

and independent judge may not be suspended, even during an emergency situation.[2859]

3086. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . no sentence be passed and penalty executed except pursuant to conviction pronounced by an impartial and regularly constituted court".[2860]

3087. The Report on US Practice states that "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3 of the 1949 Geneva Conventions". The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[2861]

III. Practice of International Organisations and Conferences

3088. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3089. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

> The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14 . . . If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.[2862]

[2859] US, Department of State, Country reports on human rights practices for 1983, Nicaragua, p. 637; Country reports on human rights practices for 1996, Cambodia, p. 611.

[2860] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427–428.

[2861] Report on US Practice, 1997, Chapter 5.3.

[2862] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 4.

3090. In its views in *Karttunen v. Finland* in 1992, the HRC defined the elements of guarantees of a fair trial contained in Article 14(1) of the 1966 ICCPR and stated that:

"Impartiality" of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of Article 14.[2863]

3091. In its views in *Bahamonde v. Equatorial Guinea* in 1993, the HRC stated that "a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal".[2864]

3092. In its views in *Espinoza de Polay v. Peru* in 1997, the HRC found a violation of Article 14 of the 1966 ICCPR and stated that "in a system of trial by 'faceless judges', neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces".[2865]

3093. In its decision in *Constitutional Rights Project v. Nigeria (60/91)* in 1995, the ACiHPR stated that:

The [national law under consideration] describes the constitution of the tribunals, which shall consist of three persons: one judge, one officer of the Army, Navy or Air Force and one officer of the Police Force. Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, the same branch that passed the [law under consideration], whose members do not necessarily possess any legal expertise. [Article 7(1)(d) of the 1981 ACHPR] requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack of impartiality. It thus violates [Article 7(1)(d)].[2866]

3094. In its decision in *Centre For Free Speech v. Nigeria (206/97)* in 1999, the ACiHPR stated that:

15. The issue of the arraignment and trial of the Journalists must also be addressed here. The complainant alleges that the Journalists were arraigned, tried and convicted by a Special Military Tribunal, presided over by a serving military officer and whose membership also included some serving military officers. This is in violation of the provisions of Article 7 of the [1981

[2863] HRC, *Karttunen v. Finland*, Views, 23 October 1992, § 7.2.
[2864] HRC, *Bahamonde v. Equatorial Guinea*, Views, 20 October 1993, § 9.4.
[2865] HRC, *Espinoza de Polay v. Peru*, Views, 6 October 1997, § 8(5)–(8).
[2866] ACiHPR, *Constitutional Rights Project v. Nigeria (60/91)*, Decision, 13–22 March 1995, § 8.

ACHPR] and Principle 5 of the [1985 Basic Principles on the Independence of the Judiciary].

16. It could not be said that the trial and conviction of the four Journalists by a Special Military Tribunal presided over by a serving military officer who is also a member of the PRC, the body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the [1981 ACHPR]. The above act is also in contravention of Article 26 of the [1981 ACHPR].[2867]

3095. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, which concerned the trial of military and civilian persons by a special court consisting of army officers, the ACiHPR stated that:

Withdrawing criminal procedure from the competence of the Courts established within the judicial order and conferring onto an extension of the executive necessarily compromises the impartiality of the Courts, to which the African Charter refers. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary and, thereby, of article 7, 1 (d) [1981 ACHPR].[2868]

3096. In its decision in *Civil Liberties Organisation and Others v. Nigeria* in 2001, the ACiHPR, with regard to the question whether a (military) tribunal, composed of military personnel as judges, meets the requirements of Article 7 of the 1981 ACHPR, stated that:

25. The issues brought before the Commission have to be judged in the environment of a military junta and serving military officers accused of offences punishable in terms of military discipline in any jurisdiction. This caution has to be applied especially as pertaining to serving military officers. The civilian accused is part of the common conspiracy and as such it is reasonable that he be charged with his military co-accused in the same judicial process. We are making this decision conscious of the fact that Africa continues to have military regimes who are inclined to suspend the constitution, govern by decree and seek to oust the application of international obligations . . .
. . .
27. It is our view that the provisions of Article 7 [1981 ACHPR] should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime . . . It is noted that [military or special courts trying civilians] could present serious problems as far as equitable, impartial and independent administration of justice is concerned. Such courts are resorted to in order to justify recourse to exceptional measures which do not comply with normal procedures . . . The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.
. . .

[2867] ACiHPR, *Centre For Free Speech v. Nigeria (206/97)*, Decision, 15 November 1999, §§ 15–16.
[2868] ACiHPR, *Malawi African Association and Others v. Mauritania (54/91)*, Decision, 11 May 2000, § 98.

43. The communication alleges that the composition of the tribunal which was presided over by a serving military officer did not meet the requirement of an independent and impartial judicial panel to try the accused, and therefore a violation of Article 7(1)(d) of the Charter . . .
44. It has been stated elsewhere in this decision, that a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. We make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic or fundamental standards that would ensure fairness. As that matter has been dealt with above, it is not necessary to find that a tribunal presided over by a military officer is a violation of the Charter. It has already been pointed out that the military tribunal fails the independence test.[2869]

3097. In its judgement in the *Piersack case* in 1982, the ECtHR held that "impartiality" in Article 6(1) of the 1950 ECHR meant, *inter alia*, a lack of prejudice or bias and that there were two aspects to this requirement: "First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."[2870]

3098. In its judgement in the *Belilos case* in 1988, the ECtHR gave the following definition of a tribunal:

"Tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner . . . It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' term of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1) itself.[2871]

3099. In *Holm v. Sweden* before the ECtHR in 1993, the applicant alleged that, "owing to the participation of five active SAP [Swedish Social Democratic Workers Party] members in the jury at the District Court of Stockholm, his case had not been heard by 'an independent and impartial tribunal' within the meaning of [Article 6(1) of the 1950 ECHR]". In its judgement, the ECtHR held that:

30. In determining whether the District Court could be considered "independent and impartial", the Court will have regard to the principles established in its own case-law . . . which apply to jurors as they do to professional judges and lay judges. Like the Commission, it finds it difficult in this case to examine the issues of independence and impartiality separately . . .
31. It is only the independence and the objective impartiality of the five jurors who were affiliated to the SAP which are in issue; the applicant did not

[2869] ACiHPR, *Civil Liberties Organisation and Others v. Nigeria (218/98)*, Decision, 23 April–7 May 2001, §§ 25, 27 and 43–44.
[2870] ECtHR, *Piersack case*, Judgement, 1 October 1982, §§ 28–34; *De Cubber case*, Judgement, 26 October 1984, §§ 24–26; *Findlay v. UK*, Judgement, 25 February 1997, § 73.
[2871] ECtHR, *Belilos case*, Judgement, 29 April 1988, § 64.

contest their subjective impartiality, finding it impracticable to do so in view of the secrecy of each juror's vote . . .

It is undisputed that the jurors in question were elected in the prescribed manner by the competent elective body, in conformity with the legal conditions for eligibility: namely that the persons concerned be known to be independent and fair-minded and to have sound judgment and also that different social groups and currents of opinion as well as geographical areas be represented among the jurors . . . The jury was constituted by the drawing of lots after each party to the proceedings had had an opportunity to express its views on the existence of grounds for disqualification of any of the jurors on the list and to exclude an equal number of jurors . . . It was also possible for the parties to appeal to the Court of Appeal against decisions by the District Court on requests for disqualification, and the applicant, albeit unsuccessfully, availed himself of this remedy . . . Before participating in the trial, each juror had to take an oath to the effect that he or she was to carry out the tasks to the best of his or her abilities and in a judicial manner . . .

32. . . . Nevertheless, it is to be noted that there were links between the defendants and the five jurors who had been challenged by the applicant which could give rise to misgivings as to the jurors' independence and impartiality. The jurors in question were active members of the SAP who held or had held offices in or on behalf of the SAP . . .

33. Having regard to the foregoing, the Court considers that the independence and impartiality of the District Court were open to doubt and that the applicant's fears in this respect were objectively justified. Moreover, since the Court of Appeal's jurisdiction, like that of the District Court, was limited by the terms of the jury's verdict, the defect in the proceedings before the latter court could not have been cured by an appeal to the former . . .

In sum, there has been a violation of Article 6 para. 1 . . . in the particular circumstances of the present case.[2872]

3100. In its judgement in *Findlay v. UK* in 1997 concerning the trial of a soldier by court martial for breaches of military discipline and criminal offences, the ECtHR stated that:

73. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence

. . .

As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect . . .

74. The Court observes that the convening officer . . . played a significant role before the hearing of Mr Findlay's case. He decided which charges should

[2872] ECtHR, *Holm v. Sweden*, Judgement, 25 November 1993, §§ 30–33; see also IACiHR, *Case 11.139 (US)*, Report, 6 December 1996, § 168.

be brought and which type of court martial was most appropriate. He convened the court martial and appointed its members and the prosecuting and defending officers . . .

75. The question therefore arises whether the members of the court martial were sufficiently independent of the convening officer and whether the organisation of the trial offered adequate guarantees of impartiality.

. . . It is noteworthy that all the members of the court martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including the president, were directly or ultimately under his command . . . Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial . . .

76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified . . .

77. In addition, the Court finds it significant that the convening officer also acted as "confirming officer". Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit . . . This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required by Article 6 para. 1 [1950 ECHR].[2873]

3101. In its judgement in *Ciraklar v. Turkey* in 1998, which concerned the trial by the Turkish State Security Court of a student arrested during a demonstration, the ECtHR reiterated its view that appearances mattered in that ascertainable facts might give rise to legitimate doubts as to the independence and impartiality of a tribunal. In this case, a violation was found because the judges belonged to the army and were subject to military discipline, their designation and appointment required the intervention of the army administration and they only received a four-year renewable mandate. The Court stated that "what is decisive is whether the fear [of non-independence or non-impartiality] can be held to be objectively justified".[2874]

3102. In its judgement in the *Cyprus case* in 2001, the ECtHR stated that:

For the Court, examination *in abstracto* of the impugned "constitutional provision" and the "Prohibited Military Areas Decree" leads it to conclude that these texts clearly introduced and authorised the trial of civilians by military courts. It considers that there is no reason to doubt that these courts suffer from the same defects of independence and impartiality which were highlighted in its Incal v. Turkey

[2873] ECtHR, *Findlay v. UK*, Judgement, 25 February 1997, §§ 73–77; see also *Ringeisen case*, Judgement, 16 July 1971, § 95; *Campbell and Fell case*, Judgement, 28 June 1984, § 78 and *Benthem case*, Judgement, 23 October 1985, §§ 41–43.

[2874] ECtHR, *Ciraklar v. Turkey*, Judgement, 28 October 1998, § 38.

judgment in respect of the system of National Security Courts established in Turkey by the respondent State (. . .), in particular the close structural links between the executive power and the military officers serving on the "TRNC" military courts. In the Court's view, civilians in the "TRNC" accused of acts characterised as military offences before such courts could legitimately fear that they lacked independence and impartiality.

The Court concluded that there had been a violation of Article 6 of the 1950 ECHR "on account of the legislative practice of authorising the trial of civilians by military courts".[2875]

3103. In its judgement in *Sahiner v. Turkey* in 2001 concerning the trial of a civilian by a martial law court composed of two civilian judges, two military officers and an army officer, the ECtHR stated that:

> 45. The Court considers in this connection that where, as in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society . . . In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces . . .
> 46. In the light of the foregoing, the Court considers that the applicant – tried in a Martial Law Court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear about being tried by a bench which included two military judges and an army officer acting under the authority of the officer commanding the state of martial law. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat on that court makes no difference in this respect . . .
> 47. In conclusion, the applicant's fears as to the Martial Law Court's lack of independence and impartiality can be regarded as objectively justified. There has accordingly been a violation of Article 6 § 1 [1950 ECHR].[2876]

3104. In its Annual Report 1992–1993, the IACiHR discussed the principles that member States should apply in order to satisfy the requirements of judicial independence and impartiality. The list included:

> a) guaranteeing the judiciary freedom from interference by the executive and legislative branches;
> b) providing the judiciary with the necessary political support for performing its functions;
> c) giving judges security of tenure;
> d) preserving the rule of law and declaring states of emergency only when necessary and in strict conformity with the requirements of the American Convention;
> e) returning to the judiciary responsibility for the disposition and supervision of detained persons.[2877]

[2875] ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 358–359.
[2876] ECtHR, *Sahiner v. Turkey*, Judgement, 25 September 2001, §§ 45–47.
[2877] IACiHR, *Annual Report 1992–1993*, Doc. OEA/Ser.L/V/II.83 Doc. 14, 12 March 1993, p. 207.

3105. In its report in a case concerning Peru in 1994, the IACiHR stated that a Special Military Court was not an independent and impartial tribunal inasmuch as it was subordinate to the Ministry of Defence and thus to the executive.[2878]

3106. In its report in a case concerning Peru in 1995, the IACiHR referred to the *Campbell and Fell case* before the ECtHR and held that the determination of whether a court is independent of the executive depends on the "manner of appointment of its members, the duration of their terms . . . [and] the existence of guarantees against outside pressures". The Commission further noted the jurisprudence of the ECtHR and stated that "the irremovability of judges . . . must . . . be considered a necessary corollary of their independence".[2879]

3107. In its report in a case concerning Peru in 1996, the IACiHR stated in relation to the meaning of "impartiality", that:

> Impartiality presumes that the court or judge does not have preconceived opinions about the case *sub judice* and, in particular, does not presume the accused to be guilty. For the European Court, the impartiality of the judge is made up of subjective and objective elements. His subjective impartiality in the specific case is presumed as long as there is no evidence to the contrary. Objective impartiality, on the other hand, requires that the tribunal or judge offer sufficient guarantees to remove any doubt as to their impartiality in the case.[2880]

3108. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR stated that:

> 132. In the instant case, the Court considers that the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the [1969 ACHR] recognizes as essentials of due process of law.
> 133. What is more, because judges who preside over the treason trials are "faceless," defendants have no way of knowing the identity of their judge and, therefore, of assessing their competence. Compounding the problem is the fact that the law does not allow these judges to recuse themselves.
> 134. The Court therefore finds that the State violated Article 8(1) of the [1969 ACHR].[2881]

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

3109. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure".[2882]

[2878] IACiHR, *Case 11.084 (Peru)*, Report, 30 November 1994, Section V(3).
[2879] IACiHR, *Case 11.006 (Peru)*, Report, 7 February 1995, Section VI(2)(a).
[2880] IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, Section V(B)(3)(c).
[2881] IACiHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, §§ 132–134.
[2882] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202.

3110. In a press release issued in 1994 in the context of the conflict in Chechnya, the ICRC urged the parties to ensure that "no sentence was passed and no penalty executed without a judgement pronounced by a court offering essential guarantees of independence and impartiality".[2883]

VI. Other Practice

3111. In 1985, the ICRC noted that an armed opposition group had emphasised that trial by an impartial and independent judiciary was required by Islamic law.[2884]

Presumption of innocence

I. Treaties and Other Instruments

Treaties

3112. Article 6(2) of the 1950 ECHR provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

3113. Article 14(2) of the 1966 ICCPR provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

3114. Article 8(2) of the 1969 ACHR provides that "every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law".

3115. Article 75(4)(d) AP I provides that "anyone charged with an offence is presumed innocent until proved guilty according to law". Article 75 AP I was adopted by consensus.[2885]

3116. Article 6(2)(d) AP II provides that "anyone charged with an offence is presumed innocent until proved guilty according to law". Article 6 AP II was adopted by consensus.[2886]

3117. Article 7(1) of the 1981 ACHPR provides that "every individual shall have the right to have his cause heard. This comprises: . . . the right to be presumed innocent until proved guilty by a competent court or tribunal."

3118. Article 40(2)(b)(i) of the 1989 Convention on the Rights of the Child provides that "every child alleged or accused of having infringed the penal law has at least the following guarantees: (i) to be presumed innocent until proven guilty according to the law".

[2883] ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.
[2884] ICRC archive document.
[2885] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[2886] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3119. Article 66 of the 1998 ICC Statute, entitled "Presumption of innocence", provides that:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

3120. Article 17(3) of the 2002 Statute of the Special Court for Sierra Leone states that "the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute".

Other Instruments

3121. Article 11 of the 1948 UDHR provides that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law".

3122. Article XXVI of the 1948 American Declaration on the Rights and Duties of Man states that "every accused person is presumed innocent until proven guilty".

3123. Principle 36 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

3124. Article 19 of the 1990 Cairo Declaration on Human Rights in Islam states that "a defendant is innocent until his guilt is proven in a fair trial".

3125. Article 8 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be presumed innocent until proved guilty".

3126. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3127. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3128. According to Article 21(3) of the 1993 ICTY Statute, "the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute".

3129. According to Article 20(3) of the 1994 ICTR Statute, "the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute".

3130. Article 11(1) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against

the peace and security of mankind "shall be presumed innocent until proved guilty".

3131. Article 2(9) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that all accused persons have the right "to be presumed innocent until proven guilty".

3132. Article 48(1) of the 2000 EU Charter of Fundamental Rights provides that "everyone who has been charged shall be presumed innocent until proven guilty according to law".

II. National Practice

Military Manuals

3133. Argentina's Law of War Manual provides that presumption of innocence is a fundamental judicial guarantee which applies to prisoners of war and civilians in occupied territories.[2887] The presumption of innocence is also a fundamental guarantee in situations of non-international armed conflict.[2888]

3134. Canada's LOAC Manual provides that in non-international armed conflicts, "accused persons shall be presumed innocent until proved guilty according to law".[2889]

3135. Colombia's Basic Military Manual provides that in both international and non-international armed conflicts, civilians benefit from the right to be presumed innocent.[2890]

3136. Colombia's Instructors' Manual provides that "any person is presumed innocent until he is judicially declared guilty".[2891]

3137. New Zealand's Military Manual provides that "anyone charged with an offence is presumed innocent until proved guilty according to law".[2892] With respect to non-international armed conflicts, the manual states that "an accused is to be presumed innocent until proved guilty according to the law".[2893]

3138. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[2894]

National Legislation

3139. Countless pieces of domestic legislation provide for the right of the accused to be presumed innocent until found guilty of an offence.[2895]

[2887] Argentina, *Law of War Manual* (1989), § 3.30 (POWs), § 4.15 (civilians) and § 5.09 (occupied territory).
[2888] Argentina, *Law of War Manual* (1989), § 7.10.
[2889] Canada, *LOAC Manual* (1999), p. 17-3, § 29(d).
[2890] Colombia, *Basic Military Manual* (1995), p. 24.
[2891] Colombia, *Instructors' Manual* (1999), p. 10.
[2892] New Zealand, *Military Manual* (1992), § 1137(4)(d).
[2893] New Zealand, *Military Manual* (1992), § 1815(1)(d).
[2894] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[2895] See, e.g., Ethiopia, *Constitution* (1994), Article 20(3); Georgia, *Constitution* (1995), Article 40(1); Georgia, *Code of Criminal Procedure* (1998), Article 10; Kenya, *Constitution*

3140. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2896]
3141. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 75(4)(d) AP I, as well as any "contravention" of AP II, including violations of Articles 6(2)(d) AP II, are punishable offences.[2897]
3142. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[2898]

National Case-law
3143. In the *Ohashi case* in 1946 before the Australian Military Court at Rabaul, the judge advocate stated that the fundamental principles of justice included:

> (a) Consideration by a tribunal comprised of one or more men who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived believe in the guilt of [the] accused or any prejudice against him.
> . . .
> (e) The court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty.[2899]

Other National Practice
3144. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[2900]
3145. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[2901]

(1992), Article 77(2)(a); Kuwait, *Constitution* (1962), Article 34; Kyrgyzstan, *Constitution* (1993), Article 39(1); Russia, *Constitution* (1993), Article 49(1).
2896 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
2897 Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
2898 Norway, *Military Penal Code as amended* (1902), § 108.
2899 Australia, Military Court at Rabaul, *Ohashi case*, Judgement, 23 March 1946.
2900 Report on the Practice of Jordan, 1997, Chapter 5.
2901 Report on US Practice, 1997, Chapter 5.3.

III. Practice of International Organisations and Conferences

3146. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3147. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

> By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt . . . It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.[2902]

3148. In its views in *Gridin v. Russia* in 2000, the HRC found a violation of the presumption of innocence because of public declarations by officials, which were given wide media coverage, presenting the accused as guilty before his conviction.[2903]

3149. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court."[2904]

3150. In its decision in *Pagnoulle v. Cameroon* in 1997 concerning the five-year imprisonment of a Cameroonian citizen by a military tribunal, the ACiHPR held that "detention on the mere suspect that an individual may cause problems is a violation of his right to be presumed innocent".[2905]

3151. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, dealing with a case in which the accused refused to defend themselves in the absence of a lawyer, the ACiHPR held that:

> In the judgement of early September 1986 . . . the presiding judge declared that the refusal of the accused persons to defend themselves was tantamount to an admission of guilt. In addition, the tribunal based itself, in reaching the verdicts it handed down, on the statements made by the accused during their detention in police cells, which statements were obtained from them by force. This constitutes a violation of [Article 7(1)(b) of the 1981 ACHPR].[2906]

3152. In *Neumeister v. Austria* in 1968, the ECtHR stated that:

> 4. The Court is of the opinion that [Article 5(3) of the 1950 ECHR] cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional

[2902] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 7.
[2903] HRC, *Gridin v. Russia*, Views, 20 July 2000, § 8.3.
[2904] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(a).
[2905] ACiHPR, *Pagnoulle v. Cameroon*, Decision, 15–24 April 1997, § 21.
[2906] ACiHPR, *Malawi African Association and Others v. Mauritania (54/91)*, Decision, 11 May 2000, § 95.

release even subject to guarantees. The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable . . .

5. The Court is likewise of the opinion that, in determining in a given case whether or not the detention of an accused person exceeds a reasonable limit, it is for the national judicial authorities to seek all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty.

. . .

12. The Court is of the opinion that in these circumstances the danger that Neumeister would avoid appearing at the trial by absconding was, in October 1962 in any event, no longer so great that it was necessary to dismiss as quite ineffective the taking of the guarantees which, under Article 5(3) (art. 5-3) may condition a grant of provisional release in order to reduce the risks which it entails.[2907]

3153. In its judgement in *Allenet de Ribemont v. France* in 1995, the ECtHR stated that:

The Court notes that in the instant case some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder (see paragraph 11 above). This was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2 [1950 ECHR].[2908]

3154. In its report in a case concerning Peru in 1996, the IACiHR stated that:

The essential thing is therefore that the judge who hears the case is free of any prejudice concerning the accused's guilt and affords him the benefit of the doubt, i.e. does not condemn him until he is certain or convinced of his criminal liability, so that all reasonable doubt that the accused might be innocent is removed.[2909]

3155. In its report in a case concerning Argentina in 1996, the IACiHR found that an excessive period of pre-trial detention may violate the presumption of innocence:

The prolonged imprisonment . . . without conviction, with its natural consequence of undefined and continuous suspicion of an individual, constitutes a violation of the principle of presumed innocence . . . The substantiation of guilt calls for the formulation of a judgement establishing blame in a final sentence. If the use of that procedure fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on

[2907] ECtHR, *Neumeister v. Austria*, Judgement (Merits), 27 June 1968, §§ 4 and 12 of the part entitled "As to the Law".
[2908] ECtHR, *Allenet de Ribemont v. France*, Judgement, 10 February 1995, § 41.
[2909] IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, § V(B9(3)(c).

the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment.[2910]

3156. In its judgement in the *Suárez Rosero case* in 1997, the IACtHR held that:

> 77. This Court is of the view that the principle of the presumption of innocence- inasmuch as it lays down that a person is innocent until proven guilty- is founded upon the existence of judicial guarantees. Article 8(2) of the Convention establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure. This concept is laid down in a goodly number of instruments of international human rights law, including the International Covenant on Civil and Political Rights, which provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Art. 9(3)). This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.
> 78. The Court considers that Mr. Suárez-Rosero's prolonged preventive detention violated the principle of presumption of innocence, in that he was detained from June 23, 1992, to April 28, 1996, and that the order for his release issued on July 10, 1995, was only executed a year later. In view of the above, the Court rules that the State violated Article 8(2) of the American Convention.[2911]

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

3157. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . presumed innocence until proved guilty".[2912]

3158. The ICRC Commentary on the Additional Protocols states that "it is a widely recognized legal principle that it is not the responsibility of the accused to prove he is innocent, but of the accuser to prove he is guilty".[2913]

VI. Other Practice

3159. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum

[2910] IACiHR, *Case 11.245 (Argentina)*, Report, 1 March 1996, § 113; see also IACiHR, *Case 11.205 and Others*, Report, 11 March 1997, §§ 46–48.
[2911] IACtHR, *Suárez Rosero case*, Judgement, 12 November 1997, §§ 77–78.
[2912] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(d).
[2913] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3108.

judicial guarantees, including that "anyone charged with an offence is presumed innocent until proved guilty according to law".[2914]

Information on the nature and cause of the accusation

I. Treaties and Other Instruments

Treaties

3160. Article 16(a) of the 1945 IMT Charter (Nuremberg) provides that "in order to ensure fair trial for the Defendants, the following procedure shall be followed: (a) the Indictment shall include full particulars specifying in detail the charges against the Defendants".

3161. Article 96, fourth paragraph, GC III provides that "before any disciplinary award is pronounced, the accused shall be given precise information regarding the offences of which he is accused".

3162. Article 105, fourth paragraph, GC III provides that:

> Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language he understands, and in good time before the opening of the trial.

3163. Article 71, second paragraph, GC IV provides that "accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them".

3164. Article 123, second paragraph, GC IV provides that "before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused".

3165. Article 6(3)(a) of the 1950 ECHR provides that "everyone charged with a criminal offence has the following minimum rights: . . . to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him".

3166. Article 14(3)(a) of the 1966 ICCPR provides that "everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".

3167. Article 8(2)(b) of the 1969 ACHR provides that "every accused person is entitled to prior notification in detail of the charges against him".

3168. Article 75(4)(a) AP I provides that "the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him". Article 75 AP I was adopted by consensus.[2915]

[2914] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(c), *IRRC*, No. 282, 1991, p. 334.

[2915] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

3169. Article 6(2)(a) AP II provides that "the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him". Article 6 AP II was adopted by consensus.[2916]

3170. Article 40(2)(b)(ii) of the 1989 Convention on the Rights of the Child provides that "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (ii) to be informed promptly and directly of the charges against him or her".

3171. Article 55(2) of the 1998 ICC Statute provides that:

> Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court . . . that person shall also have the following rights of which he or she shall be informed prior to being questioned:
>
> (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court.

3172. Article 60(1) of the 1998 ICC Statute provides that:

> Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

3173. Article 67(1)(a) of the 1998 ICC Statute provides that:

> In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.

3174. Article 17(4)(a) of the 2002 Statute of the Special Court for Sierra Leone provides that:

> In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

Other Instruments

3175. Article 9(a) of the 1946 IMT Charter (Tokyo) provides that "in order to insure fair trial for the accused, the following procedure shall be followed: (a) Indictment. The Indictment shall consist of a plain, concise, and adequate statement of each offence charged."

3176. Principle 10 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "anyone who is arrested shall be promptly informed of any charges against him".

[2916] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3177. Article 8(b) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".
3178. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
3179. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.
3180. Article 21(4)(a) of the 1993 ICTY Statute provides that:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

3181. Article 20(4)(a) of the 1994 ICTR Statute provides that the accused shall be entitled "to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her".
3182. Article 11(1)(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."

II. National Practice

Military Manuals

3183. Argentina's Law of War Manual (1969) provides, in a paragraph entitled "Right of defence", that "before giving a disciplinary penalty, the accused prisoner must be informed, with precision, of the acts he is charged with".[2917] It further provides that:

> The accused prisoner of war will receive, as quickly as possible before the beginning of the trial, communication in an understandable language, of the bill of indictment as well as the acts which generally are notified to the accused in accordance with the laws in force in the army of the [detaining power].[2918]

The manual also provides that the occupying power shall inform "any indicted person . . . without delay, of the motives of accusation that have been formulated against him, in a language he will understand".[2919]

[2917] Argentina, *Law of War Manual* (1969), § 2.082(2).
[2918] Argentina, *Law of War Manual* (1969), § 2.086.
[2919] Argentina, *Law of War Manual* (1969), § 5.029(2).

3184. Argentina's Law of War Manual (1989) provides that, at least certain guarantees shall be respected, such as: "the information of the prisoner without delay of the details of the offence of which he is charged".[2920] It further states that any accused person shall be informed without delay of the particulars of the offences of which he is accused.[2921] The same provision applies in non-international armed conflicts.[2922]

3185. Australia's Defence Force Manual states that "notice of proceedings must be given to . . . the accused notifying the particulars of the charges in good time before the trial".[2923]

3186. Canada's LOAC Manual provides that "accused persons must be promptly informed, in writing, and in a language which they understand, of the charges brought against them".[2924] With respect to non-international armed conflicts, the manuals states that "accused persons shall be informed of the particulars of the offence charged".[2925]

3187. Indonesia's Directive on Human Rights in Trikora states that respect for personal and human dignity includes the right to obtain explanation of charges.[2926]

3188. The Military Manual of the Netherlands provides, with respect to non-international armed conflict, that "the suspect must be informed without delay of the particulars of the offences alleged".[2927]

3189. New Zealand's Military Manual states that "before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused".[2928] It further provides that "the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him".[2929] The manual also specifies that "the accused must be promptly informed, in writing, and in a language which they understand, of the charges brought against them".[2930]

3190. Spain's LOAC Manual provides that "before a [disciplinary] decision is imposed, the accused prisoner shall be informed of the acts of which he is charged".[2931]

3191. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[2932]

[2920] Argentina, *Law of War Manual* (1989), § 3.30.
[2921] Argentina, *Law of War Manual* (1989), § 5.09(1) (occupied territories), see also § 4.15 (civilians).
[2922] Argentina, *Law of War Manual* (1989), § 7.10.
[2923] Australia, *Defence Force Manual* (1994), § 1042(c).
[2924] Canada, *LOAC Manual* (1999), p. 12-6, § 54.
[2925] Canada, *LOAC Manual* (1999), p. 17-4, § 29(a).
[2926] Indonesia, *Directive on Human Rights in Trikora* (1995), § 4(a).
[2927] Netherlands, *Military Manual* (1993), p. XI-5.
[2928] New Zealand, *Military Manual* (1992), § 1130(1).
[2929] New Zealand, *Military Manual* (1992), § 1137(4)(a).
[2930] New Zealand, *Military Manual* (1992), § 1330(1), see also § 1815(2)(a).
[2931] Spain, *LOAC Manual* (1996), Vol. I, § 8.7.e.(2).
[2932] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

3192. Switzerland's Basic Military Manual provides that "every person arrested, detained or interned for acts committed in connection with the conflict shall be informed, without delay, in a language he or she understands, of the reasons why the measures have been taken".[2933]
3193. The UK Military Manual states that "before any disciplinary award is pronounced [against a prisoner of war] the accused must be given full information regarding the offence with which he is charged".[2934] With regard to judicial proceedings against prisoners of war, the manual provides that "particulars of the charges brought against the accused . . . must be given to the accused in a language which he understands".[2935] With respect to situations of occupation, the manual states that "the accused must be promptly informed, in writing and in a language which they understand, of the charges brought against them".[2936]
3194. The US Field Manual reproduces Articles 96 and 105 GC III.[2937] It also contains the provisions of Articles 71 and 123 GC IV.[2938]
3195. The US Air Force Pamphlet provides, with respect to protected persons arrested for criminal offences, that "among other rights, accused persons are assured the right to be informed promptly of the charges against them".[2939]
3196. The US Air Force Commander's Handbook provides that "a prisoner must be given notice of the charges".[2940]

National Legislation
3197. Countless pieces of domestic legislation provide for the right of the accused to be informed of the particulars of the alleged offence.[2941]
3198. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2942]
3199. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 96 and 105 GC III and Articles 71 and 123 GC IV, and of AP I, including violations of Article 75(4)(a) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(a) AP II, are punishable offences.[2943]
3200. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

[2933] Switzerland, *Basic Military Manual* (1987), Article 175.
[2934] UK, *Military Manual* (1958), § 208.
[2935] UK, *Military Manual* (1958), § 228.
[2936] UK, *Military Manual* (1958), § 570.
[2937] US, *Field Manual* (1956), §§ 172 and 181.
[2938] US, *Field Manual* (1956), §§ 330 and 441.
[2939] US, *Air Force Pamphlet* (1976), § 14-6.
[2940] US, *Air Force Commander's Handbook* (1980), § 4-2(c).
[2941] See, e.g., Ethiopia, *Constitution* (1994), Article 20(2); Georgia, *Constitution* (1995), Article 18(5); Georgia, *Code of Criminal Procedure* (1998), Articles 12 and 74; India, *Constitution* (1950), Article 22(1); Kenya, *Constitution* (1992), Article 77(2)(b); Kyrgyzstan, *Criminal Code* (1997), Articles 18; Mexico, *Constitution* (1917), Article 20(III).
[2942] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2943] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[2944]

National Case-law

3201. In the *Ohashi case* before the Australian Military Court at Rabaul in 1946, the Judge Advocate stated that the notion of "fair trial" supposed, *inter alia*, the following:

- the accused should know the exact nature of the charge against him/her;
- the accused should know what is alleged against him/her by way of evidence;
- he should have full opportunity to give his own version of the case and produce evidence to support it.[2945]

Other National Practice

3202. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[2946]

3203. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[2947]

III. Practice of International Organisations and Conferences

3204. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3205. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

Article 14(3)(a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing,

[2944] Norway, *Military Penal Code as amended* (1902), § 108.
[2945] Australia, Military Court at Rabaul, *Ohashi case*, Statement by the Judge Advocate, 23 March 1946.
[2946] Report on the Practice of Jordan, 1997,Chapter 5.
[2947] Report on US Practice, 1997, Chapter 5.3.

provided that the information indicates both the law and the alleged facts on which it is based.[2948]

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

3206. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly in a language understandable to him of the reasons for the measure taken".[2949]

VI. Other Practice

3207. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, and states that "the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her".[2950]

Necessary rights and means of defence

I. Treaties and Other Instruments

Treaties

3208. Article 16(d) of the 1945 IMT Charter (Nuremberg) provides that "a Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel".

3209. Article 49, fourth paragraph, GC I provides that "in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949".

3210. Article 50, fourth paragraph, GC II provides that "in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949".

3211. Article 84, second paragraph, GC III provides that "in no circumstances whatever shall a prisoner of war be tried by a court of any kind . . . the procedure

[2948] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 8.

[2949] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 201.

[2950] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(a), *IRRC*, No. 282, 1991, p. 334.

of which does not afford the accused the rights and means of defence provided for in Article 105".

3212. Article 96, fourth paragraph, GC III stipulates that "the accused shall be . . . given an opportunity of explaining his conduct and of defending himself".

3213. Article 99, third paragraph, GC III provides that "no prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel".

3214. Article 105, first paragraph, GC III provides that "the prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice". Article 105, second paragraph, provides that "failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel . . . Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence." Article 105, third paragraph, provides that:

> The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

3215. Article 72, first paragraph, GC IV provides that:

> Accused persons shall have the right to present evidence necessary for their defence . . . They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

3216. Article 123, first paragraph, GC IV provides that "the accused internee shall be . . . given an opportunity of explaining his conduct and of defending himself".

3217. Article 6(3)(b) and (c) of the 1950 ECHR provides that:

> Everyone charged with a criminal offence has the following minimum rights . . . to have adequate time and facilities for the preparation of his defence; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

3218. Article 14(3)(b) and (d) of the 1966 ICCPR provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees: . . . to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; . . . to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and

without payment by him in any such case if he does not have sufficient means to pay for it.

3219. Article 8(2)(c)-(e) of the 1969 ACHR provides that:

Every person is entitled . . . to the following minimum guarantees: . . . adequate time and means for the preparation of his defense; . . . to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

3220. Article 75(4)(a) AP I provides that "the procedure . . . shall afford the accused before and during his trial all necessary rights and means of defence". Article 75 AP I was adopted by consensus.[2951]

3221. Article 6(2)(a) AP II stipulates that "the procedure shall . . . afford the accused before and during his trial all necessary rights and means of defence". Article 6 AP II was adopted by consensus.[2952]

3222. Article 7(1)(c) of the 1981 ACHPR provides that every individual accused shall have "the right to defence, including the right to be defended by counsel of his choice".

3223. Article 40(2)(b)(ii) of the 1989 Convention on the Rights of the Child provides that "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (ii) to have legal or other appropriate assistance in the preparation and presentation of his or her defence".

3224. Article 55(2) of the 1998 ICC Statute provides that the accused shall have the right to have "legal assistance of the person's choosing".

3225. Article 67(1)(b) and (d) of the 1998 ICC Statute provides that:

In the determination of any charge, the accused shall be entitled to . . . have adequate time and facilities for the preparation of the defence and to communicate freely with the counsel of the accused's choosing in confidence . . . to conduct the defence in person or through legal assistance of the accused's choosing, . . . to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

3226. Article 17(4) of the 2002 Statute of the Special Court for Sierra Leone provides that:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

. . .

[2951] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[2952] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
...
(d) ... to defend himself or herself in person or through legal assistance of his or her own choosing ... to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

Other Instruments

3227. Article 9(c) of the 1946 IMT Charter (Tokyo) provides that:

Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

3228. Article 11 of the 1948 UDHR provides that everyone charged with a penal offence has the right to a trial "at which he has had all the guarantees necessary for his defence".

3229. Principle 15 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "communication of the detained or imprisoned person with the outside world, and in particular his ... counsel, shall not be denied for more than a matter of days".

3230. Principle 17 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

3231. Principle 18 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, with delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered

indispensable by a judicial or other authority in order to maintain security and good order.
4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

3232. Article 19(e) of the 1990 Cairo Declaration on Human Rights in Islam states that a defendant has the right to a fair trial "in which he shall be given all guarantees of defence".
3233. Article 8 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right:

(c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
...
(e) ... to defend himself in person and through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it.

3234. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
3235. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.
3236. Article 18(3) of the 1993 ICTY Statute provides that "if questioned, the suspect shall be entitled to be assisted by counsel of his own choice".
3237. Article 21(4) of the 1993 ICTY Statute provides that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
...
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
...
(d) ... to defend himself in person ... to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

3238. Article 17(3) of the 1994 ICTR Statute provides that "if questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice".

3239. Article 20(4) of the 1994 ICTR Statute provides that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

...

(b) to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

...

(d) ... to defend himself or herself in person ... to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

3240. Article 11(1)(c) and (e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" and "to defend himself in person or through legal assistance of his own choosing".

3241. The 1990 Basic Principles on the Role of Lawyers states that:

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners.

...

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings;
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

...

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence;
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services;

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention;
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing, of law enforcement officials.

3242. Article 47(2) of the 2000 EU Charter of Fundamental Rights provides that "everyone shall have the possibility of being advised, defended and represented".
3243. Article 48(2) of the 2000 EU Charter of Fundamental Rights provides that "respect for the rights of the defence of anyone who has been charged shall be guaranteed".

II. National Practice

Military Manuals

3244. Argentina's Law of War Manual (1969) provides that "in no case shall a prisoner of war appear in front of a tribunal . . . if the proceedings do not ensure to the accused person the rights and means of defence".[2953] It further provides that:

> A prisoner of war has the right to be assisted by one of his inmates [or] to be defended by a qualified lawyer of his own choosing . . . In order to prepare his defence, counsel will have at least a period of two weeks before the examination of the case, as well as the necessary facilities; he can visit the accused freely and meet with him without witness. Counsel may also meet all witnesses on his behalf, including other prisoners of war. He will enjoy these facilities until the expiration of the delay to appeal.[2954]

3245. Argentina's Law of War Manual (1989) states that "the right of prisoners to a defence is recognised and guaranteed. To this effect, prisoners have the right to be assisted by one of their fellow inmates, or to be defended by a qualified lawyer of their own choosing".[2955]
3246. Australia's Defence Force Manual states that POWs "are entitled to be represented by a qualified lawyer of their choice and assisted by another PW".[2956]
3247. Canada's LOAC Manual states that prisoners of war and accused persons in occupied territory must be allowed to present their defence.[2957] The manual further states that "accused persons in occupied territory must "have the right

[2953] Argentina, *Law of War Manual* (1969), § 2.074.
[2954] Argentina, *Law of War Manual* (1969), § 2.086, see also § 5.029(3) (occupied territory).
[2955] Argentina, *Law of War Manual* (1989), § 3.30, see also § 5.09.
[2956] Australia, *Defence Force Manual* (1994), § 1042(d).
[2957] Canada, *LOAC Manual* (1999), p. 10-7, § 76.

to be assisted by a qualified advocate or counsel of their own choice".[2958] It adds that the advocate or counsel of the accused "must be able to visit them freely and to be provided with the necessary facilities for preparing the defence".[2959] With respect to non-international armed conflicts, the manual provides that "accused persons shall be afforded all the necessary rights and means of defence".[2960]

3248. Colombia's Instructors' Manual provides that during the investigation and the trial, "any accused has the right . . . to be assisted by a qualified lawyer of his own choosing or by an *ex-officio* lawyer".[2961]

3249. Ecuador's Naval Manual provides that "at a minimum, [procedural] rights must include the assistance of lawyer counsel, an interpreter and a fellow prisoner".[2962]

3250. Germany's Military Manual provides that "prisoners of war shall be given the opportunity to present their defence".[2963]

3251. Hungary's Military Manual provides that accused POWs shall be granted rights and means of defence.[2964]

3252. The Military Manual of the Netherlands provides, with regard to non-international armed conflicts, that a suspect "must be given the necessary rights and means of defence".[2965]

3253. New Zealand's Military Manual provides that a prisoner of war "must be allowed to present his defence and be represented by qualified counsel or an advocate".[2966] With respect to occupied territory, it states that accused persons "have the right to be assisted by a qualified advocate or counsel of their own choice, who must be able to visit them freely and to enjoy the necessary facilities for preparing the defence".[2967] According to the manual, "insofar as civilians accused of war crimes are held by a Power of which they are not nationals, they are entitled to the safeguards of proper trial and defence, which shall not be less than those provided for prisoners of war by Articles 105 to 108 III GC".[2968] With respect to non-international armed conflicts, the manual states that, as a minimum, "the accused shall be . . . afforded all the necessary rights and means of defence".[2969]

3254. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "legal counsels of detainees or arrested persons must

[2958] Canada, *LOAC Manual* (1999), p. 12-6, § 57.
[2959] Canada, *LOAC Manual* (1999), p. 12-7, § 57.
[2960] Canada, *LOAC Manual* (1999), p. 17-3, § 29(a).
[2961] Colombia, *Instructors' Manual* (1999), p. 11.
[2962] Ecuador, *Naval Manual* (1989), § 11.8.1.
[2963] Germany, *Military Manual* (1992), § 725.
[2964] Hungary, *Military Manual* (1992), p. 92.
[2965] Netherlands, *Military Manual* (1993), p. XI-5.
[2966] New Zealand, *Military Manual* (1992), § 932(2), see also § 1130 (civilian internees).
[2967] New Zealand, *Military Manual* (1992), § 1330(2) and (4).
[2968] New Zealand, *Military Manual* (1992), § 1716.
[2969] New Zealand, *Military Manual* (1992), § 1815(2)(a).

be granted free access to the detention center/jail where the detainees are held".[2970]

3255. Spain's LOAC Manual provides that the right of defence must be respected during criminal proceedings in occupied territories.[2971]

3256. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[2972]

3257. Switzerland's Basic Military Manual states that "only military tribunals can try prisoners. They shall provide the accused with all recognised means of defence."[2973] It also provides that an accused prisoner "shall have the possibility of expressing himself on the subject of the accusation of which he is charged".[2974]

3258. The UK Military Manual states that "in no circumstances whatsoever may [POWs] be tried by a court ... the procedure of which does not afford the accused the rights and means of defence laid down in Art. 105 [GC III]".[2975] The manual further states that "no prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel".[2976] In addition, the manual provides that:

> In any judicial proceedings against him, the prisoner of war is entitled to ... defence by a qualified advocate or counsel of his own choice ...
>
> Defending Counsel must be given at least two weeks before the opening of the trial in which to prepare the defence of the accused. He must also be given all necessary facilities; in particular, he must be allowed freely to visit the accused and to interview him in private ... The facilities are to remain available until the expiry of the time for appeal or petition against conviction.[2977]

With respect to situations of occupation, the manual states that the accused "have the right to be assisted by a qualified advocate or counsel of their own choice", that the qualified advocate or counsel of the choosing of the accused "must be able to visit them freely and to enjoy the necessary facilities for preparing the defence" and that the "accused have the right to present evidence necessary to their defence".[2978]

3259. The US Field Manual reproduces Articles 96, 99 and 105 GC III.[2979] It also restates Articles 71 and 72 GC IV, concerning situations of occupation, and Article 123 GC IV, regarding disciplinary punishment.[2980]

3260. The US Air Force Pamphlet provides that "in no event may [a POW] be tried ... under procedure which fails to accord the rights of defense set forth

[2970] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(b)(2).
[2971] Spain, *LOAC Manual* (1996), Vol. I, § 2.7.b.(3).
[2972] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[2973] Switzerland, *Basic Military Manual* (1987), Article 106.
[2974] Switzerland, *Basic Military Manual* (1987), Article 153.
[2975] UK, *Military Manual* (1958), § 202.
[2976] UK, *Military Manual* (1958), § 225.
[2977] UK, *Military Manual* (1958), § 227.
[2978] UK, *Military Manual* (1958), § 571.
[2979] US, *Field Manual* (1956), §§ 172, 175 and 181.
[2980] US, *Field Manual* (1956), §§ 441, 442 and 330.

in Article 105 [GC III]". It adds that Article 105 GC III "gives [the accused] the right to counsel of his choice" and that the POW's "counsel will have the opportunity to prepare an adequate defense".[2981] The manual also states that "among other rights, accused persons are assured the right to . . . obtain defense counsel".[2982]

3261. The US Air Force Commander's Handbook states that prisoners must "be allowed the help of a lawyer".[2983]

3262. The US Naval Handbook provides that "at a minimum, [procedural] rights must include the assistance of lawyer counsel".[2984]

National Legislation

3263. Countless pieces of domestic legislation provide for the right of accused persons to have legal assistance, sometimes of their own choosing and/or for free.[2985]

3264. Argentina's Code of Criminal Procedure states that "incommunicado detention may not prevent the detainee from communicating with his counsel promptly before the beginning of his statement before the judge".[2986]

3265. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[2987]

3266. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 49 GC I, 50 GC II, 84, 96, 99 and 104 GC III, 71, 72 and 123 GC IV, and of AP I, including violations of Article 75(4)(a) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(a) AP II, are punishable offences.[2988]

3267. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[2989]

[2981] US, *Air Force Pamphlet* (1976), § 13-8. [2982] US, *Air Force Pamphlet* (1976), § 14-6.
[2983] US, *Air Force Commander's Handbook* (1980), § 4-2(c).
[2984] US, *Naval Handbook* (1995), § 11.7.1.
[2985] See, e.g., Ethiopia, *Penal Code* (1957), Article 292; *Constitution* (1994), Article 20(5); Georgia, *Constitution* (1995), Article 18(5) and 42(3); *Code of Criminal Procedure* (1998), Articles 11, 17, 74 and 77; India, *Constitution* (1950), Article 22(1); Kenya, *Constitution* (1992), Article 77(2); Kuwait, *Constitution* (1962), Article 34; Kyrgyzstan, *Constitution* (1993), Articles 40 and 88; Mexico, *Constitution* (1917), Article 20(V)(VII) and (IX); Russia, *Constitution* (1993), Article 48.
[2986] Argentina, *Code of Criminal Procedure* (1991), Article 205.
[2987] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[2988] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[2989] Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

3268. In its judgement in the *Ward case* in 1942, the US Supreme Court stated that:

> This Court has set aside convictions based upon confessions extorted from ignorant persons . . . who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal.[2990]

Other National Practice

3269. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[2991]

3270. Country reports on human rights practices issued by the US Department of State have often noted that defendants must be given an opportunity to present their defence. More specifically, in 1986, the Department of State expressed concern that several indicted political prisoners in Ethiopia had been denied the right to present a defence, to call witnesses or to search for further evidence.[2992]

3271. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[2993]

III. Practice of International Organisations and Conferences

United Nations

3272. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights called upon the government of Croatia "to pursue vigorously prosecutions against those suspected of past violations of international humanitarian law and human rights, while ensuring that the rights . . . to legal representation are afforded to all persons suspected of such crimes".[2994]

Other International Organisations

3273. No practice was found.

[2990] US, Supreme Court, *Ward case*, Judgement, 1 June 1942.
[2991] Report on the Practice of Jordan, 1997,Chapter 5.
[2992] US, Department of State, Country reports on human rights practices for 1986, Ethiopia, p. 144; see also Country reports on human rights practices for 1993, Nicaragua, p. 637; Country reports on human rights practices for 1996, Cambodia, p. 611.
[2993] Report on US Practice, 1997, Chapter 5.3.
[2994] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 22.

International Conferences

3274. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3275. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

> 9. Subparagraph 3 (b) [of Article 14 of the 1966 ICCPR] provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.
> ...
> 11. ... The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.[2995]

3276. In 1992, in its concluding observations on the report of Senegal, the HRC rejected the argument that the 1966 ICCPR's provisions should be interpreted against the background of the conditions prevailing in the country (a state of emergency) and expressed concern at provisions in legislation "particularly in so far as they allow detainees to be kept incommunicado during the first eight days following arrest and deprived of access to a lawyer for the period of arrest".[2996]

3277. In several cases, the HRC found a violation of the right of defence because of lack of access to counsel during detention, including during *incommunicado* detention.[2997]

3278. In several cases, the HRC has stressed the need for free legal assistance where the interests of justice so require. This was not required in criminal

[2995] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, §§ 9 and 11.

[2996] HRC, Concluding observations on the report of Senegal, UN Doc. CCPR/C/79/Add.10, 28 December 1992, § 5.

[2997] HRC, *Sala de Tourón v. Uruguay*, Views, 31 March 1981, § 12; *Pietraroia v. Uruguay*, Views, 27 March 1981, § 17; *Wight v. Madagascar*, Views, 1 April 1985, § 17; *Lafuente Peñarrieta and Others v. Bolivia*, Views, 2 November 1987, § 16.

proceedings concerning breach of traffic regulations,[2998] but was found to be necessary in cases of murder trials, as well as appeals contesting the fairness of a trial.[2999]

3279. In its views in *Little v. Jamaica* in 1991, the HRC held that the meaning of "adequate time" to prepare a defence would vary according to the circumstances and complexity of the case, but a few days would normally be deemed insufficient.[3000]

3280. In its views in *Saldías López v. Uruguay* in 1981, the HRC found a violation of Article 14 (3)(d) of the 1966 ICCPR when an *ex-officio* defence attorney had been appointed for the accused against their will.[3001]

3281. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following:

> In the determination of charges against individuals, the individual shall be entitled in particular to:
>
> . . .
>
> i) Have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice.[3002]

3282. In its decision in *Constitutional Rights Project v. Nigeria (87/93)* in 1995, the ACiHPR held that:

> The communication alleges that during the trials the defense counsel for the complainants was harassed and intimidated to the extent of being forced to withdraw from the proceedings. In spite of this forced withdrawal of counsel, the tribunal proceeded to give judgment in the matter, finally sentencing the accused to death. The Commission finds that defendants were deprived of their right to defense, including the right to be defended by counsel of their choice, [which constitutes a] violation of [Article 7(1)(c) of the 1981 ACHPR].[3003]

3283. In its decision in *Avocats Sans Frontières v. Burundi (231/99)* in 2000, the ACiHPR emphatically recalled that:

> The right to legal assistance is a fundamental element to the right to fair trial. Moreso where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty faced [i.e. death penalty], it was in the interest of Justice for him to have benefit of the assistance of a lawyer at each stage of the case.[3004]

[2998] HRC, *O.F. v. Norway*, Admissibility Decision, 26 October 1984, § 5.6.
[2999] HRC, *Currie v. Jamaica*, Views, 29 March 1994, § 13.2–13.4; *Thomas v. Jamaica*, Views, 3 November 1997, § 6.4.
[3000] HRC, *Little v. Jamaica*, Views, 1 November 1991, § 8.3–8.4.
[3001] HRC, *Saldías López v. Uruguay*, Views, 29 July 1981, § 13; see also *Celiberti de Casariego v. Uruguay*, Views, 29 July 1981, § 11.
[3002] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(i).
[3003] ACiHPR, *Constitutional Rights Project v. Nigeria (87/93)*, Decision, 13–22 March 1995, § 9.
[3004] ACiHPR, *Avocats Sans Frontières v. Burundi (231/99)*, Decision, 23 October–6 November 2000, § 30.

3284. In its decision in *Civil Liberties Organisation and Others v. Nigeria (218/98)* in 2001, the ACiHPR stated, with respect to Article 7(1)(c) of the 1981 ACHPR, that:

> 27. It is our view that the provisions of Article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime . . .
> 28. It is alleged that in contravention of Article 7(1)(c) of the Charter, the convicted persons were not given the opportunity to be represented and defended by counsel of their choice, but rather that junior military lawyers were assigned to them and their objections were overruled. The fairness of the trial is critical if justice is to be done. For that especially in serious cases, which carry the death penalty, the accused should be represented by a lawyer of his choice. The purpose of this provision is to ensure that the accused has confidence in his legal counsel. Failure to provide for this may expose the accused to a situation where they will not be able to give full instructions to their counsel for lack of confidence.
> 29. Besides, it is desirable that in cases where the accused are unable to afford legal counsel, that they be represented by counsel at state expense. Even in such cases, the accused should be able to choose out of a list the preferred independent counsel "not acting under the instructions of government but responsible only to the accused". The Human Rights Committee also prescribes that the accused person must be able to consult with his lawyer in conditions which ensure confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with established professional standards without any restrictions, influences, pressures or undue interference from any quarter . . .
> 30. The right to fair trial is essential for the protection of all other fundamental rights and freedoms . . .
> 31. The assignment of military lawyers to accused persons is capable of exposing the victims to a situation of not being able to communicate, in confidence, with counsel of their choice. The Commission therefore finds the assignment of military counsel to the accused persons, despite their objections, and especially in a criminal proceeding which carries the ultimate punishment a breach of Article 7(1)(c) [of the 1981 ACHPR].[3005]

3285. In its decision in *Ensslin, Baader and Raspe v. FRG* in 1978, the ECiHR held that it was permissible to bar a particular lawyer from representing an accused because of his support for a criminal organisation to which the accused belonged and in circumstances in which a number of other lawyers nominated by the accused were permitted to act.[3006]

3286. In its judgement in the *Pakelli case* in 1983, the ECtHR reaffirmed that free legal assistance must be given if the accused does not have sufficient means to pay counsel and if the interests of justice so require. In this case, one of the

[3005] ACiHPR, *Civil Liberties Organisation and Others v. Nigeria (218/98)*, Decision, 23 April–7 May 2001, §§ 27–31.
[3006] ECiHR, *Ensslin, Baader and Raspe v. FRG*, Decision, 8 July 1978, §§ 25 and 57.

grievances of the accused related to the application of a new rule of criminal procedure and therefore the presence of counsel was necessary.[3007]

3287. In its judgement in the *Campbell and Fell case* in 1984, the ECtHR observed that the "privileged contact prior to the commencement of litigation may be just as important as privileged contact after proceedings have been instituted".[3008]

3288. In its decision in the *Can case* in 1984, the ECiHR explained that the right of the accused to "adequate facilities" under the 1950 ECHR implied that:

> The substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial . . . The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court.[3009]

The ECiHR further stated that "to subject the defence counsel's contacts with the accused to supervision of the court" is in principle incompatible with the right to effective assistance by a lawyer as guaranteed by the 1950 ECHR. It added that:

> This does not mean, however, that the right to free contact with the defence counsel must be granted under all circumstances and without any exceptions. Any restrictions in this respect must however remain an exception to the general rule, and therefore need to be justified by the special circumstances of the case.[3010]

3289. In its judgement in *Quaranta v. Switzerland* in 1991, the ECtHR, considering that the case concerned the possibility of up to three years' imprisonment, which was severe, and that the personality of the accused was such that the lack of counsel made it impossible for him to plead his cause adequately, stated that:

> 27. . . . The right of an accused to be given, in certain circumstances, free legal assistance constitutes one aspect of the notion of a fair trial in criminal proceedings . . .
> 32. In order to determine whether the "interests of justice" required that the applicant receive free legal assistance, the Court will have regard to various criteria . . .
> 33. In the first place, consideration should be given to the seriousness of the offence . . . and the severity of the sentence which [the accused] risked . . .
> 34. An additional factor is the complexity of the case.[3011]

3290. In its judgement in the *Imbrioscia v. Switzerland case* in 1993, the ECtHR stated, with respect to Article 6(3)(c) of the 1950 ECHR, that:

[3007] ECtHR, *Pakelli case*, Judgement, 25 April 1983, §§ 30–40.
[3008] ECtHR, *Campbell and Fell case*, Judgement, 28 June 1984, § 159.
[3009] ECiHR, *Can case*, Decision, 12 July 1984, § 53.
[3010] ECiHR, *Can case*, Decision, 12 July 1984, § 57.
[3011] ECtHR, *Quaranta v. Switzerland*, Judgement, 24 May 1991, §§ 27 and 32–34.

> 33. . . . [The applicant] inferred that in order to be effective, the right to defend oneself must cover not only the trial, but also the preceding interrogations by the police and the phase which took place before the district prosecutor.
> . . .
> 36. The Court cannot accept the Government's first submission without qualification. Certainly the primary purpose of Article 6 [1950 ECHR] as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that the Article (art. 6) has no application to pre-trial proceedings. The "reasonable time" mentioned in [Article 6(1)], for instance, begins to run from the moment a "charge" comes into being, within the autonomous, substantive meaning to be given to that term.[3012]

3291. In its judgement in *Averill v. UK* in 2000, the ECtHR found that the "concept of fairness" enshrined in Article 6 of the 1950 ECHR required that legal assistance be accessible even "at the initial stages of police interrogation".[3013]

3292. In a case concerning Nicaragua in 1989, the IACiHR considered the issue of adequacy of time to prepare a defence. The Commission inferred from the shortness of the period during which the accused had been detained and tried that he had not been accorded adequate time for the preparation of his defence.[3014]

3293. In its advisory opinion in the *Exceptions to the Exhaustion of Domestic Remedies case* in 1990, the IACtHR stated that:

> 25. . . . If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the state, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his economic status if, when in need of legal counsel, the state were not to provide it to him free of charge.
> 26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing. Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.
> 27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article.[3015]

[3012] ECtHR, *Imbrioscia v. Switzerland*, Judgement, 24 November 1993, §§ 33 and 36.
[3013] ECtHR, *Averill v. UK*, Judgement, 6 June 2000, § 57.
[3014] IACiHR, *Case 10.198 (Nicaragua)*, Resolution, 29 September 1989, § 9 .
[3015] IACtHR, *Exceptions to the Exhaustion of Domestic Remedies case*, Advisory Opinion, 10 August 1990, §§ 25–27.

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

3294. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that the courts must respect "the generally recognized principles of regular judicial procedure, which include . . . the right to fair trial including means of defence".[3016]

VI. Other Practice

3295. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that "unacknowledged detention" shall remain prohibited. It also provides a list of the minimum judicial guarantees, including that "the procedure . . . shall afford the accused before and during his or her trial all the necessary rights and means of defence".[3017]

Trial without undue delay

I. Treaties and Other Instruments

Treaties

3296. Article 103, first paragraph, GC III provides that "judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible".

3297. Article 71, second paragraph, GC IV provides that accused persons prosecuted by the occupying power "shall be brought to trial as rapidly as possible".

3298. Article 5(3) of the 1950 ECHR provides that "everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article . . . shall be entitled to trial within a reasonable time or to release pending trial".

3299. Article 6(1) of the 1950 ECHR provides that "everyone is entitled to a fair and public hearing within a reasonable time".

3300. Article 9(3) of the 1966 ICCPR provides that "anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release".

3301. Article 14(3)(c) of the 1966 ICCPR provides that everyone shall be entitled "to be tried without undue delay".

3302. Article 8(1) of the 1969 ACHR provides that "every person has the right to a hearing, with due guarantees and within a reasonable time".

[3016] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(a).

[3017] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 4(2) and 9(a), *IRRC*, No. 282, 1991, pp. 331–332 and 334.

3303. Article 7(1)(d) of the 1981 ACHPR provides that every individual shall have "the right to be tried within a reasonable time by an impartial court or tribunal".
3304. Article 40(2)(b)(iii) of the 1989 Convention on the Rights of the Child provides that "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body".
3305. According to Article 64(2) of the 1998 ICC Statute, "the Trial Chamber shall ensure that the trial is . . . expeditious". Article 64(3) provides that "upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall . . . confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings".
3306. Article 67(1)(c) of the 1998 ICC Statute provides that the accused shall be entitled "to be tried without undue delay".
3307. Article 17(4)(c) of the 2002 Statute of the Special Court for Sierra Leone provides that "in the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . to be tried without undue delay".

Other Instruments
3308. Principle 38 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial".
3309. Article 8(d) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be tried without undue delay".
3310. Article 20(1) of the 1993 ICTY Statute provides that "the Trial Chamber shall ensure that a trial is fair and expeditious".
3311. Article 21(4)(c) of the 1993 ICTY Statute provides that the accused shall "be tried without undue delay".
3312. Article 19(1) of the 1994 ICTR Statute provides that "the Trial Chamber shall ensure that a trial is fair and expeditious".
3313. Article 20(4)(c) of the 1994 ICTR Statute provides that the accused shall "be tried without undue delay".
3314. Article 11(1)(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be tried without undue delay".

3315. Article 47 of the 2000 EU Charter of Fundamental Rights provides that "everyone is entitled to a fair and public hearing within a reasonable time".

II. National Practice

Military Manuals

3316. Argentina's Law of War Manual states that the verdict shall be given in "the shortest time limit as possible".[3018] It also provides that the occupying power shall conduct the case "in the most speedy way".[3019]

3317. Australia's Defence Force Manual sets out a number of procedural rules which include, *inter alia*, that "investigations must be conducted as rapidly as possible".[3020]

3318. Canada's LOAC Manual provides that in an occupied territory, accused persons "must be brought to trial as rapidly as possible".[3021]

3319. Colombia's Instructors' Manual provides that "anybody who is accused has the right to . . . a due . . . trial without unjustified delay".[3022]

3320. New Zealand's Military Manual provides that "internees charged with disciplinary offences are entitled to a speedy trial".[3023] It further provides that the accused "must be brought to trial as rapidly as possible".[3024]

3321. Spain's LOAC Manual provides that judicial criminal proceedings in occupied territory shall not last longer than the usual delay.[3025]

3322. The UK Military Manual provides that "the investigation of charges against a prisoner of war shall be carried out as quickly as circumstances permit and in such manner that his trial will take place as quickly as possible".[3026] The manual further states that in occupied territories, the accused "must be brought to trial as rapidly as possible".[3027]

3323. The US Field Manual reproduces Article 103 GC III and Article 71 GC IV.[3028]

National Legislation

3324. Countless pieces of domestic legislation provide for the right to be tried without undue delay.[3029]

[3018] Argentina, *Law of War Manual* (1969), § 5.008(2).
[3019] Argentina, *Law of War Manual* (1969), § 5.029(2).
[3020] Australia, *Defence Force Manual* (1994), § 1042(a).
[3021] Canada, *LOAC Manual* (1999), p. 12-6, § 54.
[3022] Colombia, *Instructors' Manual* (1999), p. 11.
[3023] New Zealand, *Military Manual* (1992), § 1129(5).
[3024] New Zealand, *Military Manual* (1992), § 1330(1).
[3025] Spain, *LOAC Manual* (1996), Vol. I, § 2.7.b.(3).
[3026] UK, *Military Manual* (1958), § 230.
[3027] UK, *Military Manual* (1958), § 570.
[3028] US, *Field Manual* (1956), §§ 179 and 441.
[3029] See, e.g., Kenya, *Constitution* (1992), Article 77(1).

3325. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3030]
3326. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 103 GC III and 71 GC IV, is a punishable offence.[3031]
3327. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[3032]

National Case-law
3328. No practice was found.

Other National Practice
3329. No practice was found.

III. Practice of International Organisations and Conferences

United Nations
3330. No practice was found.

Other International Organisations
3331. In a resolution adopted in 1984 concerning the situation of martial law in Turkey, the Parliamentary Assembly of the Council of Europe urged the Turkish authorities to ensure respect for the right of individuals to have their cases heard within a reasonable time.[3033]

International Conferences
3332. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3333. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC stated that "pre-trial detention should be an exception and as short as possible".[3034]
3334. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

[3030] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3031] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3032] Norway, *Military Penal Code as amended* (1902), § 108.
[3033] Council of Europe, Parliamentary Assembly, Res. 822, 10 May 1984, § 17(b)(iv).
[3034] HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, § 3.

Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal.[3035]

3335. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "In the determination of charges against individuals, the individual shall be entitled in particular to: . . . ii) Be tried within a reasonable time."[3036]

3336. In its decision in *Pagnoulle v. Cameroon* in 1997, the ACiHPR held that:

> Mr. Mazou has not yet had a judgment on his case brought before the Supreme Court over 2 years ago, without being given any reason for the delay . . . The delegation [of Cameroon] held that the case might be decided upon by the end of October 1996, but still no news of it has been forwarded to the Commission. Given that this case concerns Mr. Mazou's ability to work in his profession, two years without any hearing or projected trial date constitutes a violation of [Article 7(1)(d) of the 1981 ACHPR].[3037]

3337. In its decision in *Abubakar v. Ghana* in 1996, involving the arrest and detention of a Ghanaian national, the ACiHPR found that "the complainant was detained in prison for seven years without trial before his escape. This period clearly violates the "reasonable time" standard stipulated in the [1981 ACHPR]."[3038]

3338. In several cases, the ECtHR found that the reasonableness of the length of time for pre-trial detention would depend upon factors relating to the circumstances of the case, including the difficulty of the investigations, the behaviour of the accused and the handling of the case by the national authorities.[3039]

3339. In its judgement in *Boddaert v. Belgium* in 1992, the ECtHR stated that Article 6 of the 1950 ECHR commanded that judicial proceedings be expeditious, but it also laid down the more general principle of the proper administration of justice.[3040]

3340. In a case concerning Argentina in 1989, the IACiHR referred to the jurisprudence of the ECtHR and stated that the:

3035 HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 10.

3036 ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(ii).

3037 ACiHPR, *Pagnoulle v. Cameroon*, Decision, 15–24 April 1997, § 19.

3038 ACiHPR, *Abubakar v. Ghana*, Decision, 21–31 October 1996, § 12.

3039 ECtHR, *Wemhoff case*, Judgement, 27 June 1968, § 104; *Matznetter v. Austria*, Judgement, 10 November 1969, § 12; *Stögmüller case*, Judgement, 10 November 1969, § 16; *König v. Germany*, Judgement, 28 June 1978, § 99; *Letellier v. France*, Judgement, 26 June 1991, § 51; *Kemmache v. France*, Judgement, 27 November 1991, § 52; *Tomasi v. France*, Judgement, 27 August 1992, § 102; *Olsson v. Sweden (No. 2)*, Judgement, 27 November 1992, § 99; *Scopelliti v. Italy*, Judgement, 23 November 1993, § 19.

3040 ECtHR, *Boddaert v. Belgium*, Judgement, 12 October 1992, § 39.

reasonableness of a court order or of length of time must be weighed within its own and specific context, that is, there are no general universally valid criteria and what is involved is something that is legally known as a question of fact
...
It is not possible to define this [reasonable length of time] period *in abstracto*, but, instead, that it shall be defined in each case ... The Commission ... agrees with the opinion that the referenced State party is "not bound (by the Convention) to fix a valid period for all cases, independently from the circumstances".[3041]

3341. In a case concerning Argentina in 1996, the IACiHR noted in relation to the right to a hearing within a reasonable time that a series of factors might determine the length of a trial. The relevant considerations included "the complexity of the case, the behaviour of the accused, and the diligence of the competent authorities in their conduct of the proceedings".[3042]

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

3342. No practice was found.

VI. Other Practice

3343. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "the procedure ... shall provide for a trial within a reasonable time".[3043]

Examination of witnesses

I. Treaties and Other Instruments

Treaties

3344. Article 16(e) of the 1945 IMT Charter (Nuremberg) provides that "a Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution".

3345. Article 96, third paragraph, GC III provides that "the accused shall be ... permitted, in particular, to call witnesses".

3346. Article 105, first paragraph, GC III provides that "the prisoner of war shall be entitled ... to the calling of witnesses".

[3041] IACiHR, *Case 10.037 (Argentina)*, Resolution, 13 April 1989, Section 11(a)(s) and Section 17(seven).
[3042] IACiHR, *Case 11.245 (Argentina)*, Report, 1 March 1996, § 111.
[3043] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(a), *IRRC*, No. 282, 1991, p. 334.

3347. Article 72, first paragraph, GC IV provides that "accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses".
3348. Article 123, second paragraph, GC IV provides that "the accused internee shall be . . . permitted, in particular, to call witnesses".
3349. Article 6(3)(d) of the 1950 ECHR provides as a minimum right for any person who is charged with a criminal offence "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".
3350. Article 14(3)(e) of the 1966 ICCPR provides that, in the determination of any criminal charge, the accused is entitled as a minimum guarantee "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".
3351. Article 8(2)(f) of the 1969 ACHR states that every person accused of a criminal offence is entitled to be guaranteed "the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts".
3352. Article 75(4)(g) AP I provides that "anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Article 75 AP I was adopted by consensus.[3044]
3353. Article 40(2)(b)(iv) of the 1989 Convention on the Rights of the Child provides that "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iv) to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality".
3354. Article 67(1)(e) of the 1998 ICC Statute states that the accused is entitled:

> To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.

3355. Article 17(4) of the 2002 Statute of the Special Court for Sierra Leone provides that the accused

> shall be entitled to the following minimum guarantees, in full equality:
>
> . . .
>
> (e) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

[3044] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

Other Instruments

3356. Article 9(d) of the 1946 IMT Charter (Tokyo) provides that "an accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine".

3357. Article 8(f) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

3358. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3359. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3360. Article 21(4)(e) of the 1993 ICTY Statute provides that the accused shall be entitled "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".

3361. Article 20(4)(e) of the 1994 ICTR Statute provides that the accused shall be entitled "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her".

3362. Article 11(1)(f) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

II. National Practice

Military Manuals

3363. Argentina's Law of War Manual (1969) states that POWs have the right to "call witnesses".[3045] It further states that the counsel for defence "can . . . talk with witnesses for the prosecution, including prisoners of war".[3046] The manual also stresses that "any accused has the right to assert the means of evidence necessary for his defence . . . including citing witnesses".[3047]

[3045] Argentina, *Law of War Manual* (1969), § 2.082.
[3046] Argentina, *Law of War Manual* (1969), § 2.086.
[3047] Argentina, *Law of War Manual* (1969), § 5.029(3).

3364. Argentina's Law of War Manual (1989) states that a POW has the "right to subpoena witnesses".[3048]

3365. Canada's LOAC Manual provides that accused persons in occupied territory must "have the right to present evidence necessary to their defence and may, in particular, call witnesses".[3049]

3366. New Zealand's Military Manual states that in order to defend himself, the accused internee "shall be permitted, in particular, to call witnesses".[3050] It further provides that "anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".[3051] The manual also stresses that "accused persons have the right to present evidence necessary to their defence and may, in particular, call witnesses".[3052]

3367. Spain's LOAC Manual states that "before imposing a [disciplinary] decision, the accused prisoner . . . can explain his conduct and defend himself, including by presenting witnesses".[3053]

3368. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3054]

3369. The UK Military Manual provides, regarding disciplinary punishment of a POW, that "he must be allowed to call witnesses".[3055] It further provides that "in any judicial proceedings against him, the prisoner of war is entitled to . . . call witnesses" and that "Defending Counsel . . . must also be allowed to interview any witness for the defence, including prisoners of war".[3056] With respect to cases of occupation, the manual states that the "accused have the right to present evidence necessary to their defence and may, in particular, call witnesses".[3057]

3370. The US Field Manual reproduces Articles 96 and 105 GC III.[3058] It also uses the same wording as Article 123 GC IV regarding disciplinary punishments and Article 72 GC IV concerning situations of occupation.[3059]

3371. The US Air Force Pamphlet provides that Article 105 GC III "gives the right to [the prisoner of war] . . . to the calling of witnesses".[3060] It also states that "among other rights, accused persons are assured the right to . . . call witnesses".[3061]

[3048] Argentina, *Law of War Manual* (1989), § 3.30, see also § 5.09.
[3049] Canada, *LOAC Manual* (1999), p. 12-7, § 57.
[3050] New Zealand, *Military Manual* (1992), § 1130(1).
[3051] New Zealand, *Military Manual* (1992), § 1137(4)(g).
[3052] New Zealand, *Military Manual* (1992), § 1330(2).
[3053] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.e.(2).
[3054] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3055] UK, *Military Manual* (1958), § 208.
[3056] UK, *Military Manual* (1958), § 227.
[3057] UK, *Military Manual* (1958), § 571.
[3058] US, *Field Manual* (1956), §§ 172 and 181.
[3059] US, *Field Manual* (1956), §§ 330 and 441.
[3060] US, *Air Force Pamphlet* (1976), § 13-8.
[3061] US, *Air Force Pamphlet* (1976), § 14-6.

3372. The US Air Force Commander's Handbook states that in case of trial, prisoners must "be allowed to call witnesses for the defense".[3062]

National Legislation

3373. Countless pieces of domestic legislation provide for the right to call witnesses.[3063]

3374. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3064]

3375. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 96 and 105 GC III and Articles 72 and 123 GC IV, and of AP I, including violations of Article 75(4)(g) AP I, are punishable offences.[3065]

3376. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[3066]

National Case-law

3377. No practice was found.

Other National Practice

3378. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3067]

III. Practice of International Organisations and Conferences

3379. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3380. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that "subparagraph 3(e) ... is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution".[3068]

[3062] US, *Air Force Commander's Handbook* (1980), § 4-2(c).
[3063] See, e.g., Ethiopia, *Constitution* (1994), Article 20(4); Georgia, *Constitution* (1995), Article 42(6); Kenya, *Constitution* (1992), Article 77(2)(e); Mexico, *Constitution* (1917), Article 20(IV).
[3064] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3065] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3066] Norway, *Military Penal Code as amended* (1902), § 108.
[3067] Report on the Practice of Jordan, 1997,Chapter 5.
[3068] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 12.

3381. In its views in *L. Grant v. Jamaica* in 1994 and *García Fuenzalida v. Ecuador* in 1996, the HRC found a violation of Article 14(3)(e) of the 1966 ICCPR if the State did not take the necessary measures to enable important witnesses to appear.[3069]

3382. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following:

> In the determination of charges against individuals, the individual shall be entitled in particular to:
>
> . . .
>
> iii) Examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.[3070]

3383. In its judgement in *Engel v. Netherlands* in 1976, the ECtHR stated that Article 6 of the 1950 ECHR did not require

> the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words "under the same conditions", is a full "equality of arms" in the matter. With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6 (art. 6).[3071]

3384. In its judgement in *J. J. v. the Netherlands* in 1998, the ECtHR stated that under Article 6(3)(d) of the 1950 ECHR, the right of the defence to call and examine witnesses meant, in principle, "the opportunity for the parties to a criminal . . . trial to have knowledge of and comment on all evidence addressed or observations filed . . . with a view to influencing the court's decision".[3072]

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

3385. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . presence of defence witnesses [and] examination of witnesses against the accused".[3073]

[3069] HRC, *L. Grant v. Jamaica*, Views, 31 March 1994, § 8.5; *García Fuenzalida v. Ecuador*, Views, 12 July 1996, § 9.5.

[3070] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(iii).

[3071] ECtHR, *Engel v. Netherlands*, Judgement, 8 June 1976, § 91.

[3072] ECtHR, *J. J. v. the Netherlands*, Judgement, 27 March 1998, § 43.

[3073] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(g)–(h).

3386. The ICRC Commentary on Article 75 AP I points out that "the possibility of examining witnesses is an essential prerequisite for an effective defence".[3074]

VI. Other Practice

3387. No practice was found.

Assistance of an interpreter

I. Treaties and Other Instruments

Treaties

3388. Article 96, fourth paragraph, GC III provides that "the accused shall be . . . permitted . . . to have recourse, if necessary, to the services of a qualified interpreter".

3389. Article 105, first paragraph, GC III provides that "the prisoner of war shall be entitled . . . if he deems necessary, to the services of a competent interpreter".

3390. Article 72, third paragraph, GC IV provides that "accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement."

3391. Article 123, second paragraph, GC IV provides that "the accused internee shall be . . . permitted . . . to have recourse, if necessary, to the services of a qualified interpreter".

3392. Article 6(3)(e) of the 1950 ECHR provides that "everyone charged with a criminal offence has the following minimum rights . . . to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

3393. Article 14(3)(f) of the 1966 ICCPR provides that "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

3394. Article 8(2)(a) of the 1969 ACHR establishes "the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court".

3395. According to Article 40(2)(b)(vi) of the 1989 Convention on the Rights of the Child, "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used".

3396. Article 55(1)(c) of the 1998 ICC Statute provides that a person "shall, if questioned in a language other than a language the person fully understands

[3074] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3115.

and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness".

3397. Article 67(1) of the 1998 ICC Statute provides that:

> In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:
>
> . . .
>
> (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.

3398. Article 17(4) of the 2002 Statute of the Special Court for Sierra Leone provides that:

> In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
>
> . . .
>
> (f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court.

Other Instruments

3399. Article 8(g) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

3400. Article 21(4)(f) of the 1993 ICTY Statute provides that the accused shall be entitled "to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal".

3401. Article 20(4)(f) of the 1994 ICTR Statute provides that the accused shall be entitled "to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda".

3402. Article 11(1)(g) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

II. National Practice

Military Manuals

3403. Argentina's Law of War Manual (1969) provides that the accused POW "shall be authorised . . . to ask for the assistance of a qualified interpreter" and that a POW has the right to "use, if he considers it to be necessary, the services of

a qualified interpreter".[3075] The manual states that "any accused person, except if he refuses freely, can be assisted by an interpreter during the investigation as well as during the hearings before the tribunal. He can, at any time, challenge the interpreter and ask for his substitution."[3076]

3404. Argentina's Law of War Manual (1989) states that a POW has the "right to . . . have access to an interpreter".[3077]

3405. Canada's LOAC Manual provides that accused persons in occupied territory must "be aided by an interpreter, both during preliminary investigation and during the hearing in court".[3078]

3406. Ecuador's Naval Manual provides that "at a minimum, [procedural] rights must include the assistance of . . . an interpreter".[3079]

3407. New Zealand's Military Manual provides that the accused "shall have recourse, if necessary, to the services of a qualified interpreter".[3080] It further states that "both during the preliminary investigation and during the hearing in court, the accused must be aided by an interpreter, unless such assistance is voluntarily waived. Similarly, an accused has the right at any time to object to the interpreter and to ask for his replacement."[3081]

3408. The UK Military Manual provides, regarding disciplinary punishment of a POW, that "if necessary, [he must] be given the services of a qualified interpreter".[3082] It further states that "in any judicial proceedings against him, the prisoner of war is entitled . . . if he so desires, to have the services of a qualified interpreter".[3083] With respect to situations of occupation, the manual states that "unless they voluntarily waive such assistance, accused persons must be aided by an interpreter, both during preliminary investigation and during the hearing in court. They have the right at any time to object to the interpreter and to ask for his replacement."[3084]

3409. The US Field Manual reproduces Articles 96 and 105 GC III.[3085] It also uses the same wording as Articles 72 and 123 GC IV.[3086]

3410. The US Air Force Pamphlet provides that Article 105 GC III "gives [the prisoner of war] the right to . . . the services of a competent interpreter".[3087] It also states that "among other rights, accused persons are assured the right to . . . obtain an interpreter".[3088]

3411. The US Air Force Commander's Handbook states that prisoners must be allowed "the help of . . . an interpreter" in case of trial.[3089]

[3075] Argentina, *Law of War Manual* (1969), §§ 2.082 and 2.086.
[3076] Argentina, *Law of War Manual* (1969), § 5.029(3).
[3077] Argentina, *Law of War Manual* (1989), § 3.30, see also § 5.09.
[3078] Canada, *LOAC Manual* (1999), p. 12-7, § 58.
[3079] Ecuador, *Naval Manual* (1989), § 11.8.1.
[3080] New Zealand, *Military Manual* (1992), § 1130(1).
[3081] New Zealand, *Military Manual* (1992), § 1330(2).
[3082] UK, *Military Manual* (1958), § 208.
[3083] UK, *Military Manual* (1958), § 227.
[3084] UK, *Military Manual* (1958), § 571.
[3085] US, *Field Manual* (1956), §§ 172 and 181.
[3086] US, *Field Manual* (1956), §§ 442 and 330.
[3087] US, *Air Force Pamphlet* (1976), § 13-8.
[3088] US, *Air Force Pamphlet* (1976), § 14-6.
[3089] US, *Air Force Commander's Handbook* (1980), § 4-2(c).

3412. The US Naval Handbook states that "at a minimum, [procedural] rights must include the assistance of . . . an interpreter".[3090]

National Legislation

3413. Countless pieces of domestic legislation provide for the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court.[3091]

3414. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3092]

3415. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 96 and 105 GC III and Articles 72 and 123 GC IV, is a punishable offence.[3093]

3416. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[3094]

National Case-law

3417. No practice was found.

Other National Practice

3418. No practice was found.

III. Practice of International Organisations and Conferences

3419. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3420. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

> [The right conferred by] Subparagraph 3(f) . . . is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.[3095]

[3090] US, *Naval Handbook* (1995), § 11.7.1.
[3091] See, e.g., Ethiopia, *Constitution* (1994), Article 20(7); Germany, *Criminal Procedure Code as amended* (1987), Section 259; Kenya, *Constitution* (1992), Article 77(2)(f).
[3092] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3093] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3094] Norway, *Military Penal Code as amended* (1902), § 108(a).
[3095] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 13.

3421. In its views in *Cadoret and Le Bihan v. France* in 1991, the HRC explained the scope of the right to an interpreter as follows:

The provision for the use of one official court language by States parties to the Covenant does not . . . violate article 14. Nor does the requirement of a fair hearing obligate State parties to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding or expressing themselves in the court language is it obligatory that the services of an interpreter be made available.[3096]

3422. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "In the determination of charges against individuals, the individual shall be entitled in particular to: . . . iv) Have the free assistance of an interpreter if they cannot speak the language used in court."[3097]

3423. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, the ACiHPR held that:

The right to defence should also be interpreted as including the right to understand the charges being brought against oneself. In [one of the trials under consideration which allegedly violated the 1981 ACHPR], only 3 of the 21 accused persons spoke Arabic fluently, and this was the language used during the trial. This means that the 18 others did not have the right to defend themselves; this . . . constitutes a violation of [Article 7(1)(c) of the 1981 ACHPR].[3098]

3424. In its judgement in the *Luedicke, Belkacem and Koç case* in 1978, the ECtHR stated that:

The right protected by Article 6 para. 3 (e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.

. . .

Construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3 (e) (art. 6-3-e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial.[3099]

[3096] HRC, *Cadoret and Le Bihan v. France*, Views, 11 April 1991, § 5(6); see also *Guesdon v. France*, Views, 25 July 1990, § 10(2); *Barzhig v. France*, Views, 11 April 1991, § 5.5; *Z. P. v. Canada*, Admissibility Decision, 11 April 1991, § 5.3; *C. E. A. v. Finland*, Admissibility Decision, 10 July 1991, § 6.2; *C. L. D. v. France*, Admissibility Decision, 8 November 1991, § 4.2.

[3097] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(iv).

[3098] ACiHPR, *Malawi African Association and Others v. Mauritania (54/91)*, Decision, 11 May 2000, § 97.

[3099] ECtHR, *Luedicke, Belkacem and Koç case*, Judgement, 28 November 1978, §§ 46 and 48.

3425. In its judgement in the *Kamasinski case* in 1989, the ECtHR stated that Article 6(3)(e) of the 1950 ECHR

> does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.[3100]

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

3426. No practice was found.

VI. Other Practice

3427. No practice was found.

Presence of the accused at the trial

I. Treaties and Other Instruments

Treaties

3428. Article 12 of the 1945 IMT Charter (Nuremberg) provides that:

> The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

3429. Article 123, second paragraph, GC IV refers to the disciplinary punishment awarded to internees and states that "the decision shall be announced in the presence of the accused".

3430. Article 6(3)(c) of the 1950 ECHR provides that everyone charged with a criminal offence has the right "to defend himself in person".

3431. Article 14(3)(d) of the 1966 ICCPR provides that "everyone shall be entitled to . . . be tried in his presence".

3432. Article 8(2)(d) of the 1969 ACHR provides that during proceedings, every person accused of a criminal offence has "the right . . . to defend himself personally".

3433. Article 75(4)(e) AP I provides that "anyone charged with an offence shall have the right to be tried in his presence". Article 75 AP I was adopted by consensus.[3101]

[3100] ECtHR, *Kamasinski case*, Judgement, 19 December 1989, § 74.
[3101] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

3434. Upon ratification of AP I, Austria stated that:

> Article 75 of Protocol I will be applied insofar as sub-paragraph (e) of paragraph 4 is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing of a witness or expert witness, may be removed from the courtroom.[3102]

3435. Upon ratification of AP I, Germany stated that "Article 74, paragraph 4, subparagraph (e) of Additional Protocol I will be applied in such manner that it is for the court to decide whether an accused person held in custody may appear in person at the hearing before the court of review".[3103]

3436. Upon ratification of AP I, Ireland stated that "Article 75 will be applied in Ireland insofar as paragraph 4(e) is not incompatible with the power enabling a judge, in exceptional circumstances, to order the removal of an accused from the court who causes a disturbance at the trial".[3104]

3437. Upon ratification of AP I, Liechtenstein stated in relation to Article 75 that "paragraph 4(e) is not incompatible with legislation under which any accused who causes a disturbance in court or whose presence could impede the questioning of another accused, a witness or expert may be excluded from the courtroom".[3105]

3438. Upon ratification of AP I, Malta stated in relation to Article 75 that:

> Sub-paragraph (e) of paragraph 4 is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing or another witness or expert witness, may be removed from the courtroom.[3106]

3439. Article 6(2)(e) AP II provides that "anyone charged with an offence shall have the right to be tried in his presence". Article 6 AP II was adopted by consensus.[3107]

3440. Upon ratification of AP II, Austria stated that:

> Article 6, paragraph 2, sub-paragraph (e) of Protocol II will be applied insofar as it is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing of a witness or expert witness, may be removed from the courtroom.[3108]

3441. Upon ratification of AP II, Germany stated that "Article 6, paragraph 2, subparagraph (e) of Additional Protocol II will be applied in such manner that

[3102] Austria, Reservations made upon ratification of AP I, 13 August 1982, § 3(a).
[3103] Germany, Declarations made upon ratification of AP I and AP II, 14 February 1991, § 8.
[3104] Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 13.
[3105] Liechtenstein, Reservations made upon ratification of AP I, 10 August 1989, § 1(a).
[3106] Malta, Reservations made upon accession to AP I and AP II, 17 April 1989, § 1(a).
[3107] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.
[3108] Austria, Reservations made upon ratification of AP II, 13 August 1982, § 6.

it is for the court to decide whether an accused person held in custody may appear in person at the hearing before the court of review".[3109]

3442. Upon ratification of AP II, Ireland stated that "Article 6 will be applied in Ireland insofar as paragraph 2(e) is not incompatible with the power enabling a judge, in exceptional circumstances, to order the removal of an accused from the court who causes a disturbance at the trial".[3110]

3443. Upon ratification of AP II, Liechtenstein stated that:

> Article 6, paragraph 2(e), of Protocol II will be implemented provided that it is not incompatible with legislation under which any accused who causes a disturbance in court or whose presence could impede the questioning of another accused or of a witness or expert may be excluded from the court room.[3111]

3444. Upon ratification of AP II, Malta stated in relation to Article 6 that:

> paragraph 2, sub-paragraph (e) of Protocol II will be applied insofar as it is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing of a witness or expert witness, may be removed from the courtroom.[3112]

3445. Article 63(1) of the 1998 ICC Statute provides that "the accused shall be present during the trial".

3446. Article 67(1)(d) of the 1998 ICC Statute states that the accused, "subject to article 63, paragraph 2, [shall] be present at the trial".

3447. Article 17(4)(d) of the 2002 Statute of the Special Court for Sierra Leone provides that "in the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . to be tried in his or her presence".

Other Instruments

3448. Article 12(c) of the 1946 IMT Charter (Tokyo) provides that the Tribunal shall "provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges".

3449. Article 8(e) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be tried in his presence".

3450. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

[3109] Germany, Declarations made upon ratification of AP I and AP II, 14 February 1991, § 8.
[3110] Ireland, Declarations and reservations made upon ratification of AP II, 19 May 1999, § 2.
[3111] Liechtenstein, Reservations made upon ratification of AP II, 10 August 1989, § 2.
[3112] Malta, Reservations made upon accession to AP I and AP II, 17 April 1989, § 2.

3451. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.
3452. Article 21(4)(d) of the 1993 ICTY Statute provides that the accused shall be entitled "to be tried in his presence".
3453. Article 20(4)(d) of the 1994 ICTR Statute provides that the accused shall be entitled "to be tried in his or her presence".
3454. Article 11(1)(e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be tried in his presence".

II. National Practice

Military Manuals

3455. Argentina's Law of War Manual lists the fundamental guarantees for prisoners of war, including "trial in the presence of the accused".[3113] The same provision applies to civilians and in occupied territories.[3114] With respect to non-international armed conflicts, the manual states that one of the fundamental judicial guarantees is "trial in the presence of the accused".[3115]
3456. Canada's LOAC Manual provides that, in non-international armed conflict, "accused persons have the right to be present at their trial".[3116]
3457. New Zealand's Military Manual states, in an explanatory footnote, that "no prisoner may be tried in absentia".[3117] It further provides that "anyone charged with an offence shall have the right to be tried in his presence".[3118] With respect to non-international armed conflicts, the manual states that "the accused has the right to be present at his trial".[3119]
3458. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3120]

National Legislation

3459. Countless pieces of domestic legislation provide for the right of the accused to be tried in their presence.[3121]

[3113] Argentina, *Law of War Manual* (1989), § 3.30.
[3114] Argentina, *Law of War Manual* (1989), §§ 4.15 and 5.09(4).
[3115] Argentina, *Law of War Manual* (1989), § 7.10.
[3116] Canada, *LOAC Manual* (1999), p. 17-3, § 29(e).
[3117] New Zealand, *Military Manual* (1992), § 932(3), footnote 145.
[3118] New Zealand, *Military Manual* (1992), § 1137(4)(e).
[3119] New Zealand, *Military Manual* (1992), § 1815(4)(e).
[3120] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3121] See, e.g., Georgia, *Code of Criminal Procedure* (1998), Article 77(3); Kenya, *Constitution* (1992), Article 77; Kyrgyzstan, *Criminal Code* (1997), Article 28; Russia, *Constitution* (1993), Article 123(2).

3460. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3122]
3461. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 123 GC IV, and of AP I, including violations of Article 75(4)(e) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(e) AP II, are punishable offences.[3123]
3462. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[3124]

National Case-law
3463. No practice was found.

Other National Practice
3464. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3125]
3465. The Report on US Practice states that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II". The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[3126]

III. Practice of International Organisations and Conferences

United Nations
3466. No practice was found.

Other International Organisations
3467. No practice was found.

International Conferences
3468. The Rapporteur of the Third Committee at the CDDH noted in relation to Article 75(4)(e) AP I that "it was understood that persistent misconduct by a defendant could justify his banishment from the courtroom".[3127]

[3122] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3123] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3124] Norway, *Military Penal Code as amended* (1902), § 108.
[3125] Report on the Practice of Jordan, 1997, Chapter 5.
[3126] Report on US Practice, 1997, Chapter 5.3.
[3127] CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 10 June 1977, p. 462, § 48.

IV. Practice of International Judicial and Quasi-judicial Bodies

3469. In *Daniel Monguya Mbenge v. Zaire* in 1983, the HRC held that:

14.1 . . . According to article 14 (3) of the [ICCPR], everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art. 14 (3) (a)). Judgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)).
14.2 The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused. With regard to the present communication, however, those limits need not be specified. The State party has not challenged the author's contention that he had known of the trials only through press reports after they had taken place. It is true that both judgements state explicitly that summonses to appear had been issued by the clerk of the court. However, no indication is given of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium is correctly reproduced in the judgement of 17 August 1977 and which was therefore known to the judicial authorities. The fact that, according to the judgement in the second trial of March 1978, the summons had been issued only three days before the beginning of the hearings before the court, confirms the Committee in its conclusion that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence. In the view of the Committee, therefore, the State party has not respected D. Monguya Mbenge's rights under article 14 (3) (a), (b), (d) and (e) of the Covenant.[3128]

3470. In *Karttunen v. Finland* in 1992, the HRC stated that:

7.3 . . . The Committee considers that the author was entitled to oral proceedings before the Court of Appeal. As the State party itself concedes, only this procedure would have enabled the Court to proceed with the reevaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw had indeed affected the verdict of the District Court. In the light of the above, the Committee concludes that there has been a violation of article 14, paragraph 1 [of the 1966 ICCPR].[3129]

[3128] HRC, *Daniel Monguya Mbenge v. Zaire*, Views, 25 March 1983, §§ 14.1–14.2.
[3129] HRC, *Karttunen v. Finland*, Views, 23 October 1992, § 7.3.

3471. In its judgement in the *Colozza case* in 1985, the ECtHR held that the conduct of a criminal trial without the presence of the accused was incompatible with Article 6 of the 1950 ECHR and that in cases where a person was convicted *in absentia*, there must be an opportunity for that person to reopen the trial.[3130] The ECtHR held that a hearing *in absentia* was permitted if the State had acted diligently, but unsuccessfully, to give the accused effective notice of the hearing.[3131]

3472. In several cases, the ECtHR decided that the right to be present included appeal proceedings if the issues considered were not purely those of law, but included issues of fact or sentencing.[3132]

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

3473. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . trial in the presence of the accused".[3133]

3474. The ICRC Commentary on the Additional Protocols states that Article 75(4)(e) AP I "does not exclude sentencing a defendant in his absence if the law of the State permits judgement *in absentia*".[3134] It adds that:

> In some countries the discussions of the judges of the court are public and take place before the defendant; in other countries the discussion is held in camera, and only the verdict is made public. Finally, there are countries where the court's decision is communicated to the defendant by the clerk of the court in the absence of the judges. This sub-paragraph does not prohibit any such practices: the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections.[3135]

VI. Other Practice

3475. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

[3130] ECtHR, *Colozza case*, Judgement, 12 February 1985, § 29.
[3131] ECtHR, *Colozza case*, Judgement, 12 February 1985, § 28; see also *F. C. B. v. Italy case*, Judgement, 28 August 1991, § 33.
[3132] See, e.g., ECtHR, *Ekbatani v. Sweden*, Judgement, 26 May 1988, § 31; *Kremzow v. Austria*, Judgement, 21 September 1993, §§ 59 and 67.
[3133] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(e).
[3134] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3109.
[3135] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987,7break; § 3110.

University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "anyone charged with an offence shall have the right to be tried in his or her presence".[3136]

Compelling accused persons to testify against themselves or to confess guilt

I. Treaties and Other Instruments

Treaties

3476. Article 99, second paragraph, GC III provides that "no moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused".

3477. Article 14(3)(g) of the 1966 ICCPR provides that "everyone is entitled to the following minimum guarantees, in full equality: . . . not to be compelled to testify against himself or to confess guilt".

3478. Article 8(2)(g) of the 1969 ACHR provides for "the right not to be compelled to be a witness against himself or to plead guilty". It can be read in conjunction with Article 8(3) which states that "a confession of guilt by the accused shall be valid only if it is made without coercion of any kind".

3479. Article 75(4)(f) AP I provides that "no one shall be compelled to testify against himself or to confess guilt". Article 75 AP I was adopted by consensus.[3137]

3480. Article 6(2)(f) AP II provides that "no one shall be compelled to testify against himself or to confess guilt". Article 6 AP II was adopted by consensus.[3138]

3481. According to Article 40(2)(b)(iv) of the 1989 Convention on the Rights of the Child "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iv) not to be compelled to give testimony or to confess guilt".

3482. Article 55(1)(a) of the 1998 ICC Statute provides that "in respect of an investigation under this Statute, a person . . . shall not be compelled to incriminate himself or herself or to confess guilt".

3483. Article 67(1)(g) of the 1998 ICC Statute provides that:

> In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:
>
> . . .
>
> (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

[3136] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(d), *IRRC*, No. 282, 1991, p. 334.

[3137] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

[3138] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3484. Article 17(4)(g) of the 2002 Statute of the Special Court for Sierra Leone provides that "in the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . not to be compelled to testify against himself or herself or to confess guilt".

Other Instruments

3485. Principle 21 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person".

3486. Article 8(h) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "not to be compelled to testify against himself or to confess guilt".

3487. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3488. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3489. Article 21(4)(g) of the 1993 ICTY Statute provides that, among the minimum guarantees, the accused is "not to be compelled to testify against himself or to confess guilt".

3490. Article 20(4)(g) of the 1994 ICTR Statute provides that, among the minimum guarantees, the accused is "not to be compelled to testify against himself or herself or to confess guilt".

3491. Article 11(1)(h) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "not to be compelled to testify against himself or to confess guilt".

3492. Article 2(9) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right against self-incrimination.

II. National Practice

Military Manuals

3493. Argentina's Law of War Manual (1969) provides that "no moral or physical pressure shall be exercised on a prisoner of war to make him confess guilt for the act of which he is accused".[3139]

[3139] Argentina, *Law of War Manual* (1969), § 2.083(1).

3494. Argentina's Law of War Manual (1989) states that judicial proceedings must afford the guarantee that there is "no pressure on the prisoner to confess guilt".[3140] With respect to occupied territories, the manual states that there shall be "no pressure in order to obtain a confession".[3141] In the case of non-international armed conflict, the manual provides for the "absence of pressure [on the accused] to obtain a confession of guilt".[3142]

3495. Canada's LOAC Manual provides that "no force of any kind may be imposed upon a PW to cause the PW to plead guilty".[3143] It further states that in cases of non-international armed conflicts, "accused persons shall not be compelled to testify against themselves or to confess their guilt".[3144]

3496. Colombia's Basic Military Manual provides that it is prohibited to "compel someone to confess or to incriminate himself".[3145]

3497. New Zealand's Military Manual states that "no force of any kind may be imposed upon a prisoner to cause him to plead guilty".[3146] It further provides that "no one shall be compelled to testify against himself or to confess guilt".[3147] The manual also states that in cases of non-international armed conflict, one of the minimum guarantees is that "no accused shall be compelled to testify against himself or to confess his guilt".[3148]

3498. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3149]

3499. Switzerland's Basic Military Manual provides that "no coercion shall be exercised to lead the prisoner to confess guilt to the act of which he is accused".[3150]

3500. The US Field Manual reproduces Article 99 GC III.[3151]

National Legislation

3501. Countless pieces of domestic legislation provide for the right not to be compelled to testify against oneself or to confess guilt.[3152]

[3140] Argentina, *Law of War Manual* (1989), § 3.30.
[3141] Argentina, *Law of War Manual* (1989), § 5.09(3).
[3142] Argentina, *Law of War Manual* (1989), § 7.10.
[3143] Canada, *LOAC Manual* (1999), p. 10-7, § 76.
[3144] Canada, *LOAC Manual* (1999), p. 17-3, § 29(f).
[3145] Colombia, *Basic Military Manual* (1995), p. 29.
[3146] New Zealand, *Military Manual* (1992), § 932(2).
[3147] New Zealand, *Military Manual* (1992), § 1137(4)(f).
[3148] New Zealand, *Military Manual* (1992), § 1815(4)(f).
[3149] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3150] Switzerland, *Basic Military Manual* (1987), Article 106.
[3151] US, *Field Manual* (1956), § 175.
[3152] See, e.g., Georgia, *Constitution* (1995), Article 42(8); India, *Constitution* (1950), Article 20(3); Kenya, *Constitution* (1992), Article 77(7); Mexico, *Constitution* (1917), Article 20(II); Russia, *Constitution* (1993), Article 51(1).

3502. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3153]
3503. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 99 GC III, and of AP I, including violations of Article 75(4)(f) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(f) AP II, are punishable offences.[3154]
3504. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[3155]

National Case-law
3505. In its judgement in the *Ward case* in 1942, the US Supreme Court stated that:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held *incommunicado* without advice of friends or counsel, or who have been taken at night to lonely or isolated places for questioning. Any one of these grounds would be sufficient cause for reversal . . . The use of a confession obtained under such circumstances is a denial of due process.[3156]

Other National Practice
3506. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3157]
3507. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[3158]

III. Practice of International Organisations and Conferences

3508. No practice was found.

[3153] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3154] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3155] Norway, *Military Penal Code as amended* (1902), § 108.
[3156] US, Supreme Court, *Ward case*, Judgement, 1 June 1942.
[3157] Report on the Practice of Jordan, 1997,Chapter 5.
[3158] Report on US Practice, 1997, Chapter 5.3.

IV. Practice of International Judicial and Quasi-judicial Bodies

3509. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

> Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard, the provisions of article 7 and article 10 paragraph 1 should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.[3159]

3510. In several cases, the HRC explained that the guarantee of Article 14(3)(g) of the 1966 ICCPR must be understood "in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt".[3160]

3511. The right not to be compelled to testify against oneself or to confess guilt has been seen by the ECtHR as one element of the right to a fair trial.[3161] In its judgement in *Coëme and Others v. Belgium* in 2000, the ECtHR stated that what mattered was that the guilt of the accused must not be established through evidence obtained from him by force or other forms of pressure.[3162]

3512. In its report in a case concerning Argentina in 1990, the IACiHR stated that conviction on the basis of confessions obtained under torture violated Article XXVI of the 1948 American Declaration on the Rights and Duties of Man.[3163]

3513. In its report in a case concerning Nicaragua in 1989, the IACiHR found a violation of Article 8(2)(g) of the 1969 ACHR because a confession had been obtained whilst the defendant was being held *incommunicado* which was therefore invalid under Article 8(3).[3164]

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

3514. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . no compulsion to confess guilt".[3165]

[3159] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 14.
[3160] HRC, *Saldías López v. Uruguay*, Views, 29 July 1981, §§ 11.5–13; *Teti Izquierdo v. Uruguay*, Views, 1 April 1982, § 9; *Estrella v. Uruguay*, Views, 29 March 1983, § 10; *Hiber Conteris v. Uruguay*, Views, 17 July 1985, § 10; *Cariboni v. Uruguay*, Views, 27 October 1987, § 10; *Kelly v. Jamaica*, Views, 8 April 1991, § 5(5); *Berry v. Jamaica*, Views, 7 April 1994, § 11(7); *Johnson v. Jamaica*, Views, 22 March 1996, § 8(7).
[3161] ECtHR, *Funke case*, Judgement, 25 February 1993, § 44; *Serves v. France*, Judgement (Chamber), 20 October 1997, § 47.
[3162] ECtHR, *Coëme and Others v. Belgium*, Judgement, 22 June 2000, § 128.
[3163] IACiHR, *Case 9850 (Argentina)*, Report, 4 October 1990, Part III, § 7.
[3164] IACiHR, *Case 10.198 (Nicaragua)*, Resolution, 29 September 1989, § 1.
[3165] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(f).

VI. Other Practice

3515. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "no one shall be compelled to testify against himself or herself or to confess guilt".[3166]

Public proceedings

I. Treaties and Other Instruments

Treaties

3516. Article 62 of the 1929 Geneva POW Convention provides that:

The representatives of the protecting Power shall have the right to attend the hearing of the case. The only exception to this rule is where the hearing has to be kept secret in the interests of the safety of the State. The detaining Power would then notify the protecting Power accordingly.

3517. Article 105, fifth paragraph, GC III provides that "the representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security".

3518. Article 74, first paragraph, GC IV provides that:

Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power.

3519. Article 6(1) of the 1950 ECHR provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

3520. Article 14(1) of the 1966 ICCPR provides that:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing . . . The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would

[3166] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(e), *IRRC*, No. 282, 1991, p. 334.

prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

3521. Article 8(5) of the 1969 ACHR provides that "criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice".

3522. Article 75(4)(i) AP I provides that "anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly". Article 75 AP I was adopted by consensus.[3167]

3523. Upon ratification of AP I, Finland stated that "with regard to Article 75, paragraph 4 (i), Finland enters a reservation to the effect that under Finnish law a judgement can be declared secret if its publication can be an affront to morals or endanger national security". This reservation was withdrawn with effect from 16 February 1987.[3168]

3524. Upon ratification of AP I, Liechtenstein stated in relation to Article 75 that "paragraph 4(i) is not incompatible with legislation relating to the public nature of hearings and of the pronouncement of judgement".[3169]

3525. Article 64(7) of the 1998 ICC Statute provides that:

> The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

3526. Article 67(1) of the 1998 ICC Statute provides that "in the determination of any charge, the accused shall be entitled to a public hearing".

3527. Article 68(2) of the 1998 ICC Statute provides that "as an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera".

3528. Article 76(4) of the 1998 ICC Statute provides that "the sentence shall be pronounced in public, and whenever possible, in the presence of the accused".

3529. Article 17(2) of the 2002 Statute of the Special Court for Sierra Leone provides that "the accused shall be entitled to a . . . public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses".

3530. Article 18 of the 2002 Statute of the Special Court for Sierra Leone provides that "the judgement shall be . . . delivered in public".

Other Instruments

3531. Article 10 of the 1948 UDHR provides that "everyone is entitled in full equality to a . . . public hearing".

[3167] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[3168] Finland, Reservations made upon ratification of AP I, 7 August 1980, § 1.
[3169] Liechtenstein, Reservations made upon ratification of AP I, 10 August 1989, § 1(c).

3532. Article 11 of the 1948 UDHR provides that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial".
3533. Article XXVI of the 1948 American Declaration on the Rights and Duties of Man provides that "every person accused of an offense has the right to be given . . . a public hearing".
3534. Article 8(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "in the determination of any charge against him, to have a fair and public hearing".
3535. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
3536. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.
3537. Article 20(4) of the 1993 ICTY Statute provides that "the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence".
3538. Article 23(2) of the 1993 ICTY Statute provides that "the judgement . . . shall be delivered by the Trial Chamber in public".
3539. Article 19(4) of the 1994 ICTR Statute provides that "the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence".
3540. Article 22(2) of the 1994 ICTR Statute provides that "the judgement . . . shall be delivered by the Trial Chamber in public".
3541. Article 11(1)(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, "in the determination of any charge against him, to have a fair and public hearing".
3542. Article 47(2) of the 2000 EU Charter of Fundamental Rights provides that "everyone is entitled to a fair and public hearing".

II. National Practice

Military Manuals

3543. Argentina's Law of War Manual lists the fundamental guarantees for prisoners of war, *inter alia*, "public trial".[3170] The same provision applies to civilians and in occupied territories.[3171]
3544. Colombia's Instructors' Manual provides that "anybody who is accused has the right to . . . a due public trial".[3172]

[3170] Argentina, *Law of War Manual* (1989), § 3.30.
[3171] Argentina, *Law of War Manual* (1989), §§ 4.15 and 5.09(4).
[3172] Colombia, *Instructors' Manual* (1999), p. 11.

3545. New Zealand's Military Manual states that "unless the trial is to be held in camera, the Protecting Power's representative is entitled to be present". The footnote to this provision explains that "the Protecting Power must be informed of any trial that is to be held *in camera*".[3173] The manual further states that "anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly".[3174]

3546. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3175]

3547. The UK Military Manual provides that if the trial of a POW is held *in camera*, "the Detaining Power shall notify the Protecting Power" of the reasons why.[3176]

National Legislation

3548. Countless pieces of domestic legislation provide for the right to have a public trial and for the judgement to be pronounced publicly.[3177]

3549. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3178]

3550. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 75(4)(i) AP I, is a punishable offence.[3179]

3551. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[3180]

National Case-law

3552. In its judgement in the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg stated that "the entire proceedings from the beginning to end were secret and no public record was allowed to be made of them" and concluded, on this and other bases, that the trial of the accused was "unfair".[3181]

[3173] New Zealand, *Military Manual* (1992), § 932(3) and its footnote 145.
[3174] New Zealand, *Military Manual* (1992), § 1137(4)(i).
[3175] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3176] UK, *Military Manual* (1958), § 229.
[3177] See, e.g., Ethiopia, *Constitution* (1994), Article 20(1); Kenya, *Constitution* (1992), Article 77(10); Kuwait, *Constitution* (1962), Article 165; Mexico, *Constitution* (1917), Article 20(VI); Russia, *Constitution* (1993), Article 123(1).
[3178] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3179] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3180] Norway, *Military Penal Code as amended* (1902), § 108.
[3181] US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

Other National Practice

3553. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3182]

III. Practice of International Organisations and Conferences

3554. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3555. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.[3183]

3556. In its decision in *Media Rights Agenda v. Nigeria (224/98)* in 2000, the ACiHPR stated that:

The exceptional circumstances [to the right to a public trial] under the International Covenant on Civil and Political Rights . . . are for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The Commission notes that these circumstances are exhaustive, as indicated by the use of the phrase "apart from such exceptional circumstances".[3184]

3557. In its decision in *Civil Liberties Organisation and Others v. Nigeria* in 2001, the ACiHPR stated that:

35. The communication further alleges that except for the opening and closing ceremonies, the trial was conducted in camera in contravention of Article 7 of the [1981 ACHPR]. The Charter does not specifically mention the right to public trials; neither does its Resolution on the Right to Recourse Procedure and Fair Trial. Mindful of developments in international human rights law and practice, and drawing especially from General Comment of the Human Rights Committee to the effect that "the publicity of the hearings is an important safeguard in the interest of the individual and of society at large . . . apart from exceptional circumstances, the Committee considers

[3182] Report on the Practice of Jordan, 1997,Chapter 5.
[3183] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 6.
[3184] ACiHPR, *Media Rights Agenda v. Nigeria (224/98)*, Decision, 23 October–6 November 2000, § 52.

that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons . . ." . . .

36. The publicity of hearings is an important safeguard in the interest of the individual and the society at large. At the same time article 14, paragraph 1 [1966 ICCPR] acknowledges that courts have the power to exclude all or parts of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the UN Human Rights Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons.[3185]

3558. In its judgement in *Stefanelli v. San Marino* in 2000, the ECtHR stated that:

The Court reiterates that it is a fundamental principle enshrined in Article 6 § 1 that court hearings should be held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the principles of any democratic society.[3186]

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

3559. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . public pronouncement of the judgement".[3187]

3560. The ICRC Commentary on the Additional Protocols states that:

It is an essential element of fair justice that judgements should be pronounced publicly. Of course, a clear distinction should be made between proceedings and judgement. It may be necessary because of the circumstances and the nature of the case to hold the proceedings in camera, but the judgement itself must be made in public, unless, as the Rapporteur pointed out, this is prejudicial to the defendant himself; this could be the case for a juvenile offender.[3188]

VI. Other Practice

3561. No practice was found.

[3185] ACiHPR, *Civil Liberties Organisation and Others v. Nigeria (218/98)*, Decision, 7 May 2001, §§ 36–37.
[3186] ECtHR, *Stefanelli v. San Marino*, Judgement, 8 February 2000, § 19.
[3187] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(j).
[3188] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3118.

Advising convicted persons of available remedies and of their time-limits

I. Treaties and Other Instruments

Treaties

3562. Article 106 GC III provides that "every prisoner of war . . . shall be fully informed of his right to appeal or petition and of the time limit within which he may do so".

3563. Article 73, first paragraph, GC IV provides that "a convicted person . . . shall be fully informed of his right to appeal or petition and of the time limit within which he may do so".

3564. Article 75(4)(j) AP I provides that, among other fundamental guarantees, "a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised". Article 75 AP I was adopted by consensus.[3189]

3565. Article 6(3) AP II provides that "a convicted person shall be advised of his judicial and other remedies and of the time-limits within which they may be exercised". Article 6 AP II was adopted by consensus.[3190]

Other Instruments

3566. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3567. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

II. National Practice

Military Manuals

3568. Argentina's Law of War Manual (1969) provides that "any prisoner of war . . . shall be fully informed of his rights of recourse, as well as the required time limit to exercise them".[3191] It further states that the "proceedings shall foresee the right to appeal for the persons [placed in assigned residence or interned]".[3192]

3569. Argentina's Law of War Manual (1989) states that, in occupied territory, any convicted person shall be informed of the means of recourse available and how to exercise them.[3193] With respect to non-international armed conflict,

[3189] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[3190] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.
[3191] Argentina, *Law of War Manual* (1969), § 2.087.
[3192] Argentina, *Law of War Manual* (1969), § 5.008(2).
[3193] Argentina, *Law of War Manual* (1989), § 5.09.

the manual states that "information on the right to judicial appeals" is one of the fundamental guarantees.[3194]

3570. Canada's LOAC Manual provides that, in non-international armed conflicts, "accused persons shall be told, if convicted, of their judicial and other remedies and appellate procedures".[3195]

3571. The Military Manual of the Netherlands provides with respect to non-international armed conflicts that "a person who is convicted must be informed about the judicial remedies available to him".[3196]

3572. New Zealand's Military Manual provides that prisoners charged with offences shall be informed "with details as to the right of appeal".[3197] It further states that "a convicted person shall be advised of the remedies and of the time limits within which they may be exercised".[3198] With respect to non-international armed conflicts, the manual provides that "a convicted person shall be told on conviction of his judicial and other remedies and appellate procedures".[3199]

3573. Spain's LOAC Manual lists the "conditions and limits regarding proceedings" established by the law of war, *inter alia*, "remedies and appeal" and "time limits".[3200]

3574. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3201]

3575. The UK Military Manual states that "every prisoner of war . . . must be fully informed of this right [of appeal or petition] and also of any time limit for appeal or petition".[3202]

National Legislation

3576. Countless pieces of domestic legislation provide for the right of the convicted person to receive advice on judicial and other remedies available.[3203]

3577. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3204]

3578. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 106

[3194] Argentina, *Law of War Manual* (1989), § 7.10.
[3195] Canada, *LOAC Manual* (1999), p. 17-3, § 29(g).
[3196] Netherlands, *Military Manual* (1993), p. XI-5.
[3197] New Zealand, *Military Manual* (1992), § 932.
[3198] New Zealand, *Military Manual* (1992), § 1137(4)(j).
[3199] New Zealand, *Military Manual* (1992), § 1815(2).
[3200] Spain, *LOAC Manual* (1996), Vol. I, § 2.7.b.(3).
[3201] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3202] UK, *Military Manual* (1958), § 232.
[3203] See, e.g., Georgia, *Code of Criminal Procedure* (1998), Article 511; Mexico, *Constitution* (1917), Article 20(IX).
[3204] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

GC III and 73 GC IV, and of AP I, including violations of Article 75(4)(j) AP I, as well as any "contravention" of AP II, including violations of Article 6(3) AP II, are punishable offences.[3205]

3579. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[3206]

National Case-law

3580. No practice was found.

Other National Practice

3581. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3207]

3582. The Report on the Practice of Syria asserts that Syria considers Article 75 AP I to be part of customary international law.[3208]

3583. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[3209]

III. Practice of International Organisations and Conferences

3584. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3585. No practice was found.

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

3586. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting

[3205] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3206] Norway, *Military Penal Code as amended* (1902), § 108.
[3207] Report on the Practice of Jordan, 1997, Chapter 5.
[3208] Report on the Practice of Syria, 1997, Chapter 5.1.
[3209] Report on US Practice, 1997, Chapter 5.3.

the generally recognized principles of regular judicial procedure, which include . . . information on the right of appeal and other remedies and their time-limits".[3210]

3587. The ICRC Commentary on the Additional Protocols explains the rationale behind the guarantee of Article 75(4)(j) AP I as follows:

> It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right of appeal against [the] sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft. However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies.[3211]

VI. Other Practice

3588. No practice was found.

Right to appeal

I. Treaties and Other Instruments

Treaties

3589. Article 106 GC III provides that "every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial".

3590. Article 73, first paragraph, GC IV provides that "a convicted person shall have the right of appeal provided for by the laws applied by the court".

3591. Article 14(5) of the 1966 ICCPR provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

3592. Article 8(2)(h) of the 1969 ACHR provides that "during the proceedings, every person is entitled, with full equality, to the following minimum guarantees . . . the right to appeal the judgment to a higher court".

3593. Article 7(1)(a) of the 1981 ACHPR provides that "every individual shall have the right to have his cause heard. This comprises . . . the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."

[3210] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(k).

[3211] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4611.

3594. Article 2(1) of the 1984 Protocol 7 to the 1950 ECHR provides that "everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

3595. Article 40(2)(b) of the 1989 Convention on the Rights of the Child provides that:

> Every child alleged or accused of having infringed the penal law has at least the following guarantees:
>
> . . .
>
> (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.

Other Instruments

3596. Article 11(2) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "an individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law".

II. National Practice

Military Manuals

3597. Argentina's Law of War Manual (1969) provides that "any prisoner of war has the right, under the same conditions as the members of the armed forces of the [Detaining Power], to make an appeal against any sentence pronounced against him".[3212] It further provides that the "proceedings shall foresee the right to appeal for the persons [placed in assigned residence or interned]".[3213] With respect to occupied territory, the manual states that:

> Any sentenced person has the possibility to use the recourse prescribed in the legislation which applies to the tribunal . . . If the legislation which applies to the tribunal does not foresee possibilities of appeal, the sentenced/convicted person shall have the right to appeal the sentence in front of the competent authority of the Occupying Power.[3214]

3598. Hungary's Military Manual states, regarding the prosecution of POWs, that there is a right of appeal.[3215]

[3212] Argentina, *Law of War Manual* (1969), § 2.087.
[3213] Argentina, *Law of War Manual* (1969), § 5.008(2).
[3214] Argentina, *Law of War Manual* (1969), § 5.029(4).
[3215] Hungary, *Military Manual* (1992), p. 92.

3599. New Zealand's Military Manual provides that prisoners charged with offences "shall enjoy the same right of appeal as members of the Detaining Power's own forces".[3216] It further states that:

> There is no absolute right of appeal against sentence. The IV GC Article 73 merely lays down that "the convicted person shall have the right of appeal provided for by the laws applied by the court". If, however, the court makes no provision for appeal, the convicted person must be given the right to petition the competent authority of the Occupying Power against the finding and sentence. In either case, he must be fully informed of his right to appeal or petition and of the time limit within which he may do so.[3217]

3600. According to Switzerland's Basic Military Manual, "the right of recourse in appeal, cassation and review shall be ensured".[3218]

3601. The UK Military Manual states that "every prisoner of war must be given, in the same manner as members of the armed forces of the Detaining Power, the right of appeal or petition against any judgement or sentence passed on him, with a view to the quashing of the sentence or the reopening of the trial".[3219] With respect to situations of occupation, the manual provides that:

> There is no absolute right of appeal against sentence. The Civilian Convention Article 73 merely lays down that "the convicted person shall have the right of appeal provided for by the laws applied by the court". However, where the law makes no provision for appeal, the convicted person must be given the right to petition the competent authority of the Occupying Power against the finding and sentence. In either case, he must be fully informed of his right to appeal or petition and of the time limit within which he may do so.[3220]

3602. The US Field Manual reproduces Article 106 GC III.[3221] It also uses the same wording as Article 73 GC IV.[3222]

3603. The US Air Force Pamphlet provides that there are provisions in GC III which "grant [the prisoner of war] the right of appeal".[3223] It further states with respect to protected persons arrested for criminal offences that "among other rights, accused persons are assured the right . . . to appeal".[3224]

National Legislation

3604. The vast majority of States provide for a right to appeal in their Constitutions and/or legislation relating to criminal or military law.[3225]

[3216] New Zealand, *Military Manual* (1992), § 932.
[3217] New Zealand, *Military Manual* (1992), § 1330(3).
[3218] Switzerland, *Basic Military Manual* (1987), Article 106.
[3219] UK, *Military Manual* (1958), § 232.
[3220] UK, *Military Manual* (1958), § 572.
[3221] US, *Field Manual* (1956), § 182.
[3222] US, *Field Manual* (1956), § 443.
[3223] US, *Air Force Pamphlet* (1976), § 13-8.
[3224] US, *Air Force Pamphlet* (1976), § 14-6.
[3225] See, e.g., Ethiopia, *Constitution* (1994), Article 20(6); Georgia, *Constitution* (1995), Article 42(1); Kuwait, *Constitution* (1962), Article 166; Russia, *Constitution* (1993), Articles 46(2) and (3), 47 and 50(3).

3605. Colombia's Constitution provides that "any judicial sentence may be appealed or adjudicated, but for exceptions provided by law".[3226]
3606. Estonia's Constitution provides that "every person shall have the right to appeal a judgement by a court in his or her case to a higher court, in accordance with procedures established by law".[3227]
3607. Hungary's Constitution as amended provides that "in the Republic of Hungary everyone is entitled to legal redress or has the right to appeal against court or administrative decisions, or any other authority's decisions that infringe his rights or lawful interests".[3228]

National Case-law
3608. No practice was found.

Other National Practice
3609. No practice was found.

III. Practice of International Organisations and Conferences

United Nations
3610. In a resolution adopted in 2002 on the integrity of the judicial system, the UN Commission on Human Rights reaffirmed that "every convicted person should have the right to have his/her conviction and sentence reviewed by a higher tribunal according to law".[3229]

Other International Organisations
3611. In 1992, the Committee of Ministers of the Council of Europe recommended that "the governments of member states be guided in their internal legislation and practice by the principles set out in the text of the European rules on community sanctions and measures, appended to the present recommendation". These provide, *inter alia*, that "the offender shall have the right to make a complaint to a higher deciding authority against a decision subjecting him to a community sanction or measure, or modifying or revoking such a sanction or measure".[3230]

International Conferences
3612. No practice was found.

[3226] Colombia, *Constitution* (1991), Article 31.
[3227] Estonia, *Constitution* (1992), Article 24.
[3228] Hungary, *Constitution as amended* (1994), Article 57(5).
[3229] UN Commission on Human Rights, Res. 2002/37, 22 April 2002, § 7.
[3230] Council of Europe, Committee of Ministers, Rec. R (92) 16 on the European rules on community sanctions and measures, 19 October 1992, Appendix, Rule 13.

IV. Practice of International Judicial and Quasi-judicial Bodies

3613. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

> Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences.[3231]

3614. In its views in *Salgar de Montejo v. Colombia* in 1982, the HRC stated that the expression "according to law" contained in Article 14, paragraph 5, is not intended to leave the existence of the right of review at the discretion of States, but only refers to the "modalities by which the review by a higher tribunal is to be carried out". In this case, an appeal to the same judge was a breach of the right of appeal.[3232] However, in *Lumley v. Jamaica* in 1999, the HRC decided that refusal of appeal, where a proper procedure was followed reviewing with care the evidence and the law, was not in violation of the right to appeal.[3233]

3615. In its views in *Henry v. Jamaica* in 1991 and *Frances v. Jamaica* in 1993, the HRC stated that the right of appeal presupposed a written reasoned judgement delivered by the Court of earlier instance, even where such a court is itself an appeal court.[3234]

3616. In its views in *Domukovsky and Others v. Georgia* in 1998, the HRC stated that the right of appeal required a review of both facts and law, and not only of law.[3235]

3617. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR stated that "persons convicted of an offence shall have the right of appeal to a higher court".[3236]

3618. In its decision in *Constitutional Rights Project v. Nigeria (60/91)* in 1995, the ACiHPR held that:

> While punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of appeal to "competent national organs" in criminal cases bearing such penalties clearly violates [Article 7(1)(a) of the 1981 ACHPR], and increases the risk that severe violations may go unredressed.[3237]

[3231] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 17.
[3232] HRC, *Salgar de Montejo v. Colombia*, Views, 24 March 1982, § 10.4.
[3233] HRC, *Lumley v. Jamaica*, Views, 31 March 1999, § 7.2–7.3.
[3234] HRC, *Henry v. Jamaica*, Views, 1 November 1991, § 8.4; *Francis v. Jamaica*, Views, 24 March 1993, § 12.2.
[3235] HRC, *Domukovsky and Others v. Georgia*, Views, 6 April 1998, § 18.11.
[3236] ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 3.
[3237] ACiHPR, *Constitutional Rights Project v. Nigeria (60/91)*, Decision, 13–22 March 1995, § 8.

3619. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, the ACiHPR stated that:

> For an appeal to be effective, the appellate jurisdiction must, objectively and impartially, consider both the elements of fact and of law that are brought before it. Since this approach was not followed in the cases under consideration, the Commission considers, consequently, that there was a violation of [Article 7(1)(a) of the 1981 ACHPR].[3238]

3620. In the case of *Hadjianastassiou v. Greece*, the ECtHR indicated that the right of appeal presupposed a written reasoned judgement delivered by the Court of earlier instance, even where such a court is itself an appeal court.[3239]

3621. In a case concerning Argentina in 1997, the IACiHR decided, in the context of a situation that it characterised as a non-international armed conflict, that there had been a violation of the petitioner's right to appeal to a higher court.[3240]

3622. In 2002, in its report on terrorism and human rights, the IACiHR stated that even in a state of emergency, "the basic components of the right to a fair trial cannot be justifiably suspended" and that these included "the right of appeal".[3241]

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

3623. The ICRC Commentary on the Additional Protocols explains the rationale behind the guarantee of Article 75(4)(j) AP I as follows:

> It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right of appeal against [the] sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft. However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies.[3242]

[3238] ACiHPR, *Malawi African Association and Others v. Mauritania (54/91)*, Decision, 11 May 2000, § 94.
[3239] ECtHR, *Hadjianastassiou v. Greece*, Judgement, 16 December 1992, §§ 29–37.
[3240] IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 156 and 435.
[3241] IACiHR, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, § 247.
[3242] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4611.

VI. Other Practice

3624. Amnesty International, in relation to political prisoners, has often denounced the denial of the right to appeal in cases of the death penalty, as, for instance, in Georgia.[3243]

Non bis in idem

I. Treaties and Other Instruments

Treaties

3625. Article 86 GC III provides that "no prisoner of war may be punished more than once for the same act, or on the same charge".

3626. Article 117, third paragraph, GC IV states that "no internee may be punished more than once for the same act, or on the same count".

3627. Article 14(7) of the 1966 ICCPR provides "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

3628. Article 8(4) of the 1969 ACHR provides that "an accused person acquitted by a nonappealable judgement shall not be subjected to a new trial for the same cause".

3629. Article 75(4)(h) AP I provides that "no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure". Article 75 AP I was adopted by consensus.[3244]

3630. Upon ratification of AP I, Austria stated that "Article 75 of Protocol I will be applied insofar as sub-paragraph (h) of paragraph 4 is not incompatible with legal provisions authorizing the reopening of proceedings that have resulted in a final declaration of conviction or acquittal".[3245]

3631. Upon ratification of AP I, Denmark stated that:

> Denmark expresses a reservation with regard to the application of Article 75, paragraph 4 (h) (Protocol I), to the effect that the provisions of this paragraph shall not prevent the reopening of criminal proceedings in cases where the rules of the Danish Code of civil and criminal procedure, in exceptional circumstances, provide for such a measure.[3246]

3632. Upon ratification of AP I, Finland stated that "with reference to Article 75, paragraph 4 (h) of the Protocol, the Finnish Government wish to

[3243] Amnesty International, Georgia: Fear of Imminent Execution, AI-Index EUR 56/03/96, 21 June 1996.
[3244] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[3245] Austria, Reservations made upon ratification of AP I, 13 August 1982, § 3(b).
[3246] Denmark, Reservation made upon ratification of AP I, 17 June 1992.

clarify that under Finnish law a judgement shall not be considered final until the time-limit for exercising any extraordinary legal remedies has expired".[3247]

3633. Upon ratification of AP I, Germany stated that "Article 74, paragraph 4, subparagraph (h) of Additional Protocol I will only be applied to the extent that it is in conformity with legal provisions which permit under special circumstances the re-opening of proceedings that had led to final conviction or acquittal".[3248]

3634. Upon ratification of AP I, Iceland stated that its ratification was "subject to a reservation with respect to Article 75, paragraph 4(h), of Protocol I regarding the resumption of cases which have already been tried, the Icelandic law containing detailed provisions on this matter".[3249]

3635. Upon ratification of AP I, Liechtenstein stated in relation to Article 75 that "paragraph 4(h) is not incompatible with legislation providing for the reopening of a trial which has already led to a person's conviction or acquittal".[3250]

3636. Upon ratification of AP I, Malta stated in relation to Article 75 that "sub-paragraph (h) of paragraph 4 is not incompatible with legal provisions authorizing the reopening of proceedings that have resulted in a final declaration of conviction or acquittal".[3251]

3637. Upon ratification of AP I, Sweden stated in relation to Article 75 that "paragraph 4, sub-paragraph (h) shall be applied only to the extent that it is not in conflict with legal provisions which allow, in exceptional circumstances, the reopening of proceedings which have resulted in a final conviction or acquittal".[3252]

3638. Article 4(1)–(3) of the 1984 Protocol 7 to the 1950 ECHR provides that:

> No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> ... The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3639. Article 20(2) of the 1998 ICC Statute provides that "no person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court".

3640. Article 9(1) of the 2002 Statute of the Special Court for Sierra Leone, entitled "*Non bis in idem*", provides that "no person shall be tried before a

[3247] Finland, Reservations made upon ratification of AP I, 7 August 1980, § 3.
[3248] Germany, Declarations made upon ratification of AP I and AP II, 14 February 1991, § 8.
[3249] Iceland, Reservations made upon ratification of AP I, 10 April 1987.
[3250] Liechtenstein, Reservations made upon ratification of AP I, 10 August 1989, § 1(b).
[3251] Malta, Reservations made upon accession to AP I and AP II, 17 April 1989, § 1(b).
[3252] Sweden, Reservations made upon ratification of AP I, 31 August 1979, § 2.

national court of Sierra Leone for acts for which he or she has already been tried by the Special Court".

Other Instruments

3641. Article 9 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.
2. . . . No one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3642. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3643. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3644. Article 10(1) of the 1993 ICTY Statute, entitled "*Non bis in idem*", provides that "no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal".

3645. Article 9(1) of the 1994 ICTR Statute, entitled "*Non bis in idem*", provides that "no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda".

3646. Article 12(1) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "*Non bis in idem*", provides that "no one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court".

3647. Article 50 of the 2000 EU Charter of Fundamental Rights states that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

II. National Practice

Military Manuals

3648. Argentina's Law of War Manual (1969) provides that "a prisoner of war cannot be sentenced more than once because of the same act or on the same charge".[3253]

[3253] Argentina, *Law of War Manual* (1969), § 2.076.

3649. Argentina's Law of War Manual (1989) states that "no prisoner of war may be punished more than once for the same act or on the same charge (Article 86 GC III)".[3254] With respect to occupied territory, the manual states that "civilians shall not be punished more than once for the same fault" . . . and that anyone "shall be tried only once for the same offence or the same accusation in conformity with the same legislation in the same proceedings".[3255]
3650. Canada's LOAC Manual provides that "no PW may be punished more than once for the same offence, or on the same charge".[3256]
3651. Colombia's Instructors' Manual provides that "anybody who is accused has the right . . . not to be tried twice for the same act".[3257]
3652. Germany's Military Manual provides that "prisoners of war may not be punished or disciplined more than once for the same act".[3258]
3653. According to New Zealand's Military Manual, "no prisoner may be punished more than once for the same offence or on the same charge".[3259] It further states that "no internee may be punished more than once for the same offence or on the same count".[3260] The manual also provides that "no one shall be prosecuted or punished by the same party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure".[3261]
3654. According to Spain's LOAC Manual, "prisoners of war cannot be punished more than once for the same act or the same accusation".[3262]
3655. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3263]
3656. Switzerland's Basic Military Manual provides that a prisoner "shall be punished only once for the same act or on the same count".[3264]
3657. The UK Military Manual provides that "no internee may be punished more than once for the same act or on the same count".[3265] It also states that "a prisoner of war may not be punished more than once for the same act or on the same charge".[3266]
3658. The US Field Manual reproduces Article 86 GC III.[3267] It also uses the same wording as Article 117 GC IV.[3268]

[3254] Argentina, *Law of War Manual* (1989), § 3.23.
[3255] Argentina, *Law of War Manual* (1989), §§ 4.36 and 5.09.
[3256] Canada, *LOAC Manual* (1999), p. 10-6, § 58.
[3257] Colombia, *Instructors' Manual* (1999), p. 11.
[3258] Germany, *Military Manual* (1992), § 725.
[3259] New Zealand, *Military Manual* (1992), § 931(1).
[3260] New Zealand, *Military Manual* (1992), § 1128.
[3261] New Zealand, *Military Manual* (1992), § 1137(4)(h).
[3262] Spain, *LOAC Manual* (1996), Vol. I, § 8.7.b.
[3263] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3264] Switzerland, *Basic Military Manual* (1987), Article 106.
[3265] UK, *Military Manual* (1958), § 71.
[3266] UK, *Military Manual* (1958), § 204.
[3267] US, *Field Manual* (1956), § 162.
[3268] US, *Field Manual* (1956), § 324.

3659. The US Air Force Pamphlet provides that "Article 86 [GC III] prohibits punishing POWs more than once for the same offence (*non bis in idem*)".[3269]

National Legislation

3660. Countless pieces of domestic legislation provide for the principle of *non bis in idem*.[3270]

3661. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3271]

3662. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 86 GC III and 117 GC IV, and of AP I, including violations of Article 75(4)(h) AP I, are punishable offences.[3272]

3663. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[3273]

National Case-law

3664. No practice was found.

Other National Practice

3665. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3274]

3666. The Report on the Practice of Syria asserts that Syria considers Article 75 AP I to be part of customary international law.[3275]

III. Practice of International Organisations and Conferences

3667. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3668. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that "it seems to the Committee that most States parties make a

[3269] US, *Air Force Pamphlet* (1976), § 13-8.
[3270] See, e.g., Ethiopia, *Constitution* (1994), Article 23; Georgia, *Constitution* (1995), Article 42(4); *Criminal Code* (1999), Article 3(1); India, *Constitution* (1950), Article 20(2); Kenya, *Constitution* (1992), Article 77(5); Kyrgyzstan, *Criminal Code* (1997), Article 3(3); Mexico, *Constitution* (1917), Article 23; Russia, *Constitution* (1993), Article 50(1).
[3271] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3272] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3273] Norway, *Military Penal Code as amended* (1902), § 108.
[3274] Report on the Practice of Jordan, 1997, Chapter 5.
[3275] Report on the Practice of Syria, 1997, Chapter 5.1.

clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7".[3276]

3669. In its admissibility decision in *A. P. v. Italy* in 1987, the HRC stated that Article 14(7) did not prohibit double jeopardy for the same offence when the prosecutions were initiated in different States.[3277]

3670. In its report in a case concerning Peru in 1995, the IACiHR stated that the underlying elements of the principle of *ne bis in idem* are that: the accused has been acquitted, the judgment in question is final and that the new proceedings are based on the same cause.[3278]

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

3671. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . no punishment more than once for the same act or the same charge".[3279]

VI. Other Practice

3672. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure".[3280]

N. Principle of Legality

I. Treaties and Other Instruments

Treaties

3673. Article 99, first paragraph, GC III provides that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed".

[3276] HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 19.
[3277] HRC, *A. P. v. Italy*, Admissibility Decision, 2 November 1987, § 7.3.
[3278] IACiHR, *Case 11.006 (Peru)*, Report, 7 February 1995, pp. 298–302.
[3279] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(i).
[3280] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(f), *IRRC*, No. 282, 1991, p. 334.

3674. Article 65 GC IV provides that "the penal provisions enacted by the Occupying Power shall not come into force before they have been published" and "the effect of these penal provisions shall not be retroactive".
3675. Article 67 GC IV provides that "the courts shall apply only those provisions of law which were applicable prior to the offence".
3676. Article 7(1) of the 1950 ECHR provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Article 15(2) prohibits derogations from Article 7 of the 1950 ECHR.
3677. Article 15(1) of the 1966 ICCPR provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 4 provides that no derogations are possible from Article 15 of the 1966 ICCPR.
3678. Article 9 of the 1969 ACHR provides that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 27 prohibits any suspension of Article 9 of the 1969 ACHR.
3679. Article 75(4)(c) AP I provides that:

No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Article 75 AP I was adopted by consensus.[3281]
3680. Article 6(2)(c) AP II provides that:

No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or

[3281] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Article 6 AP II was adopted by consensus.[3282]

3681. Article 7(2) of the 1981 ACHPR provides that "no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed".

3682. Article 40(2)(a) of the 1989 Convention on the Rights of the Child provides that "no child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed".

3683. Article 22(1) of the 1998 ICC Statute provides that "a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court".

3684. Article 24(1)–(2) of the 1998 ICC Statute provides that:

No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute . . . In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Other Instruments

3685. Article 11 of the 1948 UDHR provides that:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

3686. Article 10 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Non-retroactivity", provides that:

1. No one shall be convicted under this Code for acts committed before its entry into force.
2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

3687. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

[3282] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3688. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3689. Article 13 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Non-retroactivity", provides that:

1. No one shall be convicted under the present Code for acts committed before its entry into force.
2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

3690. Article 49 of the 2000 EU Charter of Fundamental Rights provides that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed".

II. National Practice

Military Manuals

3691. Argentina's Law of War Manual (1969) provides that "tribunals will only apply legal provisions existing previously to the offence".[3283] It adds that the "legal provisions decreed by the Occupying Power . . . cannot have a retroactive effect".[3284]

3692. Argentina's Law of War Manual (1989) states that the prisoner shall be informed of the offence for which he or she is charged, an offence "which shall constitute a criminal act at the time it was committed".[3285] It further states that criminal provisions "cannot have a retroactive effect" and that the alleged offence against the accused "must constitute a criminal act at the moment it was committed".[3286] The same provision applies in non-international armed conflicts.[3287]

3693. Canada's LOAC Manual provides that "no PW may be tried or punished for any offence which was not, at the time of its commission, forbidden by International Law or the law of the Detaining Power".[3288] With respect to occupied territories, the manual states that "the penal provisions enacted by the occupant must not be retroactive".[3289] It further provides that "no person may be tried for a war crime unless the crime in question was an offence at the

[3283] Argentina, *Law of War Manual* (1969), § 5.025.
[3284] Argentina, *Law of War Manual* (1969), § 5.026.
[3285] Argentina, *Law of War Manual* (1989), § 3.30.
[3286] Argentina, *Law of War Manual* (1989), §§ 5.08 and 5.09 (occupied territory), see also § 4.15 (civilians).
[3287] Argentina, *Law of War Manual* (1989), § 7.10.
[3288] Canada, *LOAC Manual* (1999), p. 10-7, § 76.
[3289] Canada, *LOAC Manual* (1999), p. 12-6, § 49(a).

time of its commission in accordance with national legislation or International Law".[3290] The same provision applies to non-international armed conflicts.[3291]

3694. Colombia's Instructors' Manual provides that "nobody can be tried except according to the laws that pre-existed the alleged act".[3292]

3695. The Military Manual of the Netherlands provides with respect to non-international armed conflict that "nobody may be condemned for acts or omissions which did not constitute a punishable act at the time of the act or omission in question".[3293]

3696. New Zealand's Military Manual states that "no prisoner may be tried or punished for any offence which was not, at the time of its commission, forbidden by international law or the law of the Detaining Power".[3294] It further states that "no one shall be accused or convicted of a criminal offence on account of any act or commission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed".[3295] The manual also states that "the penal provisions enacted by the Occupying Power must not be retroactive".[3296] According to the manual, "no person may be tried for a war crime unless the act in question was an offence at the time of its commission".[3297] With respect to non-international armed conflicts, the manuals states that:

> No one shall be guilty of an offence in respect of any act or omission which was not an offence at the time of commission, nor shall any punishment be more severe than was applicable at that time, although, if the punishment has been alleviated, the accused shall benefit accordingly.[3298]

3697. Spain's LOAC Manual provides that "no prisoner shall be subject to judicial proceedings or be sentenced for an act which was not previously prohibited whether by the national legislation of the party under whose power he is, or by International Law in force at the time the act was committed".[3299]

3698. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3300]

3699. The UK Military Manual provides that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining

[3290] Canada, *LOAC Manual* (1999), p. 16-6, § 42.
[3291] Canada, *LOAC Manual* (1999), p. 17-3, § 29(c).
[3292] Colombia, *Instructors' Manual* (1999), p. 10.
[3293] Netherlands, *Military Manual* (1993), p. XI-5.
[3294] New Zealand, *Military Manual* (1992), § 932(2).
[3295] New Zealand, *Military Manual* (1992), § 1137(4)(c).
[3296] New Zealand, *Military Manual* (1992), § 1327(1)(a).
[3297] New Zealand, *Military Manual* (1992), § 1711(3).
[3298] New Zealand, *Military Manual* (1992), § 1815(2)(c).
[3299] Spain, *LOAC Manual* (1996), Vol. I, § 8.7.c.(1).
[3300] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

Power or by international law in force at the time the act in question was committed".[3301]

3700. The UK LOAC Manual provides that "no PW may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law in force when the act in question was committed".[3302]

3701. The US Field Manual reproduces Article 99 GC III.[3303] With respect to situations of occupation, the manual uses the same wording as Article 65 GC IV.[3304]

3702. The US Air Force Pamphlet provides that "no PW may be tried or sentenced for an act which is not forbidden by the law of the detaining power or by international law in force at the time the act was committed".[3305]

National Legislation

3703. Countless pieces of domestic legislation contain the principle of non-retroactivity in criminal matters.[3306]

3704. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3307]

3705. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 99 GC III and 65 and 67 GC IV, and of AP I, including violations of Article 75(4)(c) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(c) AP II, are punishable offences.[3308]

3706. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[3309]

National Case-law

3707. No practice was found.

Other National Practice

3708. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3310]

[3301] UK, *Military Manual* (1958), § 223.
[3302] UK, *LOAC Manual* (1981), Section 8, p. 33, § 19(f).
[3303] US, *Field Manual* (1956), § 175.
[3304] US, *Field Manual* (1956), § 435.
[3305] US, *Air Force Pamphlet* (1976), § 13-8.
[3306] See, e.g., India, *Constitution* (1950), Article 22; Kenya, *Constitution* (1992), Article 77(4); Kuwait, *Constitution* (1962), Article 32; Kyrgyzstan, *Criminal Code* (1997), Article 7.
[3307] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3308] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3309] Norway, *Military Penal Code as amended* (1902), § 108.
[3310] Report on the Practice of Jordan, 1997, Chapter 5.

3709. The Report on the Practice of Syria asserts that Syria considers Article 75 AP I to be part of customary international law.[3311]

3710. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II". According to the report, it is also the *opinio juris* of the US that military necessity will not justify derogation of the right not to be subjected to retroactive penal legislation.[3312]

III. Practice of International Organisations and Conferences

3711. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3712. In its judgement in *Kokkinakis v. Greece* in 1993, the ECtHR maintained that:

> Article 7 § 1 of the Convention is not confined to prohibiting the retroactive application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable.[3313]

3713. In its judgement in *S. W. v. UK* in 1995, the ECtHR stated that "Article 7 [1950 ECHR] cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[3314]

3714. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR held that:

> The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in

[3311] Report on the Practice of Syria, 1997, Chapter 5.1.
[3312] Report on US Practice, 1997, Chapter 5.3 and 5.7.
[3313] ECtHR, *Kokkinakis v. Greece*, Judgement, 25 May 1993, § 52.
[3314] ECtHR, *S. W. v. UK*, Judgement, 22 November 1995, § 36.

criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the [1969 ACHR].[3315]

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

3715. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . law in force at the time the offence was committed (i.e. no retroactive law)".[3316]

VI. Other Practice

3716. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed".[3317]

O. Individual Criminal Responsibility and Collective Punishments

I. Treaties and Other Instruments

Treaties

3717. Article 50 of the 1899 HR provides that "no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible".

3718. Article 50 of the 1907 HR provides that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible".

[3315] IACtHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, § 121.

[3316] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(c).

[3317] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(g), *IRRC*, No. 282, 1991, p. 334.

3719. Article 26, sixth paragraph, GC III states that "collective disciplinary measures affecting food are prohibited".
3720. Article 87, third paragraph, GC III provides that "collective punishment for individual acts" is forbidden.
3721. Article 33, first paragraph, GC IV provides that "no protected person may be punished for an offence he or she has not personally committed. Collective penalties . . . are prohibited."
3722. Article 5(3) of the 1969 ACHR provides that "punishment shall not be extended to any person other than the criminal". This guarantee is non-derogable under Article 27(2).
3723. Article 75(2)(d) AP I provides that "the following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: . . . collective punishments". Article 75(4)(b) provides that "no one shall be convicted of an offence except on the basis of individual penal responsibility". Article 75 AP I was adopted by consensus.[3318]
3724. Article 4(2)(b) AP II provides that "the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: . . . collective punishments". Article 4 AP II was adopted by consensus.[3319]
3725. Article 6(2)(b) AP II provides that "no one shall be convicted of an offence except on the basis of individual penal responsibility". Article 6 AP II was adopted by consensus.[3320]
3726. Article 7(2) of the 1981 ACHPR provides that "punishment is personal and can be imposed only on the offender".
3727. Article 25(2) of the 1998 ICC Statute, entitled "Individual criminal responsibility", provides that "a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute".
3728. Article 3(b) of the 2002 Statute of the Special Court for Sierra Leone provides that "the Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 . . . and [AP I and AP II]", which include "collective punishment".

Other Instruments
3729. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the imposition of collective penalties.

[3318] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[3319] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[3320] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3730. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that "all forms of repression ... of women and children, including ... collective punishment ... committed by belligerents in the course of military operations or in occupied territories, shall be considered criminal".
3731. Article 19(c) of the 1990 Cairo Declaration on Human Rights in Islam states that "liability is in essence personal".
3732. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.
3733. Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, states that "collective punishment" is an exceptionally serious war crime and a serious violation of the principles and rules of international law applicable in armed conflict.
3734. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.
3735. Article 20(f)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "collective punishments" committed in violation of international humanitarian law applicable in armed conflict not of an international character are war crimes.
3736. Article 4(b) of the 1994 ICTR Statute grants the Tribunal jurisdiction over violations of common Article 3 of the 1949 Geneva Conventions and AP II, and expressly refers to, *inter alia*, collective punishments.
3737. Section 7.2 of the 1999 UN Secretary-General's Bulletin states that:

> The following acts against any of the persons mentioned in section 7.1 [persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention] are prohibited at any time and in any place: ... collective punishment.

II. National Practice

Military Manuals

3738. Argentina's Law of War Manual (1969) prohibits "collective punishments" of the civilian population.[3321]
3739. Argentina's Law of War Manual (1989) prohibits collective punishments and provides that this is a fundamental guarantee which applies in international and non-international armed conflicts.[3322] The manual further states that the

[3321] Argentina, *Law of War Manual* (1969), § 4.012.
[3322] Argentina, *Law of War Manual* (1989), §§ 3.25, 4.15, 4.29 and 7.04.

"exclusion of collective responsibility for any sentence" is a fundamental guarantee in non-international armed conflicts.[3323]

3740. Under Australia's Defence Force Manual, collective penalties are expressly prohibited as measures for the control of the population of occupied territory.[3324]

3741. Belgium's Law of War Manual states that "it is prohibited to impose collective punishments [or] to take measures of intimidation or terrorism".[3325]

3742. Benin's Military Manual prohibits collective punishment.[3326]

3743. Burkina Faso's Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.[3327]

3744. Cameroon's Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.[3328]

3745. Canada's LOAC Manual forbids collective punishment against prisoners of war, civilians in general and in occupied territories, whether in international or internal armed conflicts.[3329] It also provides that, in non-international armed conflict, "no accused persons shall be convicted of an offence except on the basis of individual penal responsibility".[3330]

3746. Colombia's Circular on Fundamental Rules of IHL provides that "nobody can be considered as responsible for an act he has not committed".[3331]

3747. Congo's Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.[3332]

3748. Ecuador's Naval Manual states that prisoners of war and interned persons "may not be subjected to collective punishment".[3333]

3749. France's Disciplinary Regulations as amended prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.[3334]

3750. France's LOAC Summary Note provides that "no one shall be held responsible for an act he did not commit".[3335]

3751. France's LOAC Manual provides that collective punishment is a war crime and that one of the three main principles common to IHL and human rights is the principle of security, which guarantees to every human being the

[3323] Argentina, *Law of War Manual* (1989), § 7.10.
[3324] Australia, *Defence Force Manual* (1994), §§ 953 and 1221.
[3325] Belgium, *Law of War Manual* (1983), p. 50.
[3326] Benin, *Military Manual* (1996), Fascicule III, p. 4.
[3327] Burkina Faso, *Disciplinary Regulations* (1994), Articles 35(2) and 73(3).
[3328] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[3329] Canada, *LOAC Manual* (1999), p. 10-7, § 61, p. 11-4, § 33, p. 11-8, § 63, p. 12-5, § 41(d) and p. 17-3, § 21(a).
[3330] Canada, *LOAC Manual* (1999), p. 17-3, § 29(b).
[3331] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.
[3332] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[3333] Ecuador, *Naval Manual* (1989), §§ 11-8-1 and 11-9.
[3334] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[3335] France, *LOAC Summary Note* (1992), § 3.1.

right not to be held responsible for an offence he or she did not commit[3336] and which prohibits collective punishments.[3337] The manual further states that "no protected person may be punished for an offence he or she has not personally committed".[3338]

3752. Germany's Soldiers' Manual provides for the prohibition of collective punishment against civilians.[3339]

3753. Germany's Military Manual refers to Article 33 GC IV and prohibits "collective penalties" of civilians.[3340] It specifies that this prohibition also applies in occupied territories.[3341] With regard to prisoners of war, the manual refers to Article 87(3) GC III and provides that "collective punishment for individual acts and cruel punishment are forbidden".[3342]

3754. Germany's IHL Manual states that "collective punishments are prohibited".[3343]

3755. Israel's Manual on the Laws of War states that "collective punishment" of prisoners of war is absolutely forbidden.[3344]

3756. Italy's IHL Manual states that civilian persons in occupied territory have the right not to be subjected to collective punishment.[3345]

3757. Mali's Army Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishments.[3346]

3758. Madagascar's Military Manual provides that "nobody shall be held responsible for an act he/she did not commit".[3347]

3759. Morocco's Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishments.[3348]

3760. The Military Manual of the Netherlands reproduces the prohibition of collective punishments found in Articles 75 AP I and 4 AP II.[3349] With respect to non-international armed conflict, the manual states that "nobody may be condemned but on the basis of individual criminal responsibility".[3350]

3761. New Zealand's Military Manual, referring to Articles 32–34 GC IV, states that "the following are . . . prohibited: a. the punishment of a protected person for an offence not committed by him personally; b. collective penalties".[3351] The manual reproduces Article 75(2) AP I.[3352] With regard to the control of persons in occupied territory, it also states that "impermissible

[3336] France, *LOAC Manual* (2001), p. 52.
[3337] France, *LOAC Manual* (2001), pp. 45 and 51.
[3338] France, *LOAC Manual* (2001), p. 74.
[3339] Germany, *Soldiers' Manual* (1991), p. 4.
[3340] Germany, *Military Manual* (1992), § 507.
[3341] Germany, *Military Manual* (1992), § 536.
[3342] Germany, *Military Manual* (1992), § 725.
[3343] Germany, *IHL Manual* (1996), § 405.
[3344] Israel, *Manual on the Laws of War* (1998), p. 53.
[3345] Italy, *IHL Manual* (1991), Vol. I, § 41(f).
[3346] Mali, *Army Regulations* (1979), Article 36.
[3347] Madagascar, *Military Manual* (1994), p. 91, Rule 5.
[3348] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[3349] Netherlands, *Military Manual* (1993), pp. VIII-3 and XI-4, see also p. VII-2.
[3350] Netherlands, *Military Manual* (1993), p. XI-52.
[3351] New Zealand, *Military Manual* (1992), § 1116(2)(a) and (b).
[3352] New Zealand, *Military Manual* (1992), § 1137.

measures of population control include: . . . punishments for acts of others, that is . . . collective penalties".[3353] The manual also states that:

> Until and during World War II, Occupying Powers occasionally sought to secure observance of the law of armed conflict by the inhabitants of the occupied territory by the imposition or threat of collective penalties. Such action was contrary to HR Art. 50, and any collective penalties are now expressly forbidden by IV GC Art. 33 and AP 1 Art. 75 (2)(d).[3354]

With regard to non-international armed conflicts, the manual states that "although AP II contains no provisions relating to enforcement or punishment of breaches, it does contain a statement of fundamental guarantees prohibiting at any time and anywhere: . . . collective punishment".[3355] In a part entitled "Trial and Punishment: Restrictions and Guarantees", the manual also states that "as a minimum: . . . no one shall be convicted of an offence except on the basis of individual criminal responsibility".[3356]

3762. Nicaragua's Military Manual prohibits acts of collective punishment, including the threat to commit such acts.[3357]

3763. Romania's Soldiers' Manual provides that captured combatants and civilians "shall not be held responsible for acts which they have not committed" and that collective punishments are prohibited.[3358]

3764. Russia's Military Manual refers to the Geneva Conventions and AP I and prohibits collective punishment "of war victims".[3359]

3765. Senegal's IHL Manual lists the prohibition of collective punishment among the most basic universal rights to which every individual is entitled.[3360]

3766. Spain's LOAC Manual prohibits collective punishments.[3361] It further stresses that "any collective punishment for individual acts" is prohibited.[3362]

3767. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3363] In a chapter on IHL rules during occupation, the manual refers to Article 33 GC IV and states that "protected persons may not be punished for actions they have not themselves performed. Collective punishment of a whole group is also prohibited."[3364]

[3353] New Zealand, *Military Manual* (1992), § 1322(3).
[3354] New Zealand, *Military Manual* (1992), § 1608.
[3355] New Zealand, *Military Manual* (1992), § 1812(1)(b).
[3356] New Zealand, *Military Manual* (1992), § 1815(2)(b).
[3357] Nicaragua, *Military Manual* (1996), Article 14(35).
[3358] Romania, *Soldiers' Manual* (1991), p. 34.
[3359] Russia, *Military Manual* (1990), § 8(b).
[3360] Senegal, *IHL Manual* (1999), Chapter IV(A)(2), p. 23.
[3361] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.
[3362] Spain, *LOAC Manual* (1996), Vol. I, § 8.7.b.
[3363] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3364] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

3768. Switzerland's Basic Military Manual states that "no one shall be punished for an act he did not personally commit".[3365] It also refers to Article 87 GC III and states that "collective punishments are prohibited" and that "collective and individual punishments affecting food are prohibited".[3366] With respect to occupied territories, the manual states that "collective punishments . . . are prohibited". It also provides the following examples of prohibited collective punishments: "condemnation of the whole population of a village to forced labour [and] collective fines or temporary closing of all schools in retaliation for offences committed by a few inhabitants".[3367]
3769. Togo's Military Manual prohibits collective punishment.[3368]
3770. The UK Military Manual states that:

> The Hague Rules forbid collective punishment, in the form of a general pecuniary or other penalty, of the population for acts of individuals for which the population as a whole cannot be regarded as jointly and severally responsible. It was formerly thought that the prohibition did not exclude reprisals against a locality or community for some act committed by its inhabitants or members who cannot be identified. However, the Civilian Convention, Art. 33 has prohibited collective penalties and has expressly adopted the principle that "no protected person may be punished for an offence he or she has not personally committed".[3369]

According to the manual, all "violations of the Geneva Conventions not amounting to 'grave breaches', are also war crimes, for example, . . . imposing collective disciplinary measures affecting food of prisoners of war".[3370]
3771. The UK LOAC Manual forbids collective punishments.[3371]
3772. The US Field Manual reproduces Articles 87 GC III and 33 GC IV and Article 50 of the 1907 HR.[3372]
3773. The US Air Force Pamphlet prohibits collective punishment imposed on prisoners of war for individual acts.[3373] It refers to Article 33 GC IV and states that "collective penalties (punishment of a protected person for offences which he has not personally committed)" are prohibited.[3374]
3774. The US Naval Handbook states that "prisoners of war may not be subjected to collective punishment". The same provision applies to interned persons.[3375]

[3365] Switzerland, *Basic Military Manual* (1987), Article 153.
[3366] Switzerland, *Basic Military Manual* (1987), Articles 106 (POWs) and 120.
[3367] Switzerland, *Basic Military Manual* (1987), Article 153 (civilians in occupied territory).
[3368] Togo, *Military Manual* (1996), Fascicule III, p. 4.
[3369] UK, *Military Manual* (1958), § 647, see also §§ 42 (civilians), 205 (POWs) and 553 (occupied territory).
[3370] UK, *Military Manual* (1958), § 626.
[3371] UK, *LOAC Manual* (1981), Section 9, p. 35, § 9, see also Annex A, p. 48, § 20.
[3372] US, *Field Manual* (1956), §§ 163(a) (POWs), 272 (civilians) and 448 (occupied territory).
[3373] US, *Air Force Pamphlet* (1976), § 13-8 (POWs).
[3374] US, *Air Force Pamphlet* (1976), § 14-4 (civilians).
[3375] US, *Naval Handbook* (1995), §§ 11.7.1 (POWs) and 11.8 (interned persons).

3775. The YPA Military Manual of the SFRY (FRY) prohibits collective punishment of civilians, the wounded, sick and shipwrecked and prisoners of war.[3376]

National Legislation

3776. Argentina's Draft Code of Military Justice punishes any soldier who subjects any protected person to "collective punishments for individual acts".[3377]

3777. Australia's War Crimes Act provides that the "imposition of collective punishment" is a war crime.[3378]

3778. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3379]

3779. The Criminal Code of the Federation of Bosnia and Herzegovina provides that the "imposition of collective punishment" is a war crime.[3380] The Criminal Code of the Republika Srpska contains the same provision.[3381]

3780. China's Law Governing the Trial of War Criminals provides that "enforcing collective torture" is a war crime.[3382]

3781. The DRC Code of Military Justice as amended provides that the imposition of collective penalties during war or in an area under siege or during a declared state of emergency is an offence.[3383]

3782. Under Côte d'Ivoire's Penal Code as amended, in times of war or occupation, organising, ordering or imposing collective punishments on the civilian population constitutes a "crime against the civilian population".[3384]

3783. Croatia's Criminal Code provides that the imposition of collective punishment is a war crime.[3385]

3784. Under Ethiopia's Penal Code, in time of war, armed conflict or occupation, the imposition of collective punishment on civilian population is a war crime.[3386]

3785. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 26 and 87 GC III and 33 GC IV, and of AP I, including violations of Article 75(2)(d) AP I, as well as any "contravention" of AP II, including violations of Article 4(2)(b) AP II, are punishable offences.[3387]

[3376] SFRY (FRY), *YPA Military Manual* (1988), § 31(1).
[3377] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[3378] Australia, *War Crimes Act* (1945), Section 3.
[3379] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3380] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).
[3381] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).
[3382] China, *Law Governing the Trial of War Criminals* (1946), Article 3(6).
[3383] DRC, *Code of Military Justice as amended* (1972), Article 525.
[3384] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(5).
[3385] Croatia, *Criminal Code* (1997), Article 158.
[3386] Ethiopia, *Penal Code* (1957), Article 282(g).
[3387] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

3786. Italy's Law of War Decree as amended provides that "no collective sanction, financial or of any kind, can be imposed on the population because of an individual fault".[3388]
3787. Kyrgyzstan's Criminal Code of provides that "the Criminal Code is based upon the principles of . . . personal criminal responsibility".[3389]
3788. Under Lithuania's Criminal Code as amended, the imposition of collective punishments constitutes a war crime.[3390]
3789. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[3391]
3790. Romania's Law on the Punishment of War Criminals provides that "criminals of war" are persons who "ordered or executed collective . . . repression".[3392]
3791. Slovenia's Penal Code provides that "the imposition of collective punishments" is a war crime.[3393]
3792. Under Spain's Penal Code, "the imposition of collective punishments" is an offence.[3394]
3793. The Penal Code as amended of the SFRY (FRY) provides that "the imposition of collective penalties" is a war crime.[3395]

National Case-law
3794. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II practically reproduced specific constitutional provisions.[3396]
3795. In its judgement in the *Priebke case* in 1997, the Military Tribunal of Rome found that the killing of 335 civilians at the Ardeatine caves ordered by the accused as a reprisal for the killing of German officers in Rome by partisans was a war crime. The Court held that the "multiple murder of civilians in occupied territory had been perpetrated beyond the limits set by customary laws on reprisals and by Article 50 of the Hague Regulations on collective punishments".[3397]
3796. In the *Calley case* in 1973, a US army officer was convicted of murder for killing South Vietnamese civilians. The US Army Court of Military Review

[3388] Italy, *Law of War Decree as amended* (1938), Article 65.
[3389] Kyrgyzstan, *Criminal Code* (1997), Article 3(1).
[3390] Lithuania, *Criminal Code as amended* (1961), Article 336.
[3391] Norway, *Military Penal Code as amended* (1902), § 108.
[3392] Romania, *Law on the Punishment of War Criminals* (1945), Article I(d).
[3393] Slovenia, *Penal Code* (1994), Article 374(1).
[3394] Spain, *Penal Code* (1995), Article 612(3).
[3395] SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).
[3396] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.
[3397] Italy, Military Tribunal of Rome, *Priebke case*, Judgement, 22 July 1997.

dismissed the argument that the acts were lawful reprisals for illegal acts of the enemy and held that "slaughtering many for the presumed delicts of a few is not a lawful response to the delicts . . . Reprisal by summary execution of the helpless is forbidden in the laws of land warfare."[3398]

Other National Practice

3797. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.[3399]

3798. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that [all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions] not be subjected to . . . collective punishments".[3400]

3799. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

> Iraqi policy provided for the collective punishment of the family of any individual who served in or was suspected of assisting the Kuwaiti resistance. This punishment routinely took the form of destruction of the family home and execution of all family members. Collective punishment is prohibited expressly by Article 33 GC [IV].[3401]

3800. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[3402]

III. Practice of International Organisations and Conferences

United Nations

3801. In a resolution adopted in 1974 on the protection of women and children in emergency and armed conflict, the UN General Assembly stated that "all forms of . . . collective punishment . . . shall be considered criminal".[3403]

[3398] US, Army Court of Military Review, *Calley case*, Judgement, 16 February 1973.
[3399] Report on the Practice of Jordan, 1997, Chapter 5.
[3400] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 427.
[3401] US, Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.
[3402] Report on US Practice, 1997, Chapter 5.3.
[3403] UN General Assembly, Res. 3318 (XXIX), 14 December 1974, §§ 4 and 5.

3802. In a resolution adopted in 1993 on the occupied Arab territories, the UN Commission on Human Rights condemned "the policies and practices of Israel . . . and, in particular, . . . collective punishment".[3404]
3803. In a resolution adopted in 1998, the UN Commission on Human Rights called upon Israel:

> to cease immediately its policy of enforcing collective punishments, such as the demolition of houses and closure of the Palestinian territory, measures which constitute flagrant violations of international law and international humanitarian law, endanger the lives of the Palestinians and also constitute a major obstacle in the way of peace.[3405]

3804. In two resolutions adopted in 1988 and 1989 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights, after reaffirming that GC IV applied to the situation, considered that "collective punishment . . . amounted to a war crime under international law".[3406]
3805. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that "violations . . . of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law".[3407]

Other International Organisations
3806. No practice was found.

International Conferences
3807. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including . . . collective punishment . . . and threats to carry out such actions".[3408]

IV. Practice of International Judicial and Quasi-judicial Bodies

3808. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber addressed the question of the legality of the confinement of civilians. It referred to

[3404] UN Commission on Human Rights, Res. 1993/2 A, 19 February 1993, § 1.
[3405] UN Commission on Human Rights, Res. 1998/1, 27 March 1998, § 7.
[3406] UN Sub-Commission on the Human Rights, Res. 1988/10, 31 August 1988, § 3; Resolution 1989/4, 31 August 1989, § 3.
[3407] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[3408] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

Article 78 GC IV and ruled that "internment and assigned residence, whether in the occupying power's national territory or in the occupied territory, are exceptional measures to be taken only after careful consideration of each individual case. Such measures are never to be taken on a collective basis."[3409]

3809. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . by imposing collective punishments".[3410]

3810. In its judgement in *A. P., M. P. and T. P. v. Switzerland* in 1997, the ECtHR, accepting that, "whether or not the late Mr P. was actually guilty, the applicants were subjected to a penal sanction for tax evasion allegedly committed by him", stated that "it is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act".[3411]

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

3811. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "collective punishments are prohibited".[3412] Delegates also teach that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . individual and not collective penal responsibility".[3413]

3812. The ICRC Commentary on the Additional Protocols explains with regard to Article 6(2)(b) AP II that:

> This subparagraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. This principle is contained in every national legislation. It is already expressed in Article 33 of the fourth Convention, where it is more elegantly worded as follows: "No protected person may be punished for an offence he or she has not personally committed" . . . The wording was modified to meet the requirement of uniformity between the texts in the different languages and, in this particular case, with the English terminology ("individual penal responsibility"). Article 75, paragraph 4 (b), of Protocol I, lays down the same principle.

[3409] ICTY, *Delalić case*, Judgement, 16 November 1998, § 578.
[3410] HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 11.
[3411] ECtHR, *A. P., M. P. and T. P. v. Switzerland*, Judgement, 29 August 1997, §§ 47–48.
[3412] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 197.
[3413] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(b).

According to the Commentary, this does not exclude cases of complicity or incitement, which are punishable offences in themselves and may lead to a conviction.[3414]

3813. In a working paper submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court: collective punishment. Collective punishments, as serious violations of IHL in non-international conflicts, were also listed as war crimes.[3415]

3814. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC recalled that "restrictions on movements by means of curfews or the sealing-off of areas may in no circumstances amount to collective penalties".[3416]

VI. Other Practice

3815. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "no one shall be held responsible for an act he has not committed".[3417]

3816. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "collective punishments against persons and their property" shall remain prohibited and that "no one shall be convicted of an offence except on the basis of individual penal responsibility".[3418]

P. Respect for Convictions and Religious Practices

Note: *For practice concerning the religious beliefs of the dead, see Chapter 35, section D. For practice concerning respect for the convictions and religious practices of persons deprived of their liberty, see Chapter 37, section J. For practice concerning the education of children, see Chapter 39, section B.*

[3414] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4603.

[3415] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(ii)–(iii) and 3(i).

[3416] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

[3417] ICRC archive document.

[3418] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(b), *IRRC*, No. 282, 1991, pp. 331 and 334.

I. Treaties and Other Instruments

Treaties

3817. Article 46 of the 1899 HR provides that "religious convictions and liberty must be respected".

3818. Article 46 of the 1907 HR provides that "religious convictions and practice must be respected".

3819. Article 27, first paragraph, GC IV provides that "protected persons are entitled, in all circumstances, to respect for . . . their religious convictions and practices".

3820. Article 38, third paragraph, GC IV provides that protected persons "shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith".

3821. Article 58 GC IV provides that:

> The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.
>
> The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

3822. Article 9 of the 1950 ECHR provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

3823. Article 18 of the 1966 ICCPR provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Under Article 4(2) ICCPR no derogation may be made from this provision.

3824. Article 12 of the 1969 ACHR provides that:

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Under Article 27(2) no derogation may be made from this provision.

3825. Article 75(1) AP I provides that "each Party shall respect . . . the convictions and religious practices" of all persons who are in its power. Article 75 AP I was adopted by consensus.[3419]

3826. Article 4(1) AP II provides that all persons *hors de combat* are entitled to respect for their convictions and religious practices. Article 4 AP II was adopted by consensus.[3420]

3827. Article 8 of the 1981 ACHPR provides that "freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

3828. Article 14(1) of the 1989 Convention on the Rights of the Child provides that "States Parties shall respect the right of the child to freedom of thought, conscience and religion". Article 14(3) provides that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others".

3829. Article 30 of the 1989 Convention on the Rights of the Child provides that "in those States in which . . . religious . . . minorities . . . exist, a child belonging to such a minority . . . shall not be denied the right, in community with other members of his or her group, . . . to profess and practise his or her own religion".

Other Instruments

3830. Article 37 of the 1863 Lieber Code provides that "the United States acknowledge and protect, in hostile countries occupied by them, religion and morality . . . Offenses to the contrary shall be rigorously punished."

3831. Article 38 of the 1874 Brussels Declaration, in the section on "the military power with respect to private persons", provides that "religious convictions [of persons] and their practice, must be respected".

3832. Article 49 of the 1880 Oxford Manual, in the section on "the rules of conduct with respect to persons" in occupied territory, provides that "their religious convictions and practice, must be respected".

[3419] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[3420] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

3833. Article 18 of the 1948 UDHR provides that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

3834. According to Article III of the 1948 American Declaration on the Rights and Duties of Man, "every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private".

3835. Article 1 of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief provides that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

3836. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3837. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3838. Section 7.1 of the 1999 UN Secretary-General's Bulletin provides that:

> Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention . . . shall be accorded full respect for their . . . religious and other convictions.

3839. Article 10 of the 2000 EU Charter of Fundamental Rights provides that:

> Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

II. National Practice

Military Manuals

3840. Argentina's Law of War Manual (1969) provides that "protected persons have the right to respect for their beliefs and religious practice".[3421] With respect to non-repatriated foreigners, the manual provides that they "shall have

[3421] Argentina, *Law of War Manual* (1969), § 4.010.

the possibility to practice their religion and receive spiritual assistance from a minister of religion".[3422]

3841. Argentina's Law of War Manual (1989) provides that "protected persons have the right, in any circumstance, to respect for their beliefs and religious practices".[3423] With respect to non-repatriated foreigners, the manual states that "they shall be allowed to practice their religion and to receive spiritual assistance from ministers of their faith".[3424] In the case of non-international armed conflict, the manual states that "all persons who do not directly take part in hostilities ... have the right to be respected in their beliefs and religious practices".[3425]

3842. Australia's Defence Force Manual states that "religious convictions [of protected persons] ... shall be respected".[3426]

3843. Canada's LOAC Manual provides that, in the territories of the parties to the conflict and in occupied territories, "religious conventions and practices ... of protected persons must in all circumstances be respected".[3427] It further provides that "the occupant is obligated to allow freedom of religion in the occupied territory".[3428] According to the manual, "it is a duty of the occupant to see that religious convictions [of inhabitants of occupied territory] are not interfered with".[3429] With respect to non-international armed conflicts, the manual states that "all persons not participating in the conflict or who have ceased to do so are entitled to ... respect for their convictions and religious practices".[3430]

3844. Canada's Code of Conduct states that "civilians [in a foreign land] are entitled in all circumstances to respect for ... their religious convictions and practices, and their manners and customs".[3431]

3845. Colombia's Basic Military Manual states that "a means to guarantee the rights of non-combatants is to respect their convictions and beliefs".[3432] It further provides that it is a duty of the parties to the conflict "to permit religious practices".[3433]

3846. Colombia's Circular on Fundamental Rules of IHL provides that "captured combatants and civilian persons who are under the power of the adverse party have the right to respect ... for their convictions".[3434]

[3422] Argentina, *Law of War Manual* (1969), § 4.016.
[3423] Argentina, *Law of War Manual* (1989), § 4.27.
[3424] Argentina, *Law of War Manual* (1989), § 4.30(4.3).
[3425] Argentina, *Law of War Manual* (1989), § 7.04.
[3426] Australia, *Defence Force Manual* (1994), § 953.
[3427] Canada, *LOAC Manual* (1999), p. 11-4, § 29, see also p. 12-4, § 37 (occupied territory).
[3428] Canada, *LOAC Manual* (1999), p. 12-3, § 28.
[3429] Canada, *LOAC Manual* (1999), p. 12-5, § 36.
[3430] Canada, *LOAC Manual* (1999), p. 17-3, § 19.
[3431] Canada, *Code of Conduct* (2001), Rule 4, § 2.
[3432] Colombia, *Basic Military Manual* (1995), p. 21.
[3433] Colombia, *Basic Military Manual* (1995), p. 28.
[3434] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.

3847. The Military Manual of the Dominican Republic instructs soldiers that "however different or unusual a foreign land may seem to you, remember to respect its people and their . . . religious beliefs".[3435]
3848. Ecuador's Naval Manual prohibits "offences against civilian inhabitants of the occupied territory, including . . . infringing religious rights".[3436]
3849. France's LOAC Summary Note provides that all persons taking no direct part in the hostilities and persons *hors de combat* have the right to respect for their individual beliefs.[3437]
3850. France's LOAC Teaching Note states that "everybody has the right to respect . . . for their beliefs".[3438]
3851. France's LOAC Manual refers to Article 75(1) AP I and provides that "all the parties shall respect . . . religious practices of all persons [under their power]".[3439]
3852. Germany's Military Manual provides that "civilians who do not take part in hostilities . . . are entitled to respect for their religious convictions".[3440] It further provides that the belligerent shall ensure the "freedom of religion" to aliens remaining in the territory of a party to the conflict.[3441]
3853. Hungary's Military Manual provides for "respect for the religious convictions" of civilians in occupied territories.[3442]
3854. Indonesia's Directive on Human Rights in Trikora states that respect for personal and human dignity includes a prohibition on the violation or derogation of individual rights, such as freedom of thought, conscience and religion.[3443]
3855. Italy's IHL Manual provides that, in occupied territory, civilians have the right to respect for their religious convictions and practices.[3444]
3856. Kenya's LOAC Manual provides that "religious convictions and practices are to be respected".[3445]
3857. Madagascar's Military Manual provides that "captured combatants and civilians in the power of the adverse party have the right to respect for . . . their beliefs".[3446]
3858. New Zealand's Military Manual provides that "religious convictions and practices . . . of protected persons must in all circumstances be respected".[3447] It further provides that protected persons who remain in the territory of the

[3435] Dominican Republic, *Military Manual* (1980), p. 10.
[3436] Ecuador, *Naval Manual* (1989), § 6.2.5(1)–(2).
[3437] France, *LOAC Summary Note* (1992), § 2.1(1).
[3438] France, *LOAC Teaching Note* (2000), p. 2.
[3439] France, *LOAC Manual* (2001), p. 51.
[3440] Germany, *Military Manual* (1992), § 502, see also § 532.
[3441] Germany, *Military Manual* (1992), § 585.
[3442] Hungary, *Military Manual* (1992), p. 97.
[3443] Indonesia, *Directive on Human Rights in Trikora* (1995), § 4(a).
[3444] Italy, *IHL Manual* (1991), Vol. I, § 41(a).
[3445] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[3446] Madagascar, *Military Manual* (1994), p. 91, Rule 4.
[3447] New Zealand, *Military Manual* (1992), § 1114.

belligerents "must be allowed . . . to practise their religion".[3448] According to the manual, "the Occupying Power has a duty to allow freedom of religion in the occupied territory".[3449] In addition, "it is the duty of the Occupying Power to see that . . . [the] religious convictions [of the inhabitants] are not interfered with" and that "according to the IV GC, protected persons are entitled in all circumstances to respect for . . . their religious convictions and practices".[3450]

3859. Nicaragua's Military Manual states that "victims of an armed conflict have the right in any circumstance to respect for . . . their beliefs and religious practices".[3451]

3860. Romania Soldiers' Manual provides that captured combatants and civilians have the right to respect for their convictions and to practice their religion freely.[3452]

3861. Spain's LOAC Manual states that "religious beliefs and the practice of worship shall be respected".[3453] It further states that "the civilian population has the right to respect for its religious beliefs".[3454]

3862. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.[3455] It provides that "as a general rule, civilians within an occupied area shall, as protected persons, under all circumstances enjoy respect as to . . . religious convictions and practice".[3456] The manual also provides that "occupation shall not involve any change in the faith and religious practice of the population. The IV Geneva Convention contains a number of articles providing protection for religion, faith and religious practices, without this being linked to any particular confession."[3457]

3863. Switzerland's Basic Military Manual provides, with respect to civilians in the power of a party to the conflict, that "religious convictions and customs shall be respected".[3458] In the case of occupied territories, the manual states that "the ministers of religion shall be able to give spiritual assistance to the members of their religious communities. Religious convictions and performing religious practices shall be respected."[3459]

3864. The UK Military Manual states that "protected persons who remain in the territory of the belligerent must, in general, . . . be allowed . . . to practice their religion".[3460] In the case of occupied territories, the manual states that

[3448] New Zealand, *Military Manual* (1992), § 1118.
[3449] New Zealand, *Military Manual* (1992), § 1315.
[3450] New Zealand, *Military Manual* (1992), § 1321(1)–(2).
[3451] Nicaragua, *Military Manual* (1996), Article 14(30).
[3452] Romania, *Soldiers' Manual* (1991), p. 33, § 1.
[3453] Spain, *LOAC Manual* (1996), Vol. I, § 2.7.c.(3).
[3454] Spain, *LOAC Manual* (1996), Vol. I, § 5.6.a.(1).
[3455] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[3456] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[3457] Sweden, *IHL Manual* (1991), Section 6.1.3, pp. 127–128.
[3458] Switzerland, *Basic Military Manual* (1987), Article 146.
[3459] Switzerland, *Basic Military Manual* (1987), Article 167.
[3460] UK, *Military Manual* (1958), § 46.

"public worship must be permitted and religious convictions respected by the Occupant, who must permit ministers of religion to give spiritual assistance to the members of their religious communities".[3461] It also states that "it is a duty of the Occupant to see that . . . [the] religious convictions [of the inhabitants] are not interfered with". It adds that "according to the Civilian Convention, protected persons are entitled in all circumstances to respect for . . . their religious convictions and practices".[3462]

3865. The UK LOAC Manual states that "in all circumstances . . . religious convictions . . . of protected persons should be respected".[3463]

3866. The US Field Manual reproduces Articles 27, 38, third paragraph, and 58 GC IV. It also uses the same wording as Article 46 of the 1907 HR.[3464]

3867. The US Air Force Pamphlet recalls that GC IV contains provisions on the treatment of protected persons, including "to respect . . . religious customs".[3465] It adds that protected persons in the territory of a belligerent "in any case, are entitled . . . to practice their religion".[3466] The Pamphlet refers to Article 46 of the 1907 HR and provides for respect for "religious convictions and practices".[3467]

3868. The US Soldier's Manual instructs soldiers that "however different or unusual a foreign land may seem to you, remember to respect its people and their honor, family rights, religious beliefs, and customs".[3468]

3869. The US Naval Handbook provides that "the following acts are representative war crimes: . . . infringement of religious rights" of civilian inhabitants of occupied territory.[3469]

National Legislation

3870. Countless pieces of domestic legislation provide for the right to freedom of conscience and of religion.[3470]

3871. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3471]

3872. The Criminal Code of the Federation of Bosnia and Herzegovina provides that compelling civilians to "forcible conversion to another nationality

[3461] UK, *Military Manual* (1958), § 536.
[3462] UK, *Military Manual* (1958), §§ 546 and 547.
[3463] UK, *LOAC Manual* (1981), Section 9, p. 34, § 9.
[3464] US, *Field Manual* (1956), § 110 (Article 34 GC III), § 266 (Article 27 GC IV), § 277 (Article 38 GC IV), § 387 (Article 58 GC IV), § 293 (Article 86 GC IV), § 300 (Article 93 GC IV) and § 380.
[3465] US, *Air Force Pamphlet* (1976), § 14-4.
[3466] US, *Air Force Pamphlet* (1976), § 14-5.
[3467] US, *Air Force Pamphlet* (1976), § 14-6(a).
[3468] US, *Soldier's Manual* (1984), p. 21.
[3469] US, *Naval Handbook* (1995), § 6.2.5(1) and (2).
[3470] See, e.g., Ethiopia, *Constitution* (1994), Article 27(1); India, *Constitution* (1950), Article 25(1); Kenya, *Constitution* (1992), Article 78; Kuwait, *Constitution* (1962), Article 35; Kyrgyzstan, *Constitution* (1993), Article 16(2); Mexico, *Constitution* (1917) Article 24; Russia *Constitution* (1993), Article 28.
[3471] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

or religion" is a war crime.[3472] The Criminal Code of the Republika Srpska contains the same provision.[3473]

3873. Croatia's Criminal Code provides that "conversion to another religion" of civilian population is a war crime.[3474]

3874. Ethiopia's Penal Code provides that "forcible religious conversion" is a war crime against the civilian population.[3475]

3875. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 27, 38 and 58 GC IV, and of AP I, including violations of Article 75(1) AP I, as well as any "contravention" of AP II, including violations of Article 4(1) AP II, are punishable offences.[3476]

3876. Under Lithuania's Criminal Code as amended, "compelling [civilians] to convert to another faith" constitutes a war crime.[3477]

3877. Myanmar's Defence Services Act provides for the punishment of "any person subject to this law who . . . by defiling any place of worship, or otherwise, intentionally insults the religions or wounds the religious feelings of any person".[3478]

3878. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[3479]

3879. Under Slovenia's Penal Code, "conversion of the population to another religion" is a war crime.[3480]

3880. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of . . . forced conversion to any other faith" committed war crimes.[3481]

3881. The Penal Code as amended of the SFRY (FRY) provides that "conversion of the population to another religion" is a war crime.[3482]

[3472] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).
[3473] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.
[3474] Croatia, *Criminal Code* (1997), Article 158.
[3475] Ethiopia, *Penal Code* (1957), Article 282(e).
[3476] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3477] Lithuania, *Criminal Code as amended* (1961), Article 336.
[3478] Myanmar, *Defence Services Act* (1959), Section 66(b).
[3479] Norway, *Military Penal Code as amended* (1902), § 108.
[3480] Slovenia, *Penal Code* (1994), Article 374(1).
[3481] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[3482] SFRY (FRY), *Penal Code as amended* (1976), Article 142.

National Case-law

3882. In its judgement in the *Zühlke case* in 1948, a Special Court of Cassation of the Netherlands held that refusal to admit a clergyman or priest to a person awaiting execution of the death sentence constituted a war crime.[3483]

3883. In the *Tanaka Chuichi case* before an Australian military court in 1946, the accused had ill-treated Sikh prisoners of war, had cut their hair and beards and had forced some of them to smoke a cigarette, acts contrary to their culture and religion. The Court found the accused guilty of violations of, *inter alia*, the 1929 Geneva POW Convention.[3484]

Other National Practice

3884. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[3485]

III. Practice of International Organisations and Conferences

United Nations

3885. In a resolution on Sudan adopted in 2000, the UN General Assembly expressed its deep concern "at continuing violations of human rights in areas under the control of the Government of the Sudan, in particular: . . . restrictions on freedom of religion".[3486]

3886. In a resolution adopted in 1996, the UN Commission on Human Rights expressed serious concern about reports of religious persecution and forced conversion in the government-controlled areas of Sudan.[3487]

3887. In a resolution adopted in 2001 on the elimination of all forms of religious intolerance, the UN Commission on Human Rights condemned "all forms of intolerance [and] discrimination based on religion or belief" and urged States "to recognize the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes".[3488]

3888. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949

[3483] Netherlands, Special Court of Cassation (Second Chamber), *Zühlke case*, Judgement, 6 December 1948.
[3484] Australia, Military Court at Rabaul, *Tanaka Chuichi case*, Judgement, 12 July 1946.
[3485] Report on US Practice, 1997, Chapter 5.3.
[3486] UN General Assembly, Res. 55/116, 4 December 2000, § 2(b)(iii).
[3487] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.
[3488] UN Commission on Human Rights, Res. 2001/42, 23 April 2001, §§ 2 and 4(d).

Geneva Conventions and Article 4 AP II "have long been considered customary international law".[3489]

3889. In a report in 1993, the UN Special Rapporteur on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief stated that:

The Special Rapporteur has continued to receive allegations of infringements in most regions of the world of the rights and freedoms contained in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Practices of religious intolerance have continued to occur in countries with varying degrees of development and different political and social systems and have not been confined to a particular faith.[3490]

Other International Organisations

3890. No practice was found.

International Conferences

3891. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3892. In its General Comment on Article 18 of the 1966 ICCPR in 1993, the HRC stated that:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.[3491]

3893. In 1999, in the case of the *Association of Members of the Episcopal Conference of East Africa v. Sudan*, the ACiHPR stated that:

73. Another matter is the application of Shari'a law. There is no controversy as to Shari'a being based upon the interpretation of the Muslim religion. When Sudanese tribunals apply Shari'a, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always

[3489] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

[3490] UN Commission on Human Rights, Special Rapporteur on the Implementation of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, Report, UN Doc. E/CN.4/1993/62, 6 January 1993, § 74; see also Report, UN Doc. E/CN.4/1987/35, 24 December 1986; Report, UN Doc. E/CN.4/1988/45, 6 January 1988; Report, UN Doc. E/CN.4/1989/44, 30 December 1988; Report, UN Doc. E/CN.4/1990/46, 22 January 1990; Report, UN Doc. E/CN.4/1991/56, 18 January 1991 and Report, UN Doc. E/CN.4/1992/52, 18 December 1991.

[3491] HRC, General Comment No. 22 (Article 18 ICCPR), 30 July 1993, § 1.

accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish.

74. It is alleged that non-Muslims were persecuted in order to cause their conversion to Islam. They do not have the right to preach or build their Churches; there are restrictions on freedom of expression in the national press. Members of the Christian clergy are harassed; Christians are subjected to arbitrary arrests, expulsions and denial of access to work and food aid.
75. In its various oral and written submissions to the African Commission, the government has not responded in any convincing manner to all the allegations of human made against it. The Commission reiterates the principle that in such cases where the government does not respect its obligation to provide the Commission with a response on the allegations of which it is notified, it shall consider the facts probable.
76. Other allegations refer to the oppression of Christian civilians and religious leaders and the expulsion of missionaries. It is alleged that non-Muslims suffer persecution in the form of denial of work, food aid and education. A serious allegation is that of unequal food distribution in prisons, subjecting Christian prisoners to blackmail in order obtain food. These attacks on individuals on account of their religious persuasion considerably restrict their ability to practice freely the religion to which they subscribe. The government provides no evidence or justifications that would mitigate this conclusion. Accordingly, the Commission holds a violation of Article 8 [of the ACHPR].[3492]

3894. In 1993, in its judgement in *Kokkinakis v. Greece*, the ECtHR stated that:

31. As enshrined in Article 9 (art. 9) [of the 1950 ECHR], freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

    While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.

    According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9 (art. 9), would be likely to remain a dead letter.[3493]

[3492] ACiHPR, *Association of Members of the Episcopal Conference of East Africa v. Sudan*, Decision, 1–15 November 1999, §§ 73–76.
[3493] ECtHR, *Kokkinakis v. Greece*, Judgement, 25 May 1993, § 31.

3895. In its judgement in the *Cyprus case* in 2001, the ECtHR found, in relation to the living conditions of Greek Cypriots in the Karpas region of northern Cyprus, that there had been a violation of Article 9 of the 1950 ECHR (freedom of thought, conscience and religion) in respect of Greek Cypriots concerning the effects of restrictions on freedom of movement, which limited access to places of worship and participation in other aspects of religious life.[3494]

3896. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

> The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:
>
> . . .
>
> e. When it does not in any manner presuppose the suspension of . . . the right to freedom of thought, conscience and religion.[3495]

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

3897. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the person and the person's honour, convictions and religious practices shall be respected".[3496] Delegates also teach that in occupied territories "the religious convictions and practices of the inhabitants must be respected. Religious personnel shall be permitted to give spiritual assistance to the members of their religious communities with the aid of the occupying power."[3497]

3898. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross recalled the Geneva Conventions and AP I and reminded the parties of their obligation to respect the beliefs of combatants and civilians.[3498]

3899. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC recalled that "religious customs must be respected, which implies access to places of worship to the fullest extent possible".[3499]

[3494] ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 245–246.
[3495] IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59–61.
[3496] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 188.
[3497] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 824.
[3498] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de Enero de 1994, 3 January 1994.
[3499] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

VI. Other Practice

3900. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "captured combatants and civilians under the authority of the adverse party are entitled to respect for their . . . convictions".[3500]
3901. In 1986, an armed opposition group was said to release or execute captured combatants according to their willingness to convert to Islam and their behaviour in detention. If no solution was found to their case after two years of detention, the prisoners would have been executed.[3501]
3902. A colloquium held jointly by the IIHL and the International Institute of Human Rights in 1973 adopted a resolution on spiritual and intellectual assistance in time of armed conflict and civil disturbances. The resolution appealed to any party involved in an international or non-international armed conflict to respect the right of any victim of an armed conflict to exercise his or her spiritual and intellectual activities and to supply him or her with the facilities necessary therefor, as well as to refrain from controlling such activities in a manner incompatible with respect for beliefs and convictions, or from practising methods of information, training or teaching which were incompatible with freedom of thought and the principles of humanitarian law. It also invited all States to ratify the universal and regional instruments asserting the right to freedom of thought, conviction and religion, and to apply the provisions of those instruments in all circumstances, including during international and non-international conflicts, and in situations of internal tension.[3502]
3903. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "all persons, even if their liberty has been restricted, are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices".[3503]

Q. Respect for Family Life

Note: *For practice concerning enforced disappearance, see section K of this chapter. For practice concerning accounting for the dead, see Chapter 35, section E. For practice concerning the right of the families to know the fate of their relatives, see Chapter 36. For practice concerning the grouping of families in detention, correspondence with and visits to persons deprived of their liberty, see Chapter 37, sections B, C, H and I. For practice concerning respect for family unity during displacement, see Chapter 38, section C.*

[3500] ICRC archive document. [3501] ICRC archive document.
[3502] IIHL/International Institute of Human Rights, Colloquium on Spiritual and Intellectual Assistance in Time of Armed Conflicts and Civil Disturbances, *IRRC*, No. 152, 1973, p. 609.
[3503] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(1), *IRRC*, No. 282, 1991, p. 331.

I. Treaties and Other Instruments

Treaties

3904. Article 46 of the 1899 HR provides that "family honour and rights . . . must be respected".

3905. Article 46 of the 1907 HR provides that "family honour and rights . . . must be respected".

3906. Article 26 GC IV provides that:

> Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

3907. Article 27, first paragraph, GC IV provides that "protected persons are entitled, in all circumstances, to respect for their . . . family rights".

3908. Article 8 of the 1950 ECHR provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, of for the protection of the rights and freedoms of others.

3909. Article 17(1) of the 1966 ICCPR provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation". Article 17(2) provides that "everyone has the right to protection of the law against such interference or attacks".

3910. Article 23(1) of the 1966 ICCPR provides that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

3911. Article 10(1) of the 1966 ICESCR provides that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society".

3912. Article 11 of the 1969 ACHR provides that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interferences or attacks.

3913. Article 17(1) of the 1969 ACHR provides that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state".

3914. Article 74 AP I provides that "Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task". Article 74 AP I was adopted by consensus.[3504]

3915. Article 4(3)(b) AP II provides that "all appropriate steps shall be taken to facilitate the reunion of families temporarily separated". Article 4 AP II was adopted by consensus.[3505]

3916. Article 18 of the 1981 ACHPR provides that:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3917. Article 15(1) of the 1988 Protocol of San Salvador provides that "the family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions".

3918. Article 9 of the 1989 Convention on the Rights of the Child provides that "Parties shall ensure that a child shall not be separated from his or her parents against their will".

3919. Article 10 of the 1989 Convention on the Rights of the Child provides that "applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner".

3920. Article 16 of the 1989 Convention on the Rights of the Child provides that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

3921. Article 22(2) of the 1989 Convention on the Rights of the Child provides that:

States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating with the United Nations . . . to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.

[3504] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 248.
[3505] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

3922. In the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

> In accordance with the fundamental principle of preserving family unity, where it is not possible for families to repatriate as units, a mechanism shall be established for their reunification in Abkhazia. Measures shall also be taken for the identification and extra care/assistance for unaccompanied minors and other vulnerable persons during the repatriation process.

Other Instruments

3923. Article 37 of the 1863 Lieber Code provides that "the United States acknowledge and protect, in hostile countries occupied by them, . . . the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished."

3924. Article 38 of the 1874 Brussels Declaration provides that "family honour and rights . . . must be respected".

3925. Article 48 of the 1880 Oxford Manual provides that "family honour and rights . . . must be respected".

3926. Article 12 of the 1948 UDHR provides that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

3927. Article 16(3) of the 1948 UDHR provides that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

3928. Article V of the 1948 American Declaration on the Rights and Duties of Man provides that "everyone has the right to the protection of the law against abusive attacks upon his . . . family life".

3929. Article VI of the 1948 American Declaration on the Rights and Duties of Man provides that "every person has the right to establish a family, the basic element of society, and to receive protection therefor".

3930. Article 5(b) of the 1990 Cairo Declaration on Human Rights in Islam provides that society and the State "shall ensure family protection and welfare".

3931. Principle 17 of the 1998 Guiding Principles on Internal Displacement provides that:

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.

4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

3932. Article 7 of the 2000 EU Charter of Fundamental Rights provides that "everyone has the right to respect for his or her private and family life".

II. National Practice

Military Manuals

3933. Argentina's Law of War Manual (1969) contains provisions specifying that parties to a conflict must assist members of families to keep in contact and, if possible, facilitate the process of family reunification.[3506]

3934. Argentina's Law of War Manual (1989) provides that "the High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organisations engaged in this task".[3507]

3935. Australia's Defence Force Manual provides that "family rights [of protected persons] ... shall be respected".[3508]

3936. Canada's Code of Conduct provides that civilians in a foreign land are entitled in all circumstances to respect for their family rights.[3509]

3937. The Military Manual of the Dominican Republic instructs soldiers that "however different or unusual a foreign land may seem to you, remember to respect its people and their honour, family rights ... and customs".[3510]

3938. El Salvador's Human Rights Charter of the Armed Forces recalls that "the Universal Declaration of Human Rights establishes ... the protection of the family".[3511]

3939. Germany's Military Manual provides that "civilians who do not take part in hostilities ... are entitled to respect for their family rights".[3512]

3940. Italy's IHL Manual provides that, in occupied territory, civilians have the right to respect for their family rights.[3513]

3941. Kenya's LOAC Manual provides that "family and private honour ... are to be respected".[3514]

3942. New Zealand's Military Manual provides that "family rights ... of protected persons must in all circumstances be respected".[3515] It also recalls the

[3506] Argentina, *Law of War Manual* (1969), § 4.009.
[3507] Argentina, *Law of War Manual* (1989), § 4.14.
[3508] Australia, *Defence Force Manual* (1994), § 953.
[3509] Canada, *Code of Conduct* (2001), Rule 4, § 2.
[3510] Dominican Republic, *Military Manual* (1980), p. 10.
[3511] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 2.
[3512] Germany, *Military Manual* (1992), § 502, see also § 532.
[3513] Italy, *IHL Manual* (1991), Vol. I, § 41(a).
[3514] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[3515] New Zealand, *Military Manual* (1992), § 1114.

provisions of AP I, stating that "parties to the conflict are obliged to facilitate the reunion of families dispersed as a result of armed conflicts".[3516] The manual further states that "according to the IV GC, protected persons are entitled in all circumstances to respect for . . . their family rights".[3517]

3943. Nicaragua's Military Manual states that "victims of an armed conflict have the right in any circumstances to respect for . . . their family rights".[3518]

3944. The Handbook on Discipline of the Philippines provides for the punishment of abduction and separation of family members.[3519]

3945. Spain's LOAC Manual provides that "the reunion of dispersed families shall be favoured".[3520] It clearly stipulates that "family rights shall be respected".[3521]

3946. Sweden's IHL Manual provides that "as a general rule, civilians within an occupied area shall, as protected persons, under all circumstances enjoy respect as to . . . family rights".[3522]

3947. The UK Military Manual states that in situations of occupation, "according to the Civilian Convention, protected persons are entitled in all circumstances to respect for . . . their family rights".[3523]

3948. The UK LOAC Manual states that "in all circumstances, the . . . family rights . . . of protected persons should be respected".[3524]

3949. The US Field Manual reproduces Article 27 GC IV.[3525] It also uses the same wording as Article 46 of the 1907 HR.[3526]

3950. The US Air Force Pamphlet recalls that GC IV has provisions on the treatment of protected persons, including "to respect . . . family rights".[3527] It also refers to Article 46 of the 1907 HR, which provides for respect for "family honour".[3528]

3951. The US Soldier's Manual instructs soldiers that "however different or unusual a foreign land may seem to you, remember to respect its people and their honor, family rights . . . and customs".[3529]

3952. The Annotated Supplement to the US Naval Handbook provides that "the United States supports the principles in [AP I], Article 74, that nations facilitate in every possible way the reunion of families dispersed as a result of armed conflict and encourage the work of humanitarian organizations engaged in this task".[3530]

[3516] New Zealand, *Military Manual* (1992), § 1136.
[3517] New Zealand, *Military Manual* (1992), § 1321(2).
[3518] Nicaragua, *Military Manual* (1996), Article 14(30).
[3519] Philippines, *Handbook on Discipline* (1989), p. 16.
[3520] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1).
[3521] Spain, *LOAC Manual* (1996), Vol. I, § 2.7.c.(3).
[3522] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[3523] UK, *Military Manual* (1958), § 547.
[3524] UK, *LOAC Manual* (1981), Section 9, p. 34, § 9.
[3525] US, *Field Manual* (1956), § 266.
[3526] US, *Field Manual* (1956), § 380.
[3527] US, *Air Force Pamphlet* (1976), § 14-4.
[3528] US, *Air Force Pamphlet* (1976), § 14-6(a).
[3529] US, *Soldier's Manual* (1984), p. 21.
[3530] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

National Legislation

3953. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

> It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:
> ...
> h) To take appropriate measures to ensure family reunification.[3531]

3954. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[3532]

3955. According to Colombia's Law on Internally Displaced Persons, the family of forcibly displaced persons must benefit from the right to family reunification.[3533]

3956. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 27 GC IV, and of AP I, including violations of Article 74 AP I, as well as any "contravention" of AP II, including violations of Articles 4(3)(b) AP II, are punishable offences.[3534]

3957. Lithuania's Criminal Code as amended punishes as a "violation of the norms of international humanitarian law in time of war, an armed conflict or under the conditions of occupation or annexation: ... separation of children from their parents or guardians".[3535]

3958. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[3536]

3959. The Act on Child Protection of the Philippines provides that:

> All appropriate steps shall be taken to facilitate the reunion of families temporarily separated due to armed conflict ...
> Whenever possible, members of the same family shall be housed in the same premises and given separate accommodation from other evacuees and be provided with facilities to lead a normal family life.[3537]

National Case-law

3960. No practice was found.

[3531] Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(h).
[3532] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[3533] Colombia, *Law on Internally Displaced Persons* (1997), Article 2(4).
[3534] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[3535] Lithuania, *Criminal Code as amended* (1961), Article 336.
[3536] Norway, *Military Penal Code as amended* (1902), § 108.
[3537] Philippines, *Act on Child Protection* (1992), Sections 22(f) and 23.

Other National Practice

3961. A resolution adopted by the National Assembly of South Korea in December 1998 urged cooperation between the authorities in North and South Korea in reuniting separated family members and proposed that the National Red Cross Societies in each region proceed with their work on family reunification.[3538]

3962. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . states facilitate in every possible way the reunion of families dispersed as a result of armed conflicts".[3539]

3963. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[3540]

III. Practice of International Organisations and Conferences

United Nations

3964. In several resolutions on the rights of the child, the UN General Assembly has called upon all States and UN bodies and agencies "to ensure the early identification and registration of unaccompanied refugee and internally displaced children [and] to give priority to programmes for family tracing and reunification".[3541]

3965. In two resolutions adopted in 1997 and 1998 on the rights of the child, the UN Commission on Human Rights called upon all States "to give priority to programmes for family tracing and reunification, and to continue monitoring the care arrangements for unaccompanied refugee and internally displaced children".[3542]

3966. In 1996, in a report on the impact of armed conflict on children, the UN Secretary-General noted that:

[3538] South Korea, Resolution Calling for the Confirmation of Life or Death and the Reunion of Members of Separated Families in South and North Korea, 198th Regular Session, 1 December 1998.

[3539] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

[3540] Report on US Practice, 1997, Chapter 5.3.

[3541] UN General Assembly, Res. 51/77, 12 December 1996, Section III, § 42; Res. 52/107, 12 December 1997, Section V, § 3; Res. 53/128, 9 December 1998, Section V, § 3.

[3542] UN Commission on Human Rights, Res. 1997/78, 18 April 1997, § 16; Res. 1998/76, 22 April 1998, § 17(b).

A substantial body of rules and standards already confirms the principle of family reunion, whether children are separated from parents by armed conflict or other events. In practice, however, reunification is often frustrated or protracted, resulting in further psychological damage to children and their families.[3543]

3967. In 1981, in a Conclusion on Family Reunification, the UNHCR Executive Committee stressed that "every effort should be made to ensure the reunification of separated families".[3544]
3968. In 1997, in a Conclusion on Refugee Children and Adolescents, the UNHCR Executive Committee stated that the role of the family as the fundamental group of society should be protected in accordance with human rights and humanitarian law.[3545]

Other International Organisations
3969. No practice was found.

International Conferences
3970. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of children in armed conflict in which it recommended that "according to the Geneva Conventions and the two Additional Protocols, all necessary measures be taken to preserve the unity of the family and to facilitate the reuniting of families".[3546]
3971. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it stated that it:

(a) demands that all parties to armed conflict avoid any action aimed at, or having the effect of, causing the separation of families in a manner contrary to international humanitarian law;
(b) appeals to States to do their utmost to solve the serious humanitarian issue of dispersed families without delay.[3547]

IV. Practice of International Judicial and Quasi-judicial Bodies

3972. In its General Comment No. 16 on Article 17 of the 1966 ICCPR in 1988, the HRC held that:

[3543] UN Secretary-General, Impact of armed conflict on children, Report prepared by the expert appointed pursuant to UN General Assembly Resolution 48/157 (1993), UN Doc. E/CN.4/1996/110, 5 February 1996, § 44.
[3544] UNHCR, Executive Committee, Conclusion No. 24 (XXXII): Family Reunification, 22 October 1981, § 1.
[3545] UNHCR, Executive Committee, Conclusion No. 84 (XLVIII): Refugee Children and Adolescents, 20 October 1997, § b(i).
[3546] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 5.
[3547] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(a)-(d).

1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.

...

4. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.
5. Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term "home" in English, "manzel" in Arabic, "zhùzhái" in Chinese, "domicile" in French, "zhilische" in Russian and "domicilio" in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms "family" and "home".[3548]

3973. In 1997, in its concluding observations on the report of Myanmar, the CRC stated that the State should reinforce its central tracing agency to favour family reunification.[3549]

3974. In several cases, the ECtHR addressed the issue of family unity and held that Article 8 of the 1950 ECHR included a right for parents to have measures taken with a view to them being reunited with their children and an obligation for national authorities to take such measures. According to the Court, preventing parents from living with their children amounted to interference with the right to respect for family life.[3550]

3975. In *Johnston and Others v. Ireland* in 1986 dealing with a couple prevented from marrying one another for reasons related to the domestic law on divorce of Ireland, the ECtHR stated that:

55. The principles which emerge from the Court's case-law on Article 8 (art. 8) [of the 1950 ECHR] include the following.

[3548] HRC, General Comment No. 16 (Article 17 ICCPR), 8 April 1988, §§ 1 and 4–5.
[3549] CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, § 40–41.
[3550] ECtHR, *Eriksson case*, Judgement, 22 June 1989, p. 26, § 71; *Andersson v. Sweden*, Judgement, 25 February 1992, p. 30, § 91; *Rieme v. Sweden*, Judgement, 22 April 1992, §§ 55, 56 and 69; *Olsson v. Sweden*, Judgement, 27 November 1992, pp. 35–36, § 90; *Hokkanen v. Finland*, Judgement, 23 September 1994; *Gül v. Switzerland*, Judgement, 19 February 1996, p. 14.

(a) By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family . . .
(b) Article 8 (art. 8) applies to the "family life" of the "illegitimate" family as well as to that of the "legitimate" family . . .
(c) Although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals . . .

56. In the present case, it is clear that the applicants, the first and second of whom have lived together for some fifteen years . . . ,constitute a "family" for the purposes of Article 8 (art. 8). They are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage . . .[3551]

3976. In *B. v. UK* in 1987, the ECtHR stated that:

60. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care. It follows – and this was not contested by the Government – that the Authority's decisions resulting from the procedures at issue amounted to interferences with the applicant's right to respect for her family life.
61. According to the Court's established case-law:
(a) an interference with the right to respect for family life entails a violation of Article 8 (art. 8) [of the 1950 ECHR] unless it was "in accordance with the law", had an aim or aims that is or are legitimate under Article 8 § 2 (art. 8-2) and was "necessary in a democratic society" for the aforesaid aim or aims . . .
(b) the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued . . .
(c) although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life . . .
(d) in determining whether an interference is "necessary in a democratic society" or whether there has been breach of a positive obligation, the Court will take into account that a margin of appreciation is left to the Contracting States . . .[3552]

[3551] ECtHR, *Johnston and Others v. Ireland*, Judgement (Merits and just satisfaction), 18 December 1986, §§ 55–56.
[3552] ECtHR, *B. v. UK*, Judgement, 8 July 1987, §§ 60–61.

3977. In *Moustaquim v. Belgium* in 1991, the ECtHR stated that:

> 34. Mr Moustaquim submitted that his deportation by the Belgian authorities interfered with his family and private life. He relied on Article 8 (art. 8) of the Convention . . .
> 35. The Government expressed doubts as to whether the applicant and his parents had any real family life at the time he was deported, as family ties were, at the least, strained in view of the number of occasions on which the youth had run away and had been imprisoned. They did not, however, expressly dispute that Article 8 (art. 8) was applicable.
> 36. Mr Moustaquim lived in Belgium, where his parents and his seven brothers and sisters also resided. He had never broken off relations with them. The measure complained of resulted in his being separated from them for more than five years, although he tried to remain in touch by correspondence. There was accordingly interference by a public authority with the right to respect for family life guaranteed in paragraph 1 of Article 8 (art. 8-1).[3553]

3978. In *Vermeire v. Belgium* in 1991, the ECtHR stated that:

> 25. . . . There was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins Francine and Michel, on the grounds of the "illegitimate" nature of the kinship between her and the deceased [i.e. her grandparents] . . .
>
> For these reasons, the Court . . .
>
> 2. Holds unanimously that the applicant's exclusion from the estate of Camiel Vermeire [i.e. her grandfather] violated Article 14 in conjunction with Article 8 (art. 14+8) of the [1950 ECHR].[3554]

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

3979. No practice was found.

VI. Other Practice

3980. The SPLM Human Rights Charter provides that "children have the right not to be separated from their families and to be reunited with them".[3555]

[3553] ECtHR, *Moustaquim v. Belgium*, Judgement (Merits and just satisfaction), 18 February 1991, §§ 34–36.
[3554] ECtHR, *Vermeire v. Belgium*, Judgement (Merits), 29 November 1991, § 25 and Disposition 2.
[3555] SPLM, Human Rights Charter, May 1996, § 6.

CHAPTER 33

COMBATANTS AND PRISONER-OF-WAR STATUS

Note: *For practice concerning the definition of combatants, see Chapter 1, section C. The treatment of captured combatants entitled to prisoner-of-war status is regulated by the Third Geneva Convention. Practice pertaining thereto is not examined in detail in this study because the Third Geneva Convention is considered to be part of customary international law and, in any event, binds almost all States as a matter of treaty law. Chapter 32 contains practice on fundamental guarantees for all combatants* hors de combat, *whether entitled to prisoner-of-war status or not. Chapter 37 contains practice on persons deprived of their liberty in connection with an armed conflict, whether they are prisoners of war or not.*

A. Conditions for Prisoner-of-War Status

Distinction from the civilian population

Note: *Chapter 1, sections C and D, provides numerous references to the requirements for militia and volunteer corps to be considered as combatants, including having a distinctive sign and carrying arms openly, as provided for in Article 1 of the 1907 HR and Article 4(A)(2) GC III. These are not, generally, repeated here.*

I. Treaties and Other Instruments

Treaties

1. Article 44(3) AP I provides that "in order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack". Article 44(7) AP I provides that "this Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict". Article 44 AP I was adopted by 73 votes in favour, one against and 21 abstentions.[1]

2. Article 45(3) AP I provides that "any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol". Article 45 AP I was adopted by consensus.[2]

3. Upon accession to AP I, Argentina declared that Articles 44(2), 44(3) and 44(4) AP I could not be interpreted:

a) as conferring on persons who violate the rules of international law applicable in armed conflicts any kind of immunity exempting them from the system of sanctions which apply to each case;
b) as specifically favouring anyone who violates the rules the aim of which is the distinction between combatants and the civilian population;
c) as weakening respect for the fundamental principle of the international law of war which requires that a distinction be made between combatants and the civilian population, with the prime purpose of protecting the latter.[3]

Other Instruments

4. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that "in order to promote the protection of the civilian population, combatants are obliged to distinguish themselves from the civilian population".

II. National Practice

Military Manuals

5. Argentina's Law of War Manual states that "in order to promote the protection of the civilian population from the effects of hostilities, combatants are

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 121.
[2] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.
[3] Argentina, Interpretative declarations made upon accession to AP I and AP II, 26 November 1986, § 1.

obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack".[4]

6. Australia's Defence Force Manual provides that combatants must "have a fixed distinctive sign recognisable at a distance and carry arms openly... Combatants are normally expected to distinguish themselves from the civilian population by wearing a uniform."[5]

7. Belgium's Law of War Manual states that there is a "customary rule according to which all members of the regular armed forces wear a uniform".[6]

8. According to Benin's Military Manual, combatants "distinguish themselves by their uniform or by a fixed recognisable sign or at least by carrying arms openly".[7]

9. According to Cameroon's Instructors' Manual, combatants "wear a uniform, a distinctive sign and carry arms openly. They distinguish themselves from the civilian population."[8]

10. Canada's LOAC Manual states that "to ensure the protection of the civilian population, combatants are required to distinguish themselves from that population when engaging in attack or preparing to mount an attack".[9]

11. Colombia's Instructors' Manual states that:

> Combatants must distinguish themselves from the civilian population when they participate in combat action or in an operation preparatory thereto. Members of regular Armed Forces normally wear their uniform. Members of other militias, such as rebels and guerrillas, use a distinctive sign and normally carry their arms openly.[10]

12. Croatia's LOAC Compendium states that combatants distinguish themselves from civilians by wearing a uniform, having a distinctive sign, being under a responsible command, being subject to the law of war and by "carrying arms openly at least: during every military engagement [and] as long as visible to the enemy while engaged in a military deployment".[11]

13. Croatia's Commanders' Manual states that combatants, members of the armed forces, "distinguish themselves by their uniform or by a recognizable distinctive sign or at least by carrying their arms openly".[12]

14. The Military Manual of the Dominican Republic states that "uniformed, armed soldiers are easily recognisable. However, guerrillas often mix with the civilians, perform undercover operations, and dress in civilian clothes. Alertness and caution must guide you in deciding who is a combatant."[13]

[4] Argentina, *Law of War Manual* (1989), § 1.08(3).
[5] Australia, *Defence Force Manual* (1994), §§ 512–513.
[6] Belgium, *Law of War Manual* (1983), p. 20.
[7] Benin, *Military Manual* (1995), Fascicule I, p. 12.
[8] Cameroon, *Instructors' Manual* (1992), p. 17, see also p. 77.
[9] Canada, *LOAC Manual* (1999), p. 3-2, § 15.
[10] Colombia, *Instructors' Manual* (1999), p. 16.
[11] Croatia, *LOAC Compendium* (1991), p. 6.
[12] Croatia, *Commanders' Manual* (1992), § 2.
[13] Dominican Republic, *Military Manual* (1980), p. 3.

15. France's LOAC Summary Note, LOAC Teaching Note and LOAC Manual provide that combatants distinguish themselves by their uniform, a fixed and recognisable sign or, at least, by carrying arms openly.[14]
16. Germany's Military Manual provides that:

> Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. In accordance with the generally agreed practice of states, members of regular armed forces shall wear their uniform. Combatants who are not members of uniformed armed forces nevertheless wear a permanent distinctive sign visible from a distance and carry their arms openly.[15]

17. According to Hungary's Military Manual, combatants distinguish themselves from civilians by wearing a uniform, having a distinctive sign, being under a responsible command, being subject to the law of war and by "carrying arms openly at least: during every military engagement [and] as long as visible to the enemy while engaged in a military deployment".[16]
18. Israel's Manual on the Laws of War states that "it is prohibited to use civilians for the purpose of masking military movements or hiding among them. From this provision stems the soldiers' obligation to wear a uniform or identifying symbol to clearly distinguish them from civilians."[17]
19. Italy's IHL Manual states that "in order to obtain the best possible protection of the civilian population, lawful combatants are obliged to distinguish themselves from the civilian population when they participate in an attack or in a military operation preparatory to an attack".[18]
20. Italy's LOAC Elementary Rules Manual states that combatants, members of the armed forces, "distinguish themselves by their uniform or by a recognizable distinctive sign or at least by carrying their arms openly".[19]
21. Kenya's LOAC Manual states that:

> While engaged in combat action or in a military operation preparatory to it, combatants must distinguish themselves from the civilian population. It is customary for members of organized armed forces to wear uniform. Members of any other militias, volunteer corps or organized resistance movements wear a fixed recognizable distinctive sign or at least [carry] their arms openly.[20]

22. Madagascar's Military Manual states that combatants "distinguish themselves by their uniform or by a fixed recognisable sign or, at least, by carrying arms openly".[21] The manual further specifies that:

[14] France, *LOAC Summary Note* (1992), § 1.2; *LOAC Teaching Note* (2000), p. 2; *LOAC Manual* (2001), p. 39.
[15] Germany, *Military Manual* (1992), § 308. [16] Hungary, *Military Manual* (1992), p. 17.
[17] Israel, *Manual on the Laws of War* (1998), p. 38. [18] Italy, *IHL Manual* (1991), Vol. I, § 5.
[19] Italy, *LOAC Elementary Rules Manual* (1991), § 2.
[20] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.
[21] Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 2.

Combatants must distinguish themselves from the civilian population while engaged in a combat action or in a preparatory military operation. Members of regular armed forces or persons who are assimilated thereto usually distinguish themselves by their uniform.[22]

23. The Military Manual of the Netherlands states that:

[Combatants] have to distinguish themselves from the civilian population. This is a consequence of the principle that the parties to the conflict have to distinguish at all times between civilians and combatants. Combatants distinguish themselves in the first place by wearing a uniform. In addition, they have to carry their arms openly.[23]

24. New Zealand's Military Manual provides that:

With a view to ensuring protection of the civilian population, combatants are required to distinguish themselves from that population when engaged in an attack or preparing to mount an attack. Under the HR this distinction depended upon a recognisable emblem and the carrying of arms openly. In the case of a State's regular forces, the uniform worn by the forces strengthens the distinction.[24]

25. South Africa's LOAC Manual states that:

It is clearly important that combatants, while engaged in combat action or in a military operation preparatory thereto, must distinguish themselves from the civilian population. Members of regular and assimilated armed forces normally distinguish themselves by their uniform. Members of other armed forces wear a fixed, recognisable and distinctive sign and carry their arms openly.[25]

26. Sweden's IHL Manual states that:

The basic rule for the conduct of combatants is that they are obliged to distinguish themselves from the civilian population when taking part in an attack or in a military operation in preparation for an attack. For combatants belonging to regular forces, this is no problem, since they are recognizable by their uniforms and normally also by the carrying of weapons.[26]

27. Switzerland's Basic Military Manual states that "in order to increase the protection of the civilian population against the effects of hostilities, combatants must distinguish themselves from the civilian population by wearing a uniform, before and during an attack".[27] The manual specifies that "all members of the regular armed forces wear a uniform . . . The uniform allows for a distinction to be made between friendly and enemy armed forces, on the one hand, and between armed forces and civilians, on the other hand."[28]

[22] Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § A.
[23] Netherlands, *Military Manual* (1993), p. III-4; see also *Military Handbook* (1995), p. 7-39.
[24] New Zealand, *Military Manual* (1992), § 805(3).
[25] South Africa, *LOAC Manual* (1996), § 26.
[26] Sweden, *IHL Manual* (1991), Section 3.2.1.4, p. 36.
[27] Switzerland, *Basic Military Manual* (1987), Article 26(1).
[28] Switzerland, *Basic Military Manual* (1987), Articles 57 and 58.

28. Togo's Military Manual states that "combatants must distinguish themselves from the civilian population by wearing their uniform – or a fixed distinctive sign – and by carrying their arms openly".[29]
29. The UK LOAC Manual states that "all combatants are required to distinguish themselves from the civilian population, usually by wearing uniform".[30] The manual also states that "it is customary for members of organised armed forces to wear uniform".[31]
30. The US Air Force Pamphlet states that combatants are only entitled to POW status if, *inter alia*, they have a fixed distinctive sign and carry arms openly.[32] It explains that the requirement of having a fixed distinctive sign "may be satisfied by wearing a uniform [and] insures that combatants are clearly distinguishable from civilians to enhance protection of civilians. Less than a complete uniform will suffice provided it serves to distinguish clearly combatants from civilians."[33] With respect to the requirement to carry arms openly, the Pamphlet considers that "irregular forces do not satisfy this requirement by carrying arms concealed about the person or if the individuals hide their weapons on the approach of the enemy".[34]
31. The US Naval Handbook states that "combatants . . . carry their arms openly, and otherwise distinguish themselves clearly from the civilian population".[35]

National Legislation
32. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Articles 44(3) and 45(3) AP I, is a punishable offence.[36]
33. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[37]

National Case-law
34. In its judgement in the *Kassem case* in 1969, an Israeli Military Court held that the defendants sufficiently fulfilled the requirement to distinguish themselves from the civilian population by wearing mottled caps and green

[29] Togo, *Military Manual* (1996), Fascicule I, p. 13.
[30] UK, *LOAC Manual* (1981), Section 3, p. 9, § 2.
[31] UK, *LOAC Manual* (1981), Section 3, p. 8, § 1.
[32] US, *Air Force Pamphlet* (1976), § 3-2(b)(3); see also *Field Manual* (1956), § 61(a)(2).
[33] US, *Air Force Pamphlet* (1976), § 3-2(b)(4)(b), see also § 7-2 and *Field Manual* (1956), § 64(b).
[34] US, *Air Force Pamphlet* (1976), § 3-2(b)(4)(c); see also *Field Manual* (1956), § 64(c).
[35] US, *Naval Handbook* (1995), § 5.3.
[36] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[37] Norway, *Military Penal Code as amended* (1902), § 108(b).

clothes, which were not customary attire for the inhabitants of the area in which the accused were captured.[38]

35. In the *Swarka case* before an Israeli Military Court in 1974, the defendants had infiltrated Israeli territory from Egypt and had launched rockets at a civilian settlement. Upon their capture, they argued that they were entitled to POW status according to Article 4(A)(1) GC III because they were regular soldiers in the Egyptian army operating under orders from their commander. The Prosecutor contended that they could not benefit from this status since they wore civilian clothes while carrying out their mission. The Court observed that, indeed, neither the Hague Regulations nor GC III provided that a member of the regular armed forces had to wear a uniform at the time of capture in order to be considered a POW. It considered, however, that it would be quite illogical to regard the duty to wear a uniform (in the sense of a distinctive sign) as imposed only on the quasi-military units referred to in Article 4(A)(2) GC III and not on soldiers of regular armed forces. The Court concluded that the defendants were to be prosecuted as saboteurs.[39]

Other National Practice

36. On the basis of an interview with a retired army general, the Report on the Practice of Botswana states that "the position of Botswana is that combatants will usually have well identifiable uniforms".[40]

37. At the CDDH, the FRG stated that "the basic rule set forth in Article 42 [now Article 44], paragraph 3, first sentence, that combatants are obliged to distinguish themselves from the civilian population means that these combatants have to distinguish themselves in a clearly recognizable manner".[41]

38. On the basis of interviews with senior army officers, the Report on the Practice of Indonesia states that:

> There is no national regulation for the implementation of the distinction principle in non-international armed conflict. However, in certain insurgencies during the 1950's and the 1960's, Indonesian armed forces used uniforms as one of the criteria to distinguish between rebels and civilians . . . Though the uniforms used by some rebels did not resemble the military uniform, for example, the rebels used no insignia or other emblems, their differing colour was the main criterion by which the military was able to distinguish them from civilians.[42]

39. At the CCDH, Italy stated that draft Article 42(3) AP I (now Article 44(3)) "embodied and reaffirmed without amendment or derogation a basic rule of existing international law, the need for combatants to distinguish themselves

[38] Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969.
[39] Israel, Military Court, *Swarka case*, Judgement, 1974.
[40] Report on the Practice of Botswana, 1998, Interview with a retired army general, Chapter 1.1.
[41] FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 136.
[42] Report on the Practice of Indonesia, 1997, Interviews with senior army officers, Chapter 1.1, note 2.

from the civilian population". It added that "it was essential that the distinction principle should remain the basis of international humanitarian law, because on respect for that principle depended the protection of the civilian population".[43]

40. At the CDDH, the Netherlands stated that it was convinced that "the fundamental rule of distinction between combatants and the civilian population had not been weakened by Article 42 [now Article 44]". It stressed, however, that "the article should not be construed as entitling combatants to waive that distinction".[44]

41. At the CDDH, the US voted in favour of draft Article 42 AP I (now Article 44) and stated that:

> The basic rule contained in the first sentence of paragraph 3 meant that throughout their military operations combatants must distinguish themselves in a clearly recognized manner. Representatives who had stated or implied that the only rule on the subject was that set forth in the second sentence of paragraph 3 were wrong.[45]

42. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations".[46]

43. In 1987, the Legal Adviser of the US Department of State stated that:

> A fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying their weapons openly . . . Fighters who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy.[47]

III. Practice of International Organisations and Conferences

44. No practice was found.

[43] Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, pp. 122–123, §§ 21 and 24.

[44] Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 142, § 5.

[45] US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 150, § 44.

[46] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

[47] US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 466.

IV. Practice of International Judicial and Quasi-judicial Bodies

45. No practice was found.

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

46. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

While engaged in combat action or in a military operation preparatory to it, combatants must distinguish themselves from the civilian population.

Members of regular and assimilated armed forces normally distinguish themselves by their uniform.

Members of other armed forces wear a fixed recognizable distinctive sign and carry their arms openly.[48]

47. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC reminded all those involved that in order "to avoid endangering the civilian population, those bearing weapons and all those who take part in violence must distinguish themselves from civilians".[49]

VI. Other Practice

48. No practice was found.

Levée en masse

I. Treaties and Other Instruments

Treaties

49. Article 2 of the 1899 HR provides that:

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

50. Article 2 of the 1907 HR provides that:

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

[48] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 48.

[49] ICRC, Communication to the Press No. 00/42, ICRC Appeal to All Involved in Violence in the Near East, 21 November 2000.

51. Article 4(A)(6) GC III grants POW status to persons taking part in a *levée en masse* "provided they carry arms openly and respect the laws and customs of war".

Other Instruments

52. The 1863 Lieber Code states that:

> 51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy "en masse" to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.
> 52. No belligerent has the right to declare that he will treat every captured man in arms of a levy "en masse" as a brigand or bandit.
>
> If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53. Article 10 of the 1874 Brussels Declaration states that:

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

54. According to Article 2 of the 1880 Oxford Manual "the armed force of a State includes . . . the inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves".

II. National Practice

Military Manuals

55. Argentina's Law of War Manual provides that participants in a *levée en masse* enjoy POW status upon capture provided they carry arms openly and respect the laws and customs of war.[50]

56. Australia's Defence Force Manual provides that:

> Where the inhabitants of a country or territory spontaneously "take up arms" to resist an invader, LOAC recognises them as combatants provided they do so when there has not been time to form themselves into units and they respect LOAC. Individuals acting on their own are not entitled to combatant status nor the benefits or detriment flowing from that status.[51]

57. Belgium's Law of War Manual states that:

[50] Argentina, *Law of War Manual* (1969), § 2.002(6).
[51] Australia, *Defence Force Manual* (1994), § 514, see also Glossary, p. xxiv and *Commanders' Guide* (1994), § 612.

The population of a non-occupied territory who spontaneously take up arms to resist the invading forces without having had time to form themselves into an organised resistance movement or to join the regular armed forces are considered combatants on the condition that this population:

a. respects the laws and customs of war;
b. carries arms openly.[52]

58. Cameroon's Instructors' Manual states that participants in a *levée en masse* are recognised as combatants.[53]

59. Canada's LOAC Manual provides that:

As a general rule, civilians are considered non-combatants and cannot lawfully engage in hostilities. There is, however, an exception to this rule for inhabitants of a territory that has not been occupied by an enemy. Where they have not had time to form themselves into regular armed units, inhabitants of a non-occupied territory are lawful combatants if:

a. on the approach of the enemy they spontaneously take up arms to resist the invading forces;
b. they carry arms openly; and
c. they respect the LOAC.

This situation is referred to as a *levée en masse*.[54]

60. Germany's Military Manual provides that members of a *levée en masse* "shall be combatants. They shall carry arms openly and respect the laws and customs of war in their military operations."[55]

61. Italy's IHL Manual states that participants in a *levée en masse* are considered combatants provided they "carry arms openly and respect the laws and customs of war".[56]

62. According to Kenya's LOAC Manual, "participants in a *levée en masse* . . . are considered as combatants if: (a) they carry their arms openly [and] (b) they comply with the law of armed conflict".[57]

63. According to Madagascar's Military Manual, "participants in a *levée en masse* are considered as combatants if they carry arms openly and respect the law of war".[58]

64. The Military Manual of the Netherlands states that participants in a *levée en masse* are considered as combatants if "they carry arms openly and comply with the humanitarian law of war".[59]

[52] Belgium, *Law of War Manual* (1983), p. 20.
[53] Cameroon, *Instructors' Manual* (1992), p. 35, see also pp. 20 and 143.
[54] Canada, *LOAC Manual* (1999), p. 3-2, § 13.
[55] Germany, *Military Manual* (1992), § 310.
[56] Italy, *IHL Manual* (1991), Vol. I, § 4(c).
[57] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.
[58] Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § A.
[59] Netherlands, *Military Manual* (1993), pp. III-1 and III-2.

65. New Zealand's Military Manual states that:

> Civilians who take up arms on the approach of an enemy to resist the invasion of their State constitute a *levée en masse* and are regarded as combatants so long as they carry their arms openly and respect the laws and customs of war . . . They are not entitled to such treatment if they take up arms after their territory has been occupied, unless they are so organised as to constitute a resistance movement.[60]

66. According to Nigeria's Manual on the Laws of War, "inhabitants of a territory not under occupation, who on the approach of the enemy take up arms to resist the invading forces without having had time to form themselves into regular armed units," have the right to POW status, "provided they carry arms openly and respect the Laws of War".[61]

67. Russia's Military Manual provides that participants in a *levée en masse* enjoy POW status upon capture provided they carry arms openly and respect IHL.[62]

68. South Africa's LOAC Manual states that participants in a *levée en masse* are considered combatants "if they carry arms openly and respect the law of war".[63]

69. Spain's LOAC Manual considers the population of a territory that spontaneously takes up arms against an invading army to be combatants, provided they are part of an organised force, commanded by a person responsible for the conduct of his or her subordinates, subject to an internal disciplinary system, and comply with the law of war.[64]

70. Switzerland's Basic Military Manual states that "the civilian population does not have the right to take up arms except in the case of a *levée en masse* to resist an invader".[65] The manual further specifies that:

> The civilian population of a non-occupied territory which, *en masse*, takes up arms spontaneously at the approach of the enemy is entitled to commit acts of war, even if this population did not have time to organise itself, provided arms are carried openly and the laws and customs of war are respected.[66]

71. The UK Military Manual considers that participants in a *levée en masse*

> are recognised as being entitled to the privileges of belligerent forces if they fulfil the last two conditions laid down for irregulars, namely, if they carry arms openly and conduct their operations in accordance with the laws and customs of war. They are exempt from the obligations of being under the command of a responsible commander and wearing a distinctive sign. The inhabitants of a territory already invaded by the enemy who rise in arms do not enjoy the privileges of belligerent

[60] New Zealand, *Military Manual* (1992), §§ 803(2) and 806(4).
[61] Nigeria, *Manual on the Laws of War* (undated), § 33(f).
[62] Russia, *Military Manual* (1990), § 13.
[63] South Africa, *LOAC Manual* (1996), § 24(b).
[64] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).
[65] Switzerland, *Basic Military Manual* (1987), Article 26(3).
[66] Switzerland, *Basic Military Manual* (1987), Article 65.

forces and are not entitled to be treated as prisoners of war, unless they are members of organised resistance movements fulfilling the conditions set out in the P.O.W. Convention, Art. 4A(2).[67]

72. The US Air Force Pamphlet provides that:

A *levée en masse* need not be organized, under command, or wear a distinctive sign. However, members must carry arms openly and comply with the law of armed conflict. To be a lawful *levée en masse*, it must be a spontaneous response by inhabitants of a territory not under occupation to an invading force. Spontaneity requires that there be no time to organize into regular armed forces.[68]

73. The YPA Military Manual of the SFRY (FRY) states that participants in a *levée en masse* are considered members of the armed forces if they carry arms openly and respect the law of war.[69]

National Legislation

74. No practice was found.

National Case-law

75. No practice was found.

Other National Practice

76. In 1991, a Belgian parliamentary report considered that in the case of a *levée en masse*, actions in defence of the territory are permitted and justified by law even if they are not ordered by a proper authority.[70]

III. Practice of International Organisations and Conferences

77. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

78. No practice was found.

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

79. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

[67] UK, *Military Manual* (1958), § 97; see also *LOAC Manual* (1981), Section 3, pp. 8–9, § 1(c).
[68] US, *Air Force Pamphlet* (1976), § 3-2(b)(5); see also *Field Manual* (1956), § 65.
[69] SFRY (FRY), *YPA Military Manual* (1988), § 48(3).
[70] Belgium, Senate, Report, Enquête parlementaire sur l'existence en Belgique d'un réseau de renseignements clandestin international, 1990–1991 Session, Doc. 1117-4, 1 October 1991, § 24.

Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously and in mass take up arms to resist the invading forces, without having had time to form themselves into organized armed units, provided they carry arms openly and respect the law of war, are considered as combatants.[71]

VI. Other Practice

80. No practice was found.

Resistance and liberation movements

Note: *Chapter 1, sections C and D, provides numerous references to the requirements for resistance movements to be considered as combatants, notably by having a distinctive sign and carrying arms openly, as provided for in Article 4(A)(2) GC III. These are not, generally, repeated here.*

I. Treaties and Other Instruments

Treaties

81. Article 44(3) AP I provides that:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

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

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 c).

Article 44 AP I was adopted by 73 votes in favour, one against and 21 abstentions.[72]

82. Article 45(3) AP I provides that "any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol". Article 45 AP I was adopted by consensus.[73]

[71] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 50.
[72] CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 121.
[73] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.

83. Upon signature and/or ratification of AP I, Australia, Belgium, Canada, France, Germany, Ireland, South Korea and UK stated that the situation described in the second sentence of Article 44(3) AP I could exist only in occupied territories or in armed conflicts covered by Article 4(1) AP I (wars of national liberation).[74]

84. Upon ratification of AP I, Italy and Spain stated that the situation described in the second sentence of Article 44(3) AP I could exist only in occupied territories.[75]

85. Upon ratification of AP I, Australia stated that, in the context of Article 44(3) AP I, the term "deployment" meant "any movement towards a place from which an attack is to be launched".[76] Similar statements were made by Belgium, Canada, France, Germany, Ireland, Italy, South Korea, Netherlands, New Zealand, Spain, UK and US upon signature and/or ratification of AP I.[77]

86. Upon ratification of AP I, Australia stated that it would interpret the words "visible to the adversary" used in Article 44(3) AP I as "including visible with the aid of binoculars, or by infra-red or image intensification devices".[78]

87. Upon ratification of AP I, New Zealand stated that it would interpret the words "visible to the adversary" used in Article 44(3) AP I as including "visible with the aid of any form of surveillance, electronic or otherwise, available to help keep a member of the armed forces of the adversary under observation".[79]

Other Instruments

88. No practice was found.

[74] Australia, Declarations made upon ratification of AP I, 21 June 1991, § 2; Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 4; Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 6(a); France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 8; Germany, Declarations made upon ratification of AP I, 14 February 1991, § 3; Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 7(a); South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 1; UK, Declarations made upon signature of AP I, 12 December 1977, § c; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § g.

[75] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 3; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 4.

[76] Australia, Declarations made upon ratification of AP I, 21 June 1991, § 2.

[77] Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 4; Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 6(b); France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 8; Germany, Declarations made upon ratification of AP I, 14 February 1991, § 3; Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 7(b); Italy, Declarations made upon ratification of AP I, 27 February 1986, § 4; South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 1; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 3; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 1; Spain, Interpretative declarations made upon ratification of AP I, 11 April 1989, § 4; UK, Declarations made upon signature of AP I, 12 December 1977, § c; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § g; US, Declarations made upon signature of AP I, 12 December 1977, § 2.

[78] Australia, Declarations made upon ratification of AP I, 21 June 1991, § 2.

[79] New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 1.

II. National Practice

Military Manuals

89. Military manuals of Argentina, Australia, Belgium, Canada, Germany, Italy, Kenya, Madagascar, Netherlands, New Zealand, South Africa, Sweden and UK restate the rule contained in the second sentence of Article 44(3) AP I.[80]

90. According to Benin's Military Manual, combatants "distinguish themselves . . . at least by carrying arms openly".[81]

91. Croatia's LOAC Compendium states that combatants must carry their arms openly "at least during every military engagement [and] as long as they are visible to the enemy while engaged in a military deployment".[82]

92. Ecuador's Naval Manual provides that *guerrilleros* and members of resistance movements are considered combatants if they meet certain requirements, including "wearing a uniform or some form of identification recognizable from a distance [and] carrying arms openly".[83]

93. France's LOAC Manual states that:

> Members of guerrilla movements or armed groups can have combatant status . . . provided they carry arms openly during each engagement and they are subject to a hierarchical command structure and an internal disciplinary system which ensures, in particular, respect for the law of armed conflict.[84]

94. According to Hungary's Military Manual, combatants must carry their arms openly "at least during every military engagement [and] as long as they are visible to the enemy while engaged in a military deployment".[85] The manual further states that "inhabitants of occupied territory may organize resistance movements. Members are combatants if they meet the requirements of armed forces."[86]

95. Israel's Manual on the Laws of War states that:

> Undoubtedly, the conditions mentioned [in Article 4(A)(2) GC III] make it very difficult for non-regular forces for which, in many cases, the fulfilment of the cumulative conditions of openly bearing arms and wearing a recognizable distinctive sign may be suicidal. Still, these are the necessary conditions called for in conducting a regular war between combatant forces, without dragging the population into the conflict.
>
> In an effort to extend the protection accorded to include non-regular combatants, the Additional Protocols from 1977 drastically scaled back the conditions for

[80] Argentina, *Law of War Manual* (1989), § 1.08(3); Australia, *Defence Force Manual* (1994), § 513; Belgium, *Law of War Manual* (1983), pp. 20–21; Canada, *LOAC Manual* (1999), p. 3-2, § 16; Germany, *Military Manual* (1992), § 309; Italy, *IHL Manual* (1991), Vol. I, § 5; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8; Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § A; Netherlands, *Military Manual* (1993), p. III-4; Netherlands, *Military Handbook* (1995), p. 7-39; New Zealand, *Military Manual* (1992), § 805(3) and (4); South Africa, *LOAC Manual* (1996), § 27; Sweden, *IHL Manual* (1991), Section 3.2.1.4; UK, *LOAC Manual* (1981), Section 3, p. 9, § 2.

[81] Benin, *Military Manual* (1995), Fascicule I, p. 12.

[82] Croatia, *LOAC Compendium* (1991), p. 6.

[83] Ecuador, *Naval Manual* (1989), § 11.8.

[84] France, *LOAC Manual* (2001), p. 39.

[85] Hungary, *Military Manual* (1992), p. 17.

[86] Hungary, *Military Manual* (1992), p. 103.

defining a legal combatant. These protocols established that it is sufficient for an underground fighter to bear his arms openly during a military operation and for the duration that he is visible to the enemy, omitting all the other conditions. More seriously, the Protocols state that even non-compliance with the laws of war does not in itself deprive the non-regular combatant of his right to prisoner-of-war status . . . Clearly, such provisions deplete the provisions of the Geneva Convention of all substance, since we are losing sight of the primary goals for which such requirements were intended, namely the mutual observance of the laws of war and the distinction between combatants and the civilian population as well as the concealment of combatants among the civilian population.

We find then that, in effect, the Additional Protocols grant prisoner-of-war protection to any terrorist group that is organized and under the direct command of a commander in charge of his subordinates. Obviously, countries that find themselves embroiled in a struggle with terrorist groups have not adopted these provisions, which is one reason why many countries (including Israel and the U.S.) have not ratified the Additional Protocols. Claims made by terrorists before the IDF's military courts that they are entitled to prisoner-of-war status have been rejected.[87]

96. Russia's Military Manual provides that members of organised resistance movements enjoy POW status upon capture provided they fulfil the conditions set out in Article 4(A)(2) GC III.[88]

97. Spain's LOAC Manual states that *guerrilleros* are considered lawful combatants if "they operate in occupied territory, carry arms openly during each engagement and during any movement towards the place from which or towards which an attack is to be launched".[89]

98. Switzerland's Basic Military Manual provides that:

Exceptionally, for example, in the case of guerrilla warfare, combatants are not obliged to wear a uniform or a distinctive sign. They are considered as members of the armed forces who have the right to prisoner-of-war status, provided they fight for a State or a liberation movement, within an organisation which has a responsible command and a disciplinary system, and provided they carry their arms openly before and during an attack.[90]

99. The US Air Force Pamphlet provides that irregular forces, such as members of organised resistance movements belonging to a party to the conflict, are considered combatants if they meet certain requirements "customarily required of all combatants", including having a fixed distinctive sign recognisable at a distance and carrying arms openly.[91]

100. The YPA Military Manual of the SFRY (FRY) states that:

Civilians who during an armed attack or a military operation preparatory to an attack do not wear any distinctive sign, that is do not distinguish themselves from the

[87] Israel, *Manual on the Laws of War* (1998), pp. 50–51.
[88] Russia, *Military Manual* (1990), § 13.
[89] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).
[90] Switzerland, *Basic Military Manual* (1987), Article 26(2), see also Article 64.
[91] US, *Air Force Pamphlet* (1976), § 3-2(b)(3); see also *Field Manual* (1956), § 61(a)(2) and *Naval Handbook* (1995), § 11.7.

civilian population, are considered combatants and members of the armed forces, provided they carry arms openly during each military engagement as well as during such time as they are visible to the adversary preceding an attack in which they are to participate and provided they comply with the laws of war.[92]

101. Several manuals also contain interpretations of the terms used in the second sentence of Article 44(3) AP I, including those of Belgium, Germany, Italy, Kenya, Netherlands, New Zealand, South Africa, Sweden and UK.

102. Belgium's Law of War Manual states that:

> It would be preferable that Belgium only supports this rule on condition that it does not apply to operations on non-occupied Belgian territory. The term "military deployment" should, on the other hand, be interpreted very widely in the sense that it covers every movement towards the place from which an attack is to be launched. To be "visible" includes being able to "be observed" even at night by means of infrared rays and the notion "adversary" should be clarified.[93]

103. Germany's Military Manual limits the application of the rule contained in the second sentence of Article 44(3) AP I to a "situation in occupied territories and in wars of national liberation" and states that "the term 'military deployment' refers to any movement towards the point from which an attack shall be launched".[94]

104. Italy's IHL Manual states that the situation envisaged in the second sentence of Article 44(3) AP I does not apply to Italian territory but only to occupied territory and that the term deployment means any movement towards a place from which an attack is to be launched.[95]

105. According to Kenya's LOAC Manual, the term deployment refers to "any movement towards a place from which or where a combat action is to take place".[96]

106. The Military Manual of the Netherlands considers that the rule contained in the second sentence of Article 44(3) AP I applies in wars of national liberation and in occupied territories, i.e. "conflicts which are fought with guerrilla-like tactics in which it is not feasible for combatants to distinguish themselves at all times from the civilian population and to constantly carry arms openly". The manual adds that "the Netherlands, together with a number of other NATO countries, has taken the position that the term 'deployment' means any movement towards a place from which an attack is to be launched".[97]

107. New Zealand's Military Manual specifies that the situations to which the rule contained in the second sentence of Article 44(3) AP I applies are "special and exceptional. Many States, including New Zealand in its ratification,

[92] SFRY (FRY), *YPA Military Manual* (1988), § 48(4).
[93] Belgium, *Law of War Manual* (1983), p. 21.
[94] Germany, *Military Manual* (1992), § 309.
[95] Italy, *IHL Manual* (1991), Vol. I, § 5.
[96] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.
[97] Netherlands, *Military Manual* (1993), p. III-4.

have declared that these situations can occur only . . . during a war of self-determination conducted by a national liberation movement or in occupied territory".[98] With respect to the expression "visible to the adversary", the manual observes that:

> The text does not indicate whether they must be visible to the naked eye or whether it is sufficient for them to be seen with the aid of instruments. New Zealand's declaration on ratification provided for the term to include "the assistance of any form of surveillance, electronic or otherwise, available to help keep a member of the armed forces of the adversary under observation." While this view was shared by a number of Western States at the time of negotiation of AP I, few States have made it the subject of an understanding: Australia, indeed, takes the view that visibility without electronic aids is a more appropriate interpretation.[99]

With respect to the term "deployment", the manual states that "many States, including New Zealand on ratification [of AP I], have declared that this means any movement towards a place from which an attack is to be launched".[100]

108. South Africa's LOAC Manual states that the term "deployment" refers to "any movement towards a place from which, or where, a combat action is to take place".[101]

109. Sweden's IHL Manual provides that "the rule in Article 44:3 may only be applied by resistance units in enemy occupied or held territory or – in the case of a national liberation movement – within an area controlled by the adversary". The manual considers that part of the text contained in the second sentence of Article 44(3) AP I, namely the description "during the time the combatant is visible to the adversary when participating in military preparation for the launching of an attack in which he is to take part", is "very unclear, giving rise to varying interpretations".[102]

110. The UK LOAC Manual states that the "unusual combat conditions" to which the rule in the second sentence of Article 44(3) AP I applies "can only occur in occupied territory and during wars of national liberation . . . 'Deployment' in this context means any movement towards the place from which the attack is to be launched."[103]

National Legislation

111. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 44(3) and 45(3) AP I, is a punishable offence.[104]

[98] New Zealand, *Military Manual* (1992), § 805(3), footnote 17.
[99] New Zealand, *Military Manual* (1992), § 805(4), footnote 23.
[100] New Zealand, *Military Manual* (1992), § 805(4), footnote 24.
[101] South Africa, *LOAC Manual* (1996), § 27.
[102] Sweden, *IHL Manual* (1991), Section 3.2.1.4, p. 37.
[103] UK, *LOAC Manual* (1981), Section 3, p. 9, §§ 3 and 5.
[104] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

112. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[105]

National Case-law

113. In its judgement in the *Kassem case* in 1969, an Israeli Military Court held that in order to benefit from POW status, a person must carry arms openly. The Court specified that the phrase "carrying arms openly" was not to be construed as carrying arms in places where the arms and the persons bearing them cannot be seen, nor does it refer to bearing arms during a hostile engagement. According to the Court, the fact that the defendants used their weapons during their encounter with the IDF is unimportant since no weapons were known to be in their possession until they started firing at Israeli soldiers. It was thus ruled that they did not carry arms openly.[106]

Other National Practice

114. At the CDDH, Argentina abstained in the vote on draft Article 42 AP I (now Article 44) because "the text adopted did not guarantee the civilian population the minimum protection it needed".[107]

115. At the CDDH, Brazil voted against draft Article 42 AP I (now Article 44) in Committee III because "the provisions relating to identification of combatants were not sufficiently clear to ensure that the civilian population would be protected from the inevitable risks when it was not possible to identify unmistakably those engaged in military activities".[108] In the final vote in plenary session, Brazil abstained but gave no additional explanation.

116. At the CDDH, Canada abstained in the vote on draft Article 42 AP I (now Article 44) because it "was concerned about the perhaps necessary vagueness of the language adopted in some paragraphs, but hoped that time would make the meaning more precise".[109] Canada further explained its understanding that the situations referred to in the second sentence of the third paragraph "could exist only in occupied territory; or in armed conflicts as described in Article 1, paragraph 4, of Protocol I" and that the term "military deployment" meant "any movement towards a place from which an attack was to be launched".[110]

[105] Norway, *Military Penal Code as amended* (1902), § 108(b).
[106] Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969.
[107] Argentina, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 124, § 33.
[108] Brazil, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.56, 22 April 1977, p. 185, § 80.
[109] Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 145, § 23.
[110] Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 146, § 24.

117. At the CDDH, Colombia abstained in the vote on draft Article 42 AP I (now Article 44) because it lacked precision and did not safeguard the civilian population sufficiently.[111]

118. At the CDDH, Egypt stated that "the right to disguise was confined to the combatants of liberation movements; regular combatants were not released . . . from the obligation to wear uniform during military operations – failure to do so would be to commit an act of perfidy". It further explained that it interpreted the expression "military deployment" as meaning "the last step when the combatants were taking their firing positions just before the commencement of hostilities; a guerrilla should carry his arms openly only when within range of the natural vision of his adversary".[112]

119. At the CDDH, the FRG stated that the second sentence of draft Article 42(3) AP I (now Article 44(3)) "applies only to exceptional situations such as those occurring in occupied territories" and that the term "military deployment" means "any movement toward a place from which an attack is to be launched".[113]

120. In reply to a written question in parliament in 1977, a German Minister of State emphasised that the German delegation present during the negotiation of the Additional Protocols favoured the inclusion of a rule imposing a duty on guerrillas to carry arms openly in combat, as well as during the phase preceding an attack. According to Germany, a clear distinction between civilians and combatants was absolutely necessary, even in the context of guerrilla warfare.[114]

121. At the CDDH, Greece stated that the situations described in the second sentence of draft Article 42(3) AP I (now Article 44(3)) "which were quite exceptional, could exist not only in occupied territories but also in armed conflicts as described in paragraph 4 of Article 1 of draft Protocol I".[115]

122. At the CDDH, Iran indicated that draft Article 42(3) AP I (now Article 44(3)) "applied only to members of resistance movements fighting in occupied territory against an Occupying Power and to members of national liberation movements fighting against minority racialist régimes".[116]

123. At the CDDH, Ireland abstained in the vote on draft Article 42 AP I (now Article 44) because it considered that "the protection of the civilian population

[111] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 181.

[112] Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 145, §§ 19 and 21.

[113] FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 136.

[114] Germany, Lower House of Parliament, Answer by Dr. Hamm-Brücher, Minister of State, to a written question, 13 May 1977, *Plenarprotokoll* 8/27, 13 May 1977, p. 1985.

[115] Greece, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 127, § 47.

[116] Iran, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 152, § 55.

demanded by humanitarian principles is eroded by Article 42 to an unacceptable extent".[117]

124. At the CDDH, Israel voted against draft Article 42 AP I (now Article 44) because it was of the opinion that:

> Article 42, paragraph 3, could be interpreted as allowing the combatant not to distinguish himself from the civilian population, which would expose the latter to serious risks and was contrary to the spirit and to a fundamental principle of humanitarian law. In the case of guerrilla warfare it was particularly necessary for combatants to distinguish themselves because that was the only way in which the civilian population could be effectively protected ... Moreover, once combatants were freed from the obligation to distinguish themselves from the civilian population the risk of terrorist acts increased ... Prisoner-of-war status depended on two essential conditions: first, respect for the rules of international law applicable in armed conflicts (for the members of regular forces there was a *praesumptio juris et de jure* that that condition had been met); secondly, a clear and unmistakable distinction between the combatants and the civilian population. They were two *sine qua non* conditions established in international custom and in numerous treaties.[118]

125. The Report on the Practice of Israel states that Israel does not consider that Article 44(3) AP I reflects customary international law.[119]

126. At the CDDH, Italy abstained in the vote on draft Article 42 AP I (now Article 44) "essentially because of the ambiguity of paragraphs 3 and 4 of Article 42, but considered that the article was not unacceptable in itself if its true meaning ... could be detected".[120] Italy further stated that the particular situations to which the second sentence of the third paragraph referred "were evidently those which occurred in occupied territory or in other identical situations so far as substance was concerned, that was to say where resistance movements were organized".[121]

127. At the CDDH, Japan abstained in the vote on draft Article 42 AP I (now Article 44) because it considered that "the provisions of paragraph 3 on the ways in which members of irregular forces were required to distinguish themselves from civilians would lead to inadequate protection of the civilian population".[122] It further stated that paragraph 3 should be construed "as applying restrictively to exceptional cases" and that the term "military deployment" used in paragraph 3(b) meant "any movement towards a place from which an attack was to be launched".[123]

[117] Ireland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 137.
[118] Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, pp. 121–122, §§ 17 and 19.
[119] Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.1.
[120] Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 122, § 20.
[121] Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 123, § 22.
[122] Japan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 152, § 51.
[123] Japan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 152, § 53.

128. At the CDDH, the Netherlands stated that it understood the phrase "military deployment" in paragraph 3(b) of draft Article 42 AP I (now Article 44) to mean "any tactical movement towards a place from which the attack is to be launched".[124]

129. At the CDDH, Portugal abstained in the vote on draft Article 42 AP I (now Article 44) and considered that "the exceptional rule in the second sentence of the [third] paragraph did not ensure reasonable protection for the civilian population".[125]

130. At the CDDH, Spain abstained in the vote on draft Article 42 AP I (now Article 44) because:

> The text presented does not guarantee the safety of the civilian population, which is the essential aim of the instruments under consideration. In the view of this delegation, the terms in which the article is drafted could favour the development of the new phenomenon known as urban guerrilla warfare and, therefore, a certain form of terrorism, thus constituting a grave danger to the security of States and a step on the road to international subversion.[126]

131. At the CDDH, Switzerland abstained in the vote on draft Article 42 AP I (now Article 44) because it was afraid that "the article would only have the effect of doing away with the distinctions between combatants and civilians. The consequence would be that the adverse party could take draconian measures against civilians suspected of being combatants."[127]

132. At the CDDH, the UAE stated that it agreed with the interpretation given by Egypt of the expression "military deployment".[128]

133. At the CDDH, the UK abstained in the vote on draft Article 42 AP I (now Article 44) and stated that "any failure to distinguish between combatants and civilians could only put the latter at risk. That risk might well become unacceptable unless a satisfactory interpretation could be given to certain provisions of Article 42."[129] The UK further stated that it considered that "the situations in which a guerrilla fighter was unable to distinguish himself from the civilian population could exist only in occupied territory" and that the word "deployment" must be interpreted as meaning "any movement towards a place from which an attack was to be launched".[130]

134. At the CDDH, Uruguay abstained in the vote on draft Article 42 AP I (now Article 44) and referred to the statements made by Argentina and Switzerland

[124] Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 142, § 6.
[125] Portugal, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 148, § 36.
[126] Spain, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.55, 26 May 1977, p. 138.
[127] Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 131, § 68.
[128] UAE, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 146, § 25.
[129] UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 132, § 73.
[130] UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 132, § 74.

and to its own statement in Committee III in which it had expressed its concern about "the foreseeable consequences of the lack of a clear distinction between the combatants and the civilian population, which would expose the civilian population to a quite unnecessary risk".[131]

135. At the CDDH, the US explained its vote in favour of draft Article 42 AP I (now Article 44) as follows:

> The article conferred no protection on terrorists. It did not authorize soldiers to conduct military operations while disguised as civilians. However, it did give members of the armed forces who were operating in occupied territory an incentive to distinguish themselves from the civilian population when preparing for and carrying out an attack . . . As regards the second sentence of paragraph 3, it was the understanding of [the US] delegation that situations in which combatants could not distinguish themselves throughout their military operations could exist only in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4, of draft Protocol I . . . The sentence was clearly designed to ensure that combatants, while engaged in military operations preparatory to an attack, could not use their failure to distinguish themselves from civilians as an element of surprise in the attack. Combatants using their appearance as civilians in such circumstances in order to aid in the attack would forfeit their status as combatants . . . Combatants must distinguish themselves from civilians during the phase of the military operation which involved moving to the position from which the attack was to be launched.[132]

136. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "the executive branch regards [the provision of Article 44(3) AP I, second sentence] as highly undesirable and potentially dangerous to the civilian population and of course does not recognize it as customary law or deserving of such status".[133]

137. In a memorandum issued in 1988, the Office of the Legal Adviser of the US Department of State stated that:

> Article 44 grants combatant status to irregular forces in certain circumstances even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the existing laws of war. This was not acceptable as a new norm of international law. It clearly does not reflect customary law.[134]

[131] Uruguay, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 144, § 18; Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.55, 22 April 1977, p. 160, § 32.

[132] US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 149–150, § 43.

[133] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

[134] US, Memorandum prepared by the Office of the Legal Adviser of the Department of State, 29 March 1988, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice*

III. Practice of International Organisations and Conferences

138. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

139. No practice was found.

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

140. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

In situations where, owing to the nature of hostilities an armed combatant cannot distinguish himself, he keeps his status as a combatant if he carries his arms openly:

a) during every military engagement;
b) as long as he is visible to the enemy while he is engaged in a military deployment, that is in any movement towards a place from which or where a combat action is to take place.[135]

VI. Other Practice

141. At the CDDH, the PLO stated that the phrase "during such time as he is visible to the adversary" used in paragraph 3 of draft Article 42 AP I (now Article 44) must be interpreted as meaning "visible to the naked eye" and that the phrase "while he is engaged in a military deployment preceding the launching of an attack" could only mean "immediately before the attack, often coinciding with the actual beginning of the attack".[136]

B. Spies

Definition of spies

I. Treaties and Other Instruments

Treaties

142. Article 29 of the 1899 HR provides that:

An individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains, or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

in International Law, 1981–1988, Department of State Publication 10120, Washington, D.C., 1993–1995, p. 3441.

135 Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 49.

136 PLO, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, pp. 147–148, § 31.

Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.

143. Article 29 of the 1907 HR provides that:

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

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

144. Article 46(2) AP I provides that:

A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

Article 46 AP I was adopted by consensus.[137]

Other Instruments

145. Article 88 of the 1863 Lieber Code states that "a spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy".

146. Article 19 of the 1874 Brussels Declaration provides that "a person can only be considered a spy when acting clandestinely or on false pretenses he obtains or endeavours to obtain information in the districts occupied by the enemy, with the intention of communicating it to the hostile party".

147. Article 22 of the 1874 Brussels Declaration provides that "soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies".

148. Article 24 of the 1880 Oxford Manual provides that "individuals may not be regarded as spies, who, belonging to the armed force of either belligerent, have penetrated, without disguise, into the zone of operations of the enemy".

[137] CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

II. National Practice

Military Manuals

149. Argentina's Law of War Manual defines spies with reference to Article 29 of the 1907 HR and considers that this definition implies that members of the armed forces who wear their uniform while gathering information are not considered to be spies.[138]

150. Australia's Commanders' Guide defines spies as "combatants who conduct covert espionage operations in enemy occupied territory, while not in uniform".[139]

151. Australia's Defence Force Manual defines espionage as "the clandestine collection of information behind enemy lines or in the area of operations with the intention of communicating that information to a hostile party to the conflict".[140]

152. Belgium's Law of War Manual defines a spy as:

> an individual who gathers or attempts to gather, clandestinely or on false pretences, information in the zone of operations of a belligerent with the intention of communicating it to the adverse party. The "zone of operations" comprises zones where no land operations are taking place but which may be hit by aerial bombardment (including bombardment by long-range missiles). This interpretation is very wide. Neutral territory on which a spy may operate cannot, however, be considered as a "zone of operations".[141]

153. Cameroon's Instructors' Manual states that "spying is to be distinguished from military intelligence. The latter is legal while the former is vigorously condemned in all national and international jurisdictions. Spying is an unlawful search for information."[142]

154. Canada's LOAC Manual defines espionage as "the collection of information clandestinely behind enemy lines or in the zone of operations while wearing civilian clothing or otherwise disguised or concealed. Spies are those who engage in espionage."[143] The manual specifies that "members of the armed forces of a party to the conflict who gather or attempt to gather information *while wearing the uniform of their armed forces* will not be considered as engaging in espionage".[144] (emphasis in original)

155. Ecuador's Naval Manual defines a spy as:

> someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of non-combatant or friendly forces status with the intention of passing that

[138] Argentina, *Law of War Manual* (1989), § 1.09(1); see also *Law of War Manual* (1969), § 2.009(1).
[139] Australia, *Commanders' Guide* (1994), § 707, see also § 913.
[140] Australia, *Defence Force Manual* (1994), § 717.
[141] Belgium, *Law of War Manual* (1983), p. 21.
[142] Cameroon, *Instructors' Manual* (1992), pp. 36 and 60.
[143] Canada, *LOAC Manual* (1999), p. 6-3, § 23.
[144] Canada, *LOAC Manual* (1999), p. 3-4, § 33.

information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.[145]

156. France's LOAC Manual defines spies with reference to Article 29 of the 1907 HR.[146]

157. Germany's Military Manual defines spies as "persons who clandestinely or on false pretences, i.e. not wearing the uniform of their armed forces, gather information in the territory controlled by the adversary".[147]

158. Kenya's LOAC Manual defines spies as:

> persons who, acting clandestinely or on false pretences, gather information in the territory of a belligerent party with the intent of communicating it to the enemy . . . If members of the armed forces gather intelligence in occupied territory, they may not be treated as spies provided they are in uniform.[148]

159. The Military Manual of the Netherlands defines spies with reference to Article 29 of the 1907 HR and states that this definition implies that combatants gathering information in uniform are not considered as spies.[149]

160. New Zealand's Military Manual defines spies as "people, wearing civilian clothing or otherwise disguised, who collect information clandestinely behind enemy lines or in the zone of operations with the intention of communicating that information to a hostile Party".[150]

161. Nigeria's Manual on the Laws of War states that:

> Soldiers or civilians acting clandestinely or on false pretences to obtain information about a belligerent with the intention to communicate it to his enemy are engaged in espionage . . . Soldiers wearing their uniform when penetrating the enemy zone of operations are not spies and if captured, should be treated as prisoners of war.[151]

162. South Africa's LOAC Manual states that espionage "entails acting clandestinely in order to obtain information for transmission back to one's own side".[152]

163. Spain's LOAC Manual states that "a member of the armed forces who gathers information is not considered to be engaged in espionage if that person is wearing regular uniform or is a resident in an occupied territory and is collecting information in that territory on behalf of the occupied power".[153]

145 Ecuador, *Naval Manual* (1989), § 12.8.
146 France, *LOAC Manual* (2001), p. 64.
147 Germany, *Military Manual* (1992), § 321.
148 Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.
149 Netherlands, *Military Manual* (1993), p. III-5.
150 New Zealand, *Military Manual* (1992), § 506(2).
151 Nigeria, *Manual on the Laws of War* (undated), § 31.
152 South Africa, *LOAC Manual* (1996), § 34(d).
153 Spain, *LOAC Manual* (1996), Vol. I, § 1.4.a.

164. Switzerland's Basic Military Manual defines a spy as "an individual who, acting clandestinely or on false pretences, gathers or attempts to gather information in the zone of operation of a belligerent with the intention of communicating it to the adverse party".[154]

165. The UK LOAC Manual defines spies as "persons who, acting clandestinely or on false pretences, gather information in the territory of a belligerent with intent to communicate it to the enemy".[155]

166. The US Naval Handbook defines a spy as:

> someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.[156]

167. The YPA Military Manual of the SFRY (FRY) provides a definition of spies similar to that contained in Article 29 of the 1907 HR.[157]

National Legislation

168. Chile's Code of Military Justice defines a spy as:

> 1) anyone who surreptitiously or with the aid of a disguise or a false name, or by concealing his status or nationality, introduces himself in time of war and without justified aim in a war zone, a military post or among troops in the field; 2) anyone who conveys communications, messages or sealed documents from the enemy without being compelled to do so, or who being so compelled does not hand them over to the national authorities; 3) anyone who engages in reconnaissance, draws up plans or makes sketches of the terrain; 4) anyone who conceals, causes to be concealed or places in a safe place a person whom he knows to be an enemy spy, agent or member of the military.

The Code also provides that "enemy soldiers who, wearing their uniforms, openly enter the national territory for, *inter alia*, the purpose of engaging in reconnaissance of the terrain or observing troop movements" shall not be considered as spies but shall be subject to the rules of war as laid down by international law.[158]

169. Mexico's Code of Military Justice as amended defines a spy as someone who has penetrated a defended place or troops in the field with the aim of collecting useful information and communicating it to the enemy.[159]

[154] Switzerland, *Basic Military Manual* (1987), Article 42.
[155] UK, *LOAC Manual* (1981), Section 3, p. 9, § 6.
[156] US, *Naval Handbook* (1995), § 12.8.
[157] SFRY (FRY), *YPA Military Manual* (1988), § 109.
[158] Chile, *Code of Military Justice* (1925), Articles 252–253.
[159] Mexico, *Code of Military Justice as amended* (1933), Articles 206–207.

170. A publication on Philippine military law states that:

A spy is a person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy; or one who, being by authority within the lines, attempts secretly to accomplish such purpose.[160]

National Case-law
171. No practice was found.

Other National Practice
172. No practice was found.

III. Practice of International Organisations and Conferences

173. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

174. No practice was found.

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

175. No practice was found.

VI. Other Practice

176. No practice was found.

Status of spies

Note: *For practice concerning summary execution of spies, see Chapter 32, section M.*

I. Treaties and Other Instruments

Treaties
177. Article 30 of the 1899 HR provides that "a spy taken in the act cannot be punished without previous trial". Article 31 specifies that "a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

[160] Claro C. Gloria, *Philippine Military Law*, Capitol Publishing House, Quezon City, 1956, p. 263.

178. Article 30 of the 1907 HR provides that "a spy taken in the act shall not be punished without previous trial". Article 31 specifies that "a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage".
179. Article 46(1) AP I provides that:

> Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

Article 46 AP I was adopted by consensus.[161]
180. Article 45(3) AP I provides that "any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol". Article 45 AP I was adopted by consensus.[162]

Other Instruments
181. Article 88 of the 1863 Lieber Code states that "the spy is punishable with death by hanging by the neck, whether or not he succeeded in obtaining information or in conveying it to the enemy".
182. Article 20 of the 1874 Brussels Declaration states that "a spy taken in the act shall be tried and treated according to the laws in force in the army which captures him". Article 21 adds that "a spy who rejoins the army to which he belongs and who is subsequently captured by the enemy is treated as a prisoner of war and incurs no responsibility for his previous acts".
183. Article 23 of the 1880 Oxford Manual states that "individuals captured as spies cannot demand to be treated as prisoners of war".
184. Article 25 of the 1880 Oxford Manual states that "in order to avoid the abuses to which accusations of espionage too often give rise in war, it is important to assert emphatically that no person charged with espionage shall be punished until the judicial authority shall have pronounced judgment".
185. Article 26 of the 1880 Oxford Manual states that "a spy who succeeds in quitting the territory occupied by the enemy incurs no responsibility for his previous acts, should he afterwards fall into the hands of that enemy".

II. National Practice

Military Manuals
186. Argentina's Law of War Manual cites Articles 29–31 of the 1907 HR.[163]

[161] CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.
[162] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.
[163] Argentina, *Law of War Manual* (1969), § 2.009.

187. Australia's Commanders' Guide states that:

The most notable exception to granting of PW status to enemy military personnel is to those individuals who are classified as spies . . . Such individuals are not entitled to PW status and may be tried as common criminals under the detaining power's criminal code. It is important to note, however, that if military clothing is worn during such operations, the perpetrators are lawful combatants and are entitled to PW status.[164]

188. Belgium's Law of War Manual states that:

Spying is not contrary to the law of war and, as a result, does not constitute a war crime. Most countries provide, however, that spying is a crime [under domestic law] in order to protect their national interests and the interests of their armed forces. A person who is caught spying for the enemy is liable to punishment, but only after being tried . . . In general, civilians act as spies. This activity, by itself, does not give them the status of combatant . . . Members of the armed forces who perform spying missions in the zone of operations will be treated, if captured, either as prisoners of war or as spies, depending on whether they accomplished their mission wearing their uniform or disguised as civilians wearing civilian clothes.[165]

189. Cameroon's Disciplinary Regulations states that:

Members of the Armed Forces in organised units, *francs-tireurs* detached from their regular units, commando detachments and isolated *saboteurs*, as well as voluntary militias, self-defence groups and organised resistance formations are lawful combatants on condition that those units, organisations or formations have a designated commander, that their members wear a distinctive sign, notably on their clothing, that they carry arms openly and that they respect the laws and customs of war. These combatants must be considered prisoners of war. Anyone who does not comply with these conditions may be considered a spy subject to the applicable criminal sanctions.[166]

190. Cameroon's Instructors' Manual states that a combatant caught spying "loses his status as a prisoner of war".[167]

191. Canada's LOAC Manual states that:

Members of the armed forces engaging in espionage *while not in uniform* may be treated as spies and lose their entitlement to PW status if they are captured before rejoining the armed forces to which they belong. Spies who are not in uniform are not lawful combatants. If they engage in hostilities, they may be punished for doing so but only after a fair trial affording all judicial guarantees.[168] [emphasis in original]

192. Croatia's LOAC Compendium states that:

The Occupying Power may impose the death penalty only on inhabitants guilty of espionage, sabotage [and] intentional offences having caused death. However, such

[164] Australia, *Commanders' Guide* (1994), § 707, see also §§ 511 and 913–914 and *Defence Force Manual* (1994), § 717.
[165] Belgium, *Law of War Manual* (1983), pp. 21–22.
[166] Cameroon, *Disciplinary Regulations* (1975), Article 30.
[167] Cameroon, *Instructors' Manual* (1992), p. 89, see also pp. 36, 60, 77 and 143.
[168] Canada, *LOAC Manual* (1999), p. 3-4, §§ 34 and 35, see also p. 6-3, §§ 23 and 24.

offences must have been punishable by death under the law in force in occupied territory before occupation.[169]

193. Croatia's Commanders' Manual provides that "search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war status."[170]

194. According to Ecuador's Naval Manual,

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.[171]

195. France's LOAC Teaching Note states that "spies . . . are not combatants and have no right to prisoner-of-war status".[172]

196. France's LOAC Manual states that "a spy has no right to prisoner-of-war status and is subject to the national legislation of the territory where he is captured".[173]

197. Germany's Military Manual states that:

Even if they are members of their armed forces, [spies] do not have the right to the status of prisoner of war. Persons who fall into the hands of the adversary while engaging in espionage shall be liable to punishment. Even if taken while engaging in espionage, a spy shall not be punished without prior conviction pursuant to regular judicial proceedings.[174]

198. Hungary's Military Manual states that:

The Occupying Power may impose the death penalty only on inhabitants guilty of espionage, sabotage [and] intentional offences having caused death. However, such offences must have been punishable by death under the law in force in occupied territory before occupation.[175]

199. Israel's Manual on the Laws of War states that:

The spy does not meet the conditions required of a legal combatant (since he is assimilated in the civilian population) and thus is not entitled to the prisoner-of-war's immunity against being tried. Therefore, a state that captures a spy is allowed to bring him to trial in accordance with its own internal laws, an offense that is generally punishable by a long prison sentence or even death . . . A spy who

[169] Croatia, *LOAC Compendium* (1991), p. 65.
[170] Croatia, *Commanders' Manual* (1992), § 31.
[171] Ecuador, *Naval Manual* (1989), § 12.8.1.
[172] France, *LOAC Teaching Note* (2000), p. 2.
[173] France, *LOAC Manual* (2001), p. 64, see also p. 40.
[174] Germany, *Military Manual* (1992), §§ 321–322.
[175] Hungary, *Military Manual* (1992), p. 101.

has succeeded in completing his mission and returning to his army is once again entitled to legal combatant status.[176]

200. Italy's LOAC Elementary Rules Manual provides that "search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war treatment."[177]

201. Kenya's LOAC Manual states that:

Those captured while engaged in espionage do not have POW status but may not be punished without trial . . . Members of the armed forces who were involved in spying cease to be spies as soon as they return to their own lines. If subsequently captured, they cannot be punished for their previous spying activities.[178]

202. Madagascar's Military Manual provides that "the search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war status."[179]

203. The Military Manual of the Netherlands states that:

A member of the armed forces who falls into the hands of the adversary while engaged in espionage has no entitlement to the status of prisoner of war; he can be treated as a spy . . . Military spies, who rejoin their forces after having accomplished their task and are subsequently captured, must be treated as prisoners of war and no longer be convicted for their earlier spying activities . . . A spy caught in the act may under no circumstances be sentenced without trial.[180]

204. New Zealand's Military Manual states that:

Although spying is not contrary to the law of armed conflict, international law provides that spies, if captured, may be tried in accordance with the law of the captor and may be liable to the death penalty. To punish them without a proper trial is, however, a war crime. The collection of information by persons wearing uniform is a permitted means of conflict and a person so engaged is liable to be fired upon as is any other member of the enemy forces. If captured, such a person is to be treated as a prisoner of war.[181]

The manual adds that:

Persons who have evaded capture when carrying out acts of espionage and who have rejoined their own forces or own national authority cannot be charged with such acts if subsequently captured; if they are members of armed forces they must be treated as prisoners of war.[182]

[176] Israel, *Manual on the Laws of War* (1998), p. 59.
[177] Italy, *LOAC Elementary Rules Manual* (1991), § 31.
[178] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.
[179] Madagascar, *Military Manual* (1994), Fiche No. 5-O, § 31.
[180] Netherlands, *Military Manual* (1993), pp. III-5 and III-6.
[181] New Zealand, *Military Manual* (1992), § 506(2) and (3).
[182] New Zealand, *Military Manual* (1992), § 506(4).

205. Nigeria's Military Manual states that "spies . . . are however not to be considered as prisoner of war".[183]

206. Nigeria's Manual on the Laws of War states that:

For the purpose of waging war it is necessary to obtain information about the enemy. To get such information, it is lawful to employ spies and use soldiers and civilians of the enemy for committing acts of treason. But although this practice by the states is considered legitimate, lawful punishment under the municipal law may be imposed upon individuals engaged in espionage or treason when they are caught by the enemy . . . Soldiers wearing their uniform when penetrating the enemy zone of operations are not spies and if captured, should be treated as prisoners of war. When a spy is apprehended, he should not be punished without a fair regular trial. A spy who succeeds to rejoin his armed forces and is subsequently captured by the enemy is not liable to be punished for his previous acts of espionage. Such immunity is not accorded to a civilian spy captured by the enemy after reaching his own territory.[184]

207. South Africa's LOAC Manual states that espionage "is not a violation of the law of war but there is no protection under the Geneva Conventions in respect of acts of espionage".[185]

208. Spain's LOAC Manual states that spies are not entitled to POW status.[186]

209. According to Sweden's IHL Manual, "spies . . . are not entitled to combatant or prisoner-of-war status".[187]

210. Switzerland's Basic Military Manual states that:

International law applicable in armed conflict does not prohibit the use of spies and secret agents, who can even be soldiers or civilians of enemy nationality. Nevertheless, upon their capture or arrest, these persons are liable to be sentenced severely, according to the domestic law of the State concerned . . . A spy who is caught in the act may not be sentenced without previous judgement.[188]

211. The UK Military Manual states that "regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war. But they would appear to be entitled, as a minimum, to the limited privileges conferred upon civilian spies or saboteurs by [Article 5 GC IV]."[189]

212. The UK LOAC Manual provides that:

Those captured while engaged in espionage do not have PW status but may not be punished without trial. If members of the armed forces gather intelligence in occupied territory they may not be treated as spies provided that they are in uniform. Even if not in uniform, members of the armed forces who were involved in spying

[183] Nigeria, *Military Manual* (1994), p. 8, § 9(c)(2).
[184] Nigeria, *Manual on the Laws of War* (undated), § 31.
[185] South Africa, *LOAC Manual* (1996), § 34(d).
[186] Spain, *LOAC Manual* (1996), Vol. I, § 1.4.
[187] Sweden, *IHL Manual* (1991), Section 3.2.1.4, p. 36.
[188] Switzerland, *Basic Military Manual* (1987), Articles 41(2) and 43.
[189] UK, *Military Manual* (1958), § 96.

cease to be spies as soon as they return to their own lines. If subsequently captured they cannot be punished for their previous spying activities.[190]

213. The US Naval Handbook states that:

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.[191]

214. The YPA Military Manual of the SFRY (FRY) states that spies caught in the act cannot be punished without previous trial, but spies who rejoin their army and are subsequently caught must be treated as POWs and incur no responsibility for their previous acts of espionage.[192]

National Legislation

215. Chile's Code of Military Justice states that spies can be sentenced to life imprisonment or death.[193]

216. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 45(3) AP I, is a punishable offence.[194]

217. Referring to Malaysia's Armed Forces Act, the Report on the Practice of Malaysia states that the use of spies is unlawful in Malaysia. The report adds that there is no statutory definition of "spy", but it nevertheless considers that it is an offence for any person subject to service law in Malaysia to assist the enemy, communicate with it or share intelligence with it and that the Official Secrets Act and Armed Forces Act provide a penalty for spying.[195]

218. Mexico's Code of Military Justice as amended provides that spies will be punished by death. Once spies have returned to their own troops and are then arrested, they cannot be punished as spies, but have to be treated as POWs.[196]

219. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[197]

[190] UK, *LOAC Manual* (1981), Section 3, pp. 9–10, § 6.
[191] US, *Naval Handbook* (1995), § 12.8.1.
[192] SFRY (FRY), *YPA Military Manual* (1988), §§ 111–112.
[193] Chile, *Code of Military Justice* (1925), Articles 252–253.
[194] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[195] Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.1, referring to *Armed Forces Act* (1972), Section 41 and *Official Secrets Act* (1972), Sections 2–3.
[196] Mexico, *Code of Military Justice as amended* (1933), Articles 206–207.
[197] Norway, *Military Penal Code as amended* (1902), § 108(b).

220. A publication on Philippine military law states that:

> Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of the Armed Forces of the Philippines or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.[198]

221. Spain's Military Criminal Code provides that non-combatants involved in military espionage are subject to punishment and do not benefit from POW status.[199]

National Case-law

222. No practice was found.

Other National Practice

223. The Report on the Practice of Botswana maintains that spies are not protected.[200]

224. The Report on the Practice of Jordan notes that while there is no definition of the concept of spies in domestic law nor any provision concerning their status, interviews with military officers confirmed that spies are put on trial in Jordan.[201]

225. According to the legal adviser of the South Korean Ministry of Foreign Affairs, a captured spy who is a member of enemy armed forces cannot be deemed a POW and may be punished under national law.[202]

226. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda affirms that spies are not considered as civilians. The report therefore concludes that spies are liable to attack.[203]

227. According to the Report on the Practice of Zimbabwe, "spies and mercenaries are likely to be regarded as combatants in Zimbabwe for purposes of being military targets. They are, however, unlikely to be afforded POW status and related protection if captured."[204]

III. Practice of International Organisations and Conferences

228. No practice was found.

198 Claro C. Gloria, *Philippine Military Law*, Capitol Publishing House, Quezon City, 1956, p. 263.
199 Spain, *Military Criminal Code* (1985), Articles 52 and 57.
200 Report on the Practice of Botswana, 1998, Chapter 1.1.
201 Report on the Practice of Jordan, 1997, Interviews with military officers, Answers to additional questions on Chapter 1.1.
202 South Korea, Opinion of a legal adviser of the Ministry of Foreign Affairs concerning the North Korean Submarine Infiltration Case, September 1996, Report on the Practice of South Korea, 1997, Chapter 1.1.
203 Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 1.1.
204 Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

IV. Practice of International Judicial and Quasi-judicial Bodies

229. In its admissibility decision in *Treholt v. Norway* in 1991, the ECiHR held that the special character of espionage meant that there was a need for additional security measures and surveillance in relation to persons suspected of spying. The Commission stated that while these increased security measures were permitted, they might not extend to interference with the fundamental rights of a detainee.[205]

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

230. No practice was found.

VI. Other Practice

231. No practice was found.

C. Mercenaries

Definition of mercenaries

I. Treaties and Other Instruments

Treaties

232. Mercenaries are defined by Article 47(2) AP I as any person who:

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

Article 47 AP I was adopted by consensus.[206]

233. In an interpretative declaration made upon accession to AP I, Algeria reserved judgement on the definition of mercenarism as set out in Article 47(2) AP I, which it deemed "restrictive".[207]

[205] ECiHR, *Treholt v. Norway*, Admissibility Decision, 9 July 1991, pp. 192 and 194.
[206] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156.
[207] Algeria, Interpretative declarations made upon accession to AP I, 16 August 1989, § 3.

234. Article 1 of the 1977 OAU Convention against Mercenarism defines a mercenary as:

Any person who:
a) is specially recruited locally or abroad in order to fight in an armed conflict;
b) does in fact take a direct part in the hostilities;
c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
e) is not a member of the armed forces of a party to the conflict; and
f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

235. Article 1 of the 1989 UN Mercenary Convention defines a mercenary as:

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

Other Instruments

236. Article 23(2) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind defines a mercenary as any individual who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
(d) is not a member of the armed forces of a party to the conflict; and
(e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

II. National Practice

Military Manuals

237. Military manuals of Argentina, Australia, Belgium, Canada, France, Netherlands, New Zealand, Spain and SFRY (FRY) contain a definition of mercenaries that is identical to the one provided by Article 47(2) AP I.[208]

238. Cameroon's Instructors' Manual defines mercenaries as "persons who are specially recruited at home or abroad to fight for pay during an armed conflict".[209]

239. Germany's Military Manual defines mercenaries as "any person who is motivated to take a direct part in the hostilities by the desire for private gain without being a national or a member of the armed forces of a party to the conflict (Art. 47 AP I). In addition, the provisions of the 1989 Mercenary Convention apply."[210]

240. Kenya's LOAC Manual defines a mercenary as "a person who takes part in the conflict for private gain, who is not a member of any organized armed forces of a Party to the conflict and has not been sent on official duty by a country not involved in the conflict".[211]

241. The UK LOAC Manual states that "a mercenary is a person who takes part in the conflict for private gain, who is not a member of any organised armed forces and has no connection with the countries involved in the conflict".[212]

242. The US Air Force Commander's Handbook states that:

Until recently, there was no generally accepted definition of a "mercenary," but the term was usually applied to foreigners who took part in an armed conflict on one side or the other, primarily for high pay or hope of booty . . . The definition of

[208] Argentina, *Law of War Manual* (1989), § 1.09(2); Australia, *Defence Force Manual* (1994), Glossary; Australia, *Commanders' Guide* (1994), Glossary, p. xxiii; Belgium, *Law of War Manual* (1983), p. 23; Canada, *LOAC Manual* (1999), p. 3-4, § 30; France, *LOAC Manual* (2001), p. 81; Netherlands, *Military Manual* (1993), p. III-6; New Zealand, *Military Manual* (1992), § 807; Spain, *LOAC Manual* (1996), Vol. I, § 1.4.b; SFRY (FRY), *YPA Military Manual* (1988), § 113.
[209] Cameroon, *Instructors' Manual* (1992), pp. 36 and 60.
[210] Germany, *Military Manual* (1992), § 303.
[211] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.
[212] UK, *LOAC Manual* (1981), Section 3, p. 10, § 7.

"mercenary" in [AP I] is so narrow that few persons would fit within it. The United States has signed this Protocol but has not yet ratified it.[213]

National Legislation

243. Armenia's Penal Code defines a mercenary as:

a person who is specially recruited, who acts in exchange for financial remuneration, who is neither a national of a party to the armed conflict or the military operations, nor its permanent resident, who is not a member of the armed forces of a party to the conflict, and who is not sent by another State to carry out official duties within the armed forces.[214]

244. Azerbaijan's Criminal Code defines a mercenary as "a person not being a citizen of a State party to an armed conflict or hostilities, not having permanent residence on the territory of the State, as well as not being sent to carry out official duties, who acts with a view to private gain".[215]

245. The Criminal Code of Belarus defines a mercenary as a person who participates, "on the territory of a foreign State, in armed conflict or hostilities and who does not belong to the armed forces of the parties to the conflict and who acts with a view to a material remuneration without being authorised by the State of his origin or by the State on whose territory he permanently resides".[216]

246. Georgia's Criminal Code defines a mercenary as "a specially recruited person who acts with the view to receive a remuneration and who is neither a national of a State party to the conflict or hostilities, nor its permanent resident and who is not sent by any other State on official duty as a member of its armed forces".[217]

247. Kazakhstan's Penal Code defines a mercenary as "any person who acts with a view to receive material remuneration or any other personal advantage and who does not belong to any party to the conflict, is not a permanent resident on its territory and is not dispatched by another State to fulfil official duties".[218]

248. Kyrgyzstan's Criminal Code defines a mercenary as "a person who acts with a view to receive a remuneration and who is not a citizen of a state party to an armed conflict or hostilities, who is not its permanent resident and who is not a person sent on an official mission".[219]

249. Moldova's Penal Code defines a mercenary as:

a person acting in the territory of a state involved in an armed conflict or in military hostilities with the aim to receive material gains, while not being a national of the

[213] US, *Air Force Commander's Handbook* (1980), § 5-3.
[214] Armenia, *Penal Code* (2003), Article 395(4).
[215] Azerbaijan, *Criminal Code* (1999), Article 114, remark.
[216] Belarus, *Criminal Code* (1999), Article 133.
[217] Georgia, *Criminal Code* (1999), Article 410, note.
[218] Kazakhstan, *Penal Code* (1997), Article 162, note.
[219] Kyrgyzstan, *Criminal Code* (1997), Article 375, note.

said state, not having a permanent residence on the territory of the latter and not being under the duty to exercise official obligations.[220]

250. Russia's Criminal Code defines a mercenary as "a person who acts for the purpose of getting a material reward and is not a citizen of the State that participates in the armed conflict or hostilities, who does not reside on a permanent basis on its territory, and who is not fulfilling official duties".[221]

251. Tajikistan's Criminal Code defines a mercenary as:

> a specially recruited person who acts with a view to receive a remuneration and who is neither a national of a State party to the conflict nor its permanent resident, nor a member of the armed forces of a party which is in a state of war and is not sent by any other State on official duty as a member of its armed forces.[222]

252. Ukraine's Criminal Code defines mercenary activity as "participation in armed conflicts of other States for the purpose of pecuniary compensation without authorisation obtained from appropriate government authorities".[223]

253. Uzbekistan's Criminal Code defines mercenary activity as:

> participation on the territory or side of a foreign State in an armed conflict or military actions by a person who is neither a citizen nor a member of the armed forces of State in conflict, nor a permanent resident of the territory under its control, nor someone sent on official duty by any State to the armed forces of another State, with a view to receive a financial reward or other personal advantages.[224]

National Case-law

254. No practice was found.

Other National Practice

255. At the CDDH, Afghanistan stated that it "does not see any need for the retention of the clause immediately following the words 'private gain' in paragraph 2(c)" of Article 42 *quater* of draft AP I (now Article 47).[225]

256. At the CDDH, Cameroon suggested that the definition of a mercenary in Article 42 *quater* of draft AP I (now Article 47) would have been improved by the deletion of the condition of a promise of "material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions" in paragraph 2(c) because "it would be very difficult to prove that a mercenary received exorbitant pay".[226]

[220] Moldova, *Penal Code* (2002), Article 130.
[221] Russia, *Criminal Code* (1996), Article 359, note.
[222] Tajikistan, *Criminal Code* (1998), Article 401, note.
[223] Ukraine, *Criminal Code* (2001), Article 447(2).
[224] Uzbekistan, *Criminal Code* (1994), Article 154.
[225] Afghanistan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 175.
[226] Cameroon, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156, § 76.

257. At the CDDH, Cuba stated, with regard to paragraph 2(c) of Article 42 *quater* of draft AP I (now Article 47), that it "has serious doubts about its objectivity, since in practice it will not be possible to verify whether or not the material compensation is in excess of that paid to combatants of similar rank and functions".[227]

258. At the CDDH, Mauritania expressed "the greatest reservation with regard to the definition, motivation and scope" of mercenary activity as set forth in paragraphs 2(a)–(c) of Article 42 *quater* of draft AP I (now Article 47). It explained that "the mercenary of today is no longer motivated solely by the desire for private gain" and, as a result, considered that "the definition and motivations of the mercenary as specified in Article 42 *quater*, paragraph 2, are incomplete in so far as their range does not cover all categories of mercenaries".[228]

259. At the CDDH, the Netherlands stated that:

> We are somewhat worried by the fact that in the list of criteria [to define a mercenary], the motivation of a person has been brought into play. We should like to reiterate our position that the application of humanitarian law and the granting of humanitarian treatment should not be made dependent on someone's motivation for taking part in the armed conflict. Moreover the element of motivation will be difficult to establish and could give rise to more than one interpretation.[229]

260. At the CDDH, Nigeria stated that it "appreciated the suggestion made by the representative of the United Republic of Cameroon and regretted that it had been made too late".[230]

261. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law".[231]

262. In 1980, during a debate in the Sixth Committee of the UN General Assembly on the UN Mercenary Convention, the SFRY stated that it supported the definition of a mercenary provided by Article 47 AP I.[232]

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[227] Cuba, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 185.

[228] Mauritania, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 191–192.

[229] Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 194.

[230] Nigeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156, § 77.

[231] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426–427.

[232] SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/35/SR.23,17 October 1980, § 70.

263. At the CDDH, Zaire stated that it considered that paragraph 2(c) in Article 42 *quater* of draft AP I (now Article 47) "was greatly weakened by the inclusion of the second clause" requiring a promise of "material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions".[233]

III. Practice of International Organisations and Conferences

United Nations
264. In a resolution adopted in 1999 on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, the UN General Assembly asked the UN Secretary-General:

> to invite Governments to make proposals towards a clearer legal definition of mercenaries, and, in this regard, requests the United Nations High Commissioner for Human Rights to convene expert meetings, as requested in previous General Assembly resolutions, to study and update the international legislation in force and to propose recommendations for a clearer legal definition of mercenaries that would allow for more efficient prevention and punishment of mercenary activities.[234]

Regional Organisations
265. No practice was found.

International Conferences
266. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

267. No practice was found.

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

268. No practice was found.

VI. Other Practice

269. No practice was found.

[233] Zaire, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 160, § 100.
[234] UN General Assembly, Res. 54/151, 17 December 1999, § 12.

Status of mercenaries

I. Treaties and Other Instruments

Treaties

270. Pursuant to Article 47(1) AP I, "a mercenary shall not have the right to be a combatant or a prisoner of war". Article 47 AP I was adopted by consensus.[235]

271. Article 45(3) AP I provides that "any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol". Article 45 AP I was adopted by consensus.[236]

272. Upon ratification of AP I, Ireland declared that "Article 47 in no way prejudices the application of Articles 45(3) and 75 of Protocol I to mercenaries as defined in this Article".[237]

273. Upon ratification of AP I, the Netherlands stated that "Article 47 in no way prejudices the application of Articles 45 and 75 of Protocol I to mercenaries as defined in this Article".[238]

274. Article 3 of the 1977 OAU Convention against Mercenarism states that "mercenaries shall not enjoy the status of combatants and shall not be entitled to prisoner of war status".

275. Article 11 of the 1977 OAU Convention against Mercenarism states that a mercenary "shall be entitled to all guarantees normally granted to any ordinary person by the State on whose territory he is being tried".

Other Instruments

276. No practice was found.

II. National Practice

Military Manuals

277. Military manuals of Argentina, Australia, Belgium, Cameroon, France, Italy, Netherlands, New Zealand, Nigeria, Spain, Sweden, Switzerland, UK and SFRY (FRY) state that mercenaries are neither combatants nor entitled to POW status.[239]

[235] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156.
[236] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.
[237] Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 8.
[238] Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 4.
[239] Argentina, *Law of War Manual* (1989), § 1.09(2); Australia, *Commanders' Guide* (1994), § 708; Belgium, *Law of War Manual* (1983), p. 23; Cameroon, *Instructors' Manual* (1992), p. 143, see also pp. 36, 60 and 77; France, *LOAC Teaching Note* (2000), p. 2; France, *LOAC Manual* (2001), p. 40, see also p. 81; Italy, *IHL Manual* (1991), Vol. I, § 6; Netherlands, *Military Manual* (1993), p. III-6, § 5; New Zealand, *Military Manual* (1992), § 807; Nigeria, *Military Manual* (1994), p. 8, § 9(c)(2); Spain, *LOAC Manual* (1996), Vol. I, § 1.4.b; Sweden, *IHL Manual* (1991), Section

278. Canada's LOAC Manual states that:

Mercenaries are unlawful combatants and may be attacked for such time as they take a direct part in hostilities. If captured, mercenaries are not entitled to PW status. They may be punished for being mercenaries but only following a fair trial affording all judicial guarantees.[240]

279. Germany's Military Manual provides that:

Mercenaries shall be regarded as unlawful combatants [i.e.] persons who take a direct part in the hostilities without being entitled to do so and have to face penal consequences. They do not have the right to the status of a prisoner of war. [They] do, however, have a legitimate claim to certain fundamental guarantees (Art. 75 AP I), including the right to humane treatment and a regular judicial procedure.[241]

280. Israel's Manual on the Laws of War states that "another provision in the Additional Protocols is meant precisely to deny prisoner-of-war status to ... mercenaries. This provision, which was adopted under pressure from African countries, is accepted as a customary rule and is therefore binding."[242]

281. Kenya's LOAC Manual states that "mercenaries are neither entitled to combatant nor to POW status ... Nevertheless, a captured mercenary ... cannot be deprived of his fundamental rights and may not be punished without trial."[243]

282. New Zealand's Military Manual states that:

Prior to 1977 there was no restriction upon the use of mercenaries in armed conflict and, in accordance with the principles of humanitarian law, any form of discrimination among combatants was forbidden. By a series of resolutions in relation to specific anti-colonial conflicts in Africa, the United Nations recommended prohibition of the use of such personnel against national liberation movements. This did not affect their legal status, although the government of Angola instituted criminal proceedings against captured mercenaries. Insofar as countries accepting AP I are concerned mercenaries are not entitled to combatant rights, thus denying to this type of soldier the equal treatment otherwise prescribed by the Protocol. Nevertheless, they remain entitled to the provisions concerning humanitarian treatment contained in AP I Art. 75.[244]

283. Nigeria's Operational Code of Conduct states that "foreign nationals on legitimate business will not be molested, but mercenaries will not be spared: they are the worst of enemies".[245]

3.2.1.4, p. 36; Switzerland, *Basic Military Manual* (1987), Article 177; UK, *LOAC Manual* (1981), Section 3, p. 10, § 7; SFRY (FRY), *YPA Military Manual* (1988), § 114.

240 Canada, *LOAC Manual* (1999), p. 3-4, § 31.

241 Germany, *Military Manual* (1992), §§ 302–303.

242 Israel, *Manual on the Laws of War* (1998), p. 51.

243 Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

244 New Zealand, *Military Manual* (1992), § 807(2).

245 Nigeria, *Operational Code of Conduct* (1967), § 4(l).

284. Nigeria's Military Manual states that "mercenaries are however not to be considered as prisoner[s] of war".[246]

285. Spain's LOAC Manual states that mercenaries are not entitled to POW status.[247]

286. Switzerland's Basic Military Manual provides that "a mercenary has no right to combatant or prisoner-of-war status".[248]

287. The US Air Force Commander's Handbook states that:

> In recent years, many countries have claimed that "mercenaries" are unlawful combatants and subject to punishment upon capture . . .
>
> a. The United States has long recognized that neutral nationals taking part in an armed conflict can encourage the escalation of that conflict, and US statutes place certain limits on the recruitment of mercenaries in this country. We have also, however, regarded mercenaries as lawful combatants entitled to PW status upon capture. The US government has always protested vigorously against any attempt by other nations to punish American citizens as mercenaries.
> b. [AP I] provides that mercenaries do not have the right to be combatants or prisoners of war, but the definition of "mercenary" in this Protocol is so narrow that few persons would fit within it.[249]

National Legislation

288. Armenia's Penal Code, Azerbaijan's Criminal Code, the Criminal Code of Belarus, Georgia's Criminal Code, Kazakhstan's Penal Code, Moldova's Penal Code, Russia's Criminal Code, Tajikistan's Criminal Code, Ukraine's Criminal Code, Uzbekistan's Criminal Code and Vietnam's Penal Code criminalise the participation of a mercenary in an armed conflict.[250]

289. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 45(3) AP I, is a punishable offence.[251]

290. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[252]

National Case-law

291. No practice was found.

[246] Nigeria, *Military Manual* (1994), p. 8, § 9(c)(2).
[247] Spain, *LOAC Manual* (1996), Vol. I, § 1.4.
[248] Switzerland, *Basic Military Manual* (1987), Article 177.
[249] US, *Air Force Commander's Handbook* (1980), § 5-3.
[250] Armenia, *Penal Code* (2003), Article 395(3); Azerbaijan, *Criminal Code* (1999), Article 114(3); Belarus, *Criminal Code* (1999), Article 133; Georgia, *Criminal Code* (1999), Article 410(3); Kazakhstan, *Penal Code* (1997), Article 162(3); Moldova, *Penal Code* (2002), Article 141(1); Russia, *Criminal Code* (1996), Article 359(3); Tajikistan, *Criminal Code* (1998), Article 401(3); Ukraine, *Criminal Code* (2001), Article 447(2); Uzbekistan, *Criminal Code* (1994), Article 154; Vietnam, *Penal Code* (1990), Article 280(2).
[251] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[252] Norway, *Military Penal Code as amended* (1902), § 108(b).

Other National Practice

292. At the CDDH, Australia stated that it held the view that "mercenaries, who are in the hands of a Party to an armed conflict to which draft Protocol I applies, are entitled to the benefits of the treatment provided for by Article 65 [now Article 75] of that Protocol".[253]

293. The Report on the Practice of Botswana asserts that "mercenaries have no protection at all".[254]

294. At the CDDH, Canada stated that it "welcomed the recognition by the Nigerian representative that mercenaries were entitled to the fundamental guarantees provided in Article 65 [now Article 75 AP I]".[255]

295. China considers that mercenaries should not benefit from the treatment reserved for POWs and that they may also be liable to punishment, depending upon the seriousness of the crimes committed.[256]

296. At the CDDH, Colombia stated that it "would have liked some specific reference to be included [in Article 42 *quater* draft AP I (now Article 47)] to the fundamental guarantees provided for in Article 65 [now Article 75 AP I]".[257]

297. At the CDDH, Cyprus stated that it "wished to express its appreciation for the clarification given by the Nigerian representative".[258]

298. In 1982, during a debate in the Sixth Committee of the UN General Assembly, Egypt stated that mercenaries should benefit from humanitarian treatment according to human rights principles and established norms.[259]

299. At the CDDH, the Holy See stated that it:

> could not agree that mercenaries should not be expressly granted the minimum protection given to all men, whatever their faults and their moral destitution. Consequently, . . . the Holy See would have liked Article 42 *quater* [now Article 47 AP I] to refer explicitly to Article 65 on fundamental guarantees [now Article 75].[260]

300. At the CDDH, India stated that it "welcomed the clarification given by the Nigerian representative".[261]

[253] Australia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 175, see also p. 176.
[254] Report on the Practice of Botswana, 1998, Chapter 1.1.
[255] Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 160, § 98.
[256] China, Address on the Convention on Suppressing the Activities of Mercenaries, *Selected Documents of the Chinese Delegation to the United Nations*, World Knowledge Press, Beijing, 1980, p. 173.
[257] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161, § 105, see also p. 182.
[258] Cyprus, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 159, § 96.
[259] Egypt, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/37/SR.10, 14 October 1982, § 10.
[260] Holy See, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 158, §§ 87–88.
[261] India, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 159, § 90.

301. With reference to a press conference by the Iraqi Minister of Defence in 1986, the Report on the Practice of Iraq states that mercenaries are not treated as POWs.[262]

302. At the CDDH, Italy stated that:

> Mercenaries, though not entitled to prisoner-of-war status, were covered by Article 65 [now Article 75 AP I], which contained the fundamental safeguards to be given to all persons not enjoying more favourable treatment, regardless of the gravity of the crimes with which they might be charged.[263]

303. In 1981, during a debate in the Sixth Committee of the UN General Assembly, Italy stated that Article 47 AP I should be interpreted in parallel to Article 75 AP I.[264]

304. At the CDDH, Mexico stated that "the guarantees contained in Article 65 [now Article 75 AP I] are implicitly applicable to the persons dealt with in Article 42 *quater* [now Article 47]".[265]

305. At the CDDH, the Netherlands reiterated "the applicability to a mercenary of the fundamental guarantees" embodied in Article 65 of draft AP I (now Article 75).[266]

306. In 1980, during a debate in the Sixth Committee of the UN General Assembly, the representative of the Netherlands stated that the status of mercenaries under Article 47 AP I was less than the Dutch delegation found desirable. He added that, notwithstanding their reprehensible activities, the human rights of mercenaries should be respected, as with every other human being.[267]

307. At the CDDH, Nigeria stated:

> While recognizing the fundamental guarantees provided for in the new Article 65 of draft Protocol I [now Article 75] and not denying the common humanity which mercenaries shared with the rest of mankind, [Nigeria] did not think that such considerations could serve as a pretext for giving mercenaries the rights of combatants or prisoners of war in any situation of armed conflict.[268]

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[262] Report on the Practice of Iraq, 1998, Chapter 5.3, referring to Press conference by the Iraqi Minister of Defence, 4 October 1986.

[263] Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 159, § 92.

[264] Italy, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.18, 28 October 1981, § 36.

[265] Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 192.

[266] Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 194, see also p. 195.

[267] Netherlands, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/35/SR.23, 7 November 1980, § 76.

[268] Nigeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 157, § 81.

308. At the CDDH, Portugal stated that according to its interpretation of draft Article 65 on fundamental guarantees and draft Article 42 *quater* on mercenaries (now Articles 75 and 47 AP I), "the latter were in a category covered by the fundamental guarantees set out in Article 65".[269]

309. The Report on the Practice of Russia states that:

As far as mercenaries are concerned, it must be said that they participate in nearly all the conflicts in the CIS countries. In connection with various political considerations, however, their legal status is made equal to the status of "volunteers". Once Georgians brought down a plane and captured a mercenary – an officer of the Russian armed forces who fought for Abkhazia. Georgia demonstrated goodwill: it released the man and handed him over to Russia.[270]

310. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that mercenaries are not considered as civilians. The report concludes, therefore, that mercenaries are liable to attack.[271]

311. At the CDDH, Sweden stated that the text of Article 42 *quater* of draft AP I (now Article 47) "should be complemented with a sentence stating that mercenaries are entitled to the protection laid down in Article 65 [now Article 75] in Protocol I".[272]

312. At the CDDH, Switzerland stated that it "regretted that there had been no reference in Article 42 *quater* [now Article 47 AP I] to other provisions of the Protocol, in particular Article 65 [now Article 75]".[273]

313. In 1980, in a memorandum concerning the international legal rights of captured mercenaries, the US Department of State stated that:

The act of being a mercenary is not a crime under international law. An individual who is accused of being a mercenary and who is captured during an armed conflict is entitled to the basic humanitarian protections of the international law applicable in armed conflict, including those specified in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The specific rights which such an individual would be entitled to vary depending on whether the conflict is an international conflict or an internal one and, in the case of international armed conflicts, on whether the person is entitled to prisoner-of-war status . . . The protections of [common] article 3 [of the 1949 Geneva Conventions] would also apply to any captured individual accused of being a mercenary during a civil war. [Common Article 3] does not provide any immunity from prosecution to individuals for engaging in combatant acts. The provisions of the Geneva Conventions

[269] Portugal, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 160, § 97.
[270] Report on the Practice of Russia, 1997, Chapter 5.3.
[271] Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 1.1.
[272] Sweden, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 198.
[273] Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 158, § 82.

dealing with prisoners of war do not apply in civil wars, and combatants captured during civil wars are not prisoners of war within the meaning of international law.[274]

314. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law".[275]

315. In 1987, the Legal Adviser of the US Department of State stated that:

> For a third example [of why the Joint Chiefs of Staff judged AP I too ambiguous and complicated to use as a practical guide for military operations], article 47 of Protocol I provides that "a mercenary shall not have the right to be a combatant or a prisoner of war." This article was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is unwelcome. In doing so, this article disregards one of the fundamental principles of international humanitarian law by defining the right to combatant status, at least in part, on the basis of the personal or political motivations of the individual in question. This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself.[276]

316. In 1980, during a debate in the Sixth Committee of the UN General Assembly on the UN Mercenary Convention, the SFRY recalled that Article 47 AP I provided that mercenaries did not have a right to the status of combatant or POW and concluded that mercenaries could not enjoy any protection under international law.[277]

317. According to the Report on the Practice of Zimbabwe, "spies and mercenaries are likely to be regarded as combatants in Zimbabwe for purposes of being military targets. They are, however, unlikely to be afforded POW status and related protection if captured."[278]

[274] US, International Legal Rights of Captured Mercenaries, Memorandum prepared by the Attorney-Adviser in the Office of the Assistant Legal Adviser for African Affairs, US Department of State, 17 October 1980, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3457 and 3463–3464.

[275] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426–427.

[276] US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 469.

[277] SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/35/SR.23, 17 October 1980, § 70.

[278] Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

318. In 1985, in a meeting with the ICRC, a government stated that "foreign prisoners may be exchanged after being tried".[279]

III. Practice of International Organisations and Conferences

United Nations

319. The mission dispatched by the UN Secretary-General in 1988 to investigate the situation of POWs in Iran and Iraq reported that:

> Some of the prisoners detained in [Iran] are not Iraqi nationals but come from other countries . . . The Iranian authorities call them mercenaries and have argued that, under Protocol I of the Geneva Conventions, they are not protected. The Iranian authorities contend that they could, according to custom, suffer capital punishment but have not been executed; on the contrary, they are treated as the other POWs. Since this seems to be the case, the legal argument about mercenaries has become redundant. (Otherwise, one would have to observe that [Iran] is not a party to the Protocol mentioned, and in any event has not shown that the condition[s] of its article 47 have been fulfilled.) . . . The Iranian authorities . . . promised that the non-Iraqi prisoners also will be released after the cessation of hostilities.[280]

Regional Organisations

320. No practice was found.

International Conferences

321. The Rapporteur of Committee III at the CDDH stated with regard to Article 47 AP I that:

> Although the proposed new article makes no reference to the fundamental protections of Article 65 [now Article 75 AP I], it was understood by the Committee Group that mercenaries would be one of the groups entitled to the protections of that article which establishes minimum standards of treatment for persons not entitled to more favourable treatment under the Conventions and Protocol I.[281]

IV. Practice of International Judicial and Quasi-judicial Bodies

322. No practice was found.

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

323. No practice was found.

[279] ICRC archive document.
[280] UN Secretary-General, Report of the mission dispatched by the Secretary-General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq, UN Doc. S/20147, Annex, 24 August 1988, § 65.
[281] CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 455, § 27.

VI. Other Practice

324. In an address to the nation in 1993, the President of UNITA stated that "captured mercenaries will be summarily executed".[282]

[282] UNITA, Address to the Nation by Jonas Savimbi, President, relayed live from Huambo, 9 March 1993.

CHAPTER 34

THE WOUNDED, SICK AND SHIPWRECKED

A. Search for and Collection and Evacuation of the Wounded, Sick and Shipwrecked

Search and collection

I. Treaties and Other Instruments

Treaties

1. Article 6 of the 1864 GC provides that "wounded or sick combatants, to whatever nation they may belong, shall be collected".

2. Article 16 of the 1907 Hague Convention (X) provides that "after every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked".

3. Common Article 3 of the 1949 Geneva Conventions provides that "the wounded and sick shall be collected". (Article 3 GC II adds the shipwrecked)

4. Article 4 GC I and Article 5 GC II provide that neutral and other States not parties to the conflict shall apply the provisions of these instruments to the wounded, sick and shipwrecked of the armed forces of the parties to the conflict.

5. Article 15, first paragraph, GC I provides that "at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick".
6. Article 18 GC I provides that:

> The military authorities may appeal to the charity of the inhabitants voluntarily to collect . . . under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities . . .
>
> The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality.

7. Article 18, first paragraph, GC II states that "after each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick".
8. Article 21, first paragraph, GC II states that "the Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons".
9. According to Article 13 GC IV, the obligation to search and care for the wounded applies to the "whole population of the countries in conflict".
10. Article 16, second paragraph, GC IV provides that "as far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the . . . wounded".
11. Article 17(2) AP I provides that "the Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 [i.e. aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies] to collect . . . the wounded, sick and shipwrecked". Article 17 AP I was adopted by consensus.[1]
12. Article 19 AP I provides that neutral and other States not parties to the conflict shall apply the provisions of AP I to the wounded, sick and shipwrecked of the armed forces of the parties to the conflict. Article 19 AP I was adopted by consensus.[2]
13. Article 8 AP II provides that "whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked". Article 8 AP II was adopted by consensus.[3]
14. Article 18(1) AP II provides that "the civilian population may, even on its own initiative, offer to collect . . . the wounded, sick and shipwrecked". Article 18 AP II was adopted by consensus.[4]

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.
[2] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[3] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.
[4] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

Other Instruments

15. Article 10 of the 1880 Oxford Manual provides that "wounded and sick soldiers should be brought in . . . to whatever nation they belong".

16. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "all wounded and sick on land shall be treated in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949".

17. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook "to apply the following fundamental principles: wounded and ill persons must be helped and protected in all circumstances".

18. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949".

19. Article 4(2) and (9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the wounded and sick shall be searched for and collected.

20. Section 9.2 of the 1999 UN Secretary-General's Bulletin states that "whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the search for . . . the wounded [and] the sick . . . left on the battlefield and allow for their collection . . .".

II. National Practice

Military Manuals

21. Argentina's Law of War Manual (1969) states that "at all times and particularly after an engagement, the belligerents shall take all possible measures to search for and collect the wounded and sick".[5] It adds that "appeal can be made to the civilian population for the collection . . . of the wounded and sick".[6]

22. Argentina's Law of War Manual (1989) provides that the wounded, sick and shipwrecked shall be searched for and collected.[7]

23. Australia's Commanders' Guide and Defence Force Manual require that all possible measures be taken to search for and collect the shipwrecked, wounded and sick.[8]

24. Belgium's Law of War Manual refers to common Article 3 of the 1949 Geneva Conventions and provides that the wounded and sick shall be searched for.[9]

[5] Argentina, *Law of War Manual* (1969), § 3.003.
[6] Argentina, *Law of War Manual* (1969), § 3.006.
[7] Argentina, *Law of War Manual* (1989), § 2.05.
[8] Australia, *Commanders' Guide* (1994), § 858; *Defence Force Manual* (1994), §§ 668 and 986.
[9] Belgium, *Law of War Manual* (1983), p. 17.

25. Belgium's Teaching Manual for Soldiers states that "if operations so permit, the wounded must be searched for".[10]
26. Benin's Military Manual provides that "combatants shall participate in the search for ... the wounded and sick".[11] It instructs soldiers to "collect ... the wounded and sick, whether friend or foe".[12]
27. Burkina Faso's Disciplinary Regulations provides that "whenever circumstances permit, the wounded, sick and shipwrecked shall be collected".[13]
28. Cameroon's Disciplinary Regulations states that "when operational circumstances permit, the wounded, sick and shipwrecked must be collected".[14]
29. Cameroon's Instructors' Manual provides that the wounded and shipwrecked shall be searched for and collected. It adds that "an appeal may be launched to the civilian population to help National Societies of the Red Cross and Red Crescent to collect ... the wounded, sick and shipwrecked".[15]
30. Canada's LOAC Manual states that "following an engagement, parties to a conflict are obliged to take all possible measures to search for and collect the wounded and sick and shipwrecked".[16] It adds that "appeals may be made to local inhabitants and relief societies to collect ... the wounded and sick. Such inhabitants and relief societies, even in occupied or invaded territory, shall be permitted spontaneously to collect ... such personnel."[17] In the case of non-international armed conflicts, the manual states that "after an engagement and whenever circumstances permit, all possible steps must be taken without delay to search for and collect the wounded, sick and shipwrecked".[18]
31. Canada's Code of Conduct instructs soldiers "to take all possible measures to search for and collect the wounded and sick from all sides, opposing forces or not, as well as civilians".[19] It also provides that "military authorities may ask the inhabitants in the area of conflict to voluntarily collect ... the wounded under their direction".[20]
32. Colombia's Circular on Fundamental Rules of IHL provides that the "parties to the conflict shall collect and assist the wounded and sick in their power".[21]
33. Colombia's Basic Military Manual states that "the wounded and sick must be collected".[22]

[10] Belgium, *Teaching Manual for Soldiers* (undated), pp. 16–17, see also p. 32.
[11] Benin, *Military Manual* (1995), Fascicule II, p. 10.
[12] Benin, *Military Manual* (1995), Fascicule II, p. 18.
[13] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).
[14] Cameroon, *Disciplinary Regulations* (1975), Article 31.
[15] Cameroon, *Instructors' Manual* (1992), p. 96.
[16] Canada, *LOAC Manual* (1999), p. 9-1, § 8.
[17] Canada, *LOAC Manual* (1999), p. 9-2, § 12.
[18] Canada, *LOAC Manual* (1999), p. 17-4, § 32.
[19] Canada, *Code of Conduct* (2001), Rule 7, § 3.
[20] Canada, *Code of Conduct* (2001), Rule 10, § 8.
[21] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.
[22] Colombia, *Basic Military Manual* (1995), p. 28.

34. Colombia's Instructors' Manual provides that "the wounded, sick and shipwrecked shall be collected".[23]
35. Colombia's Soldiers' Manual provides that wounded enemy combatants shall be collected.[24]
36. Congo's Disciplinary Regulations instructs soldiers "to collect . . . the wounded, the sick and shipwrecked whenever circumstances permit".[25]
37. Croatia's LOAC Compendium provides that "whenever the tactical situation permits, the wounded, sick and shipwrecked shall be collected".[26]
38. Croatia's Commanders' Manual stipulates that the wounded and shipwrecked shall be searched for and collected.[27]
39. Croatia's Soldiers' Manual instructs soldiers to search for and collect the wounded, sick and shipwrecked members of the adversary's armed forces.[28]
40. Croatia's Instructions on Basic Rules of IHL instructs soldiers to collect the wounded and sick.[29]
41. Ecuador's Naval Manual provides that "parties to the conflict shall, after each engagement and without delay, take all possible measures to search for and collect the wounded and sick on the field of battle".[30] It contains similar provisions with respect to the shipwrecked.[31]
42. France's LOAC Summary Note provides that "wounded, sick and shipwrecked shall be searched for and collected . . . by the Party to the conflict in whose power they may be".[32]
43. France's LOAC Teaching Note provides that the "wounded, sick and shipwrecked shall be searched for and collected . . . by the Party to the conflict in whose power they may be".[33]
44. Germany's Military Manual states that a cease-fire may be concluded for "humanitarian purposes, in particular searching and collecting the wounded and the shipwrecked".[34] It adds that "at all times, all possible measures shall be taken to collect the wounded and sick and shipwrecked".[35] The manual also provides that "civilians and help organisations such as, for example, the National Red Cross or Red Crescent Society are permitted to collect . . . the wounded, sick and shipwrecked".[36]

[23] Colombia, *Instructors' Manual* (1999), p. 24.
[24] Colombia, *Soldiers' Manual* (1999), p. 20.
[25] Congo, *Disciplinary Regulations* (1986), Article 32.
[26] Croatia, *LOAC Compendium* (1991), p. 45.
[27] Croatia, *Commanders' Manual* (1992), p. 10, Rule No. 71.
[28] Croatia, *Soldiers' Manual* (1992), p. 3
[29] Croatia, *Instructions on Basic Rules of IHL* (1993), p. 11, Nos. 1–3.
[30] Ecuador, *Naval Manual* (1989), § 11.4.
[31] Ecuador, *Naval Manual* (1989), § 11.6.
[32] France, *LOAC Summary Note* (1992), § 2.1.
[33] France, *LOAC Teaching Note* (2000), p. 3.
[34] Germany, *Military Manual* (1992), § 233.
[35] Germany, *Military Manual* (1992), § 605.
[36] Germany, *Military Manual* (1992), § 632.

45. Hungary's Military Manual provides that "whenever the tactical situation permits, the wounded, sick and shipwrecked shall be collected".[37]
46. Indonesia's Military Manual states that "the wounded and sick should be searched for and collected, as soon as the hostilities end".[38]
47. Italy's LOAC Elementary Rules Manual instructs soldiers that when confronted with wounded enemy combatants, the following rule must be observed: "Collect them."[39]
48. Kenya's LOAC Manual refers to common Article 3 of the 1949 Geneva Conventions and states that the "wounded and sick shall be collected and cared for".[40] The manual provides that "combatants are required to search for and collect the wounded and sick" and states that this principle also applies to wounded enemy combatants.[41] It also provides that "civil defence units and personnel shall participate in the search for victims, particularly when there are civilian casualties". The manual adds that "commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies . . . to collect . . . the wounded and shipwrecked".[42]
49. Lebanon's Teaching Manual instructs members of the armed forces to search for and collect enemy wounded in the field as well as shipwrecked at sea.[43]
50. Madagascar's Military Manual provides that "when the mission so permits, the wounded [and] shipwrecked . . . shall be searched for and collected". It instructs soldiers that, when confronted with wounded enemy combatants, the following rule must be observed: "Collect them."[44] It also states that "local arrangements may be concluded for the search, collection [and] exchange . . . of the wounded and shipwrecked".[45]
51. Mali's Army Regulations provides that "refusal to collect and protect the wounded, sick and shipwrecked whenever circumstances permit" is a violation of the laws and customs of war.[46]
52. Morocco's Disciplinary Regulations instructs soldiers "to collect and protect the wounded and sick when circumstances permit".[47]
53. According to the Military Manual of the Netherlands, "particularly after an engagement, wounded and sick shall be searched for and collected".[48] In

[37] Hungary, *Military Manual* (1992), p. 73.
[38] Indonesia, *Military Manual* (1982), § 37.
[39] Italy, *LOAC Elementary Rules Manual* (1991), p. 29.
[40] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 6 and Précis No. 3, p. 14.
[41] Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 13 and 15 and Précis No. 3, p. 11.
[42] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
[43] Lebanon, *Teaching Manual* (1997), pp. 77–78.
[44] Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 16, Fiche No. 2-T, § 21, Fiche No. 5-SO, § C and Fiche No. 4-T, § 2.2(22).
[45] Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § B.
[46] Mali, *Army Regulations* (1979), Article 36.
[47] Morocco, *Disciplinary Regulations* (1974), Article 25.
[48] Netherlands, *Military Manual* (1993), p. VI-2.

the case of non-international armed conflicts, the manual states that the "wounded, sick and shipwrecked must be searched for and collected".[49]

54. The Military Handbook of the Netherlands provides that the "wounded ... shall be searched for and collected when the circumstances permit it".[50]

55. The IFOR Instructions of the Netherlands instruct soldiers to "collect the wounded ... whether friend or foe".[51]

56. New Zealand's Military Manual provides that "the Parties to a conflict are obliged to take all possible measures to search for and collect, without delay, the wounded, sick and shipwrecked".[52] It adds that "appeals may be made to the charity and humanity of the local inhabitants and relief societies to collect ... the wounded and sick".[53] With regard to non-international armed conflict, the manual states that "after any engagement and whenever circumstances permit, all possible steps must be taken, without delay, to search for and collect the wounded, sick and shipwrecked".[54]

57. Nicaragua's Military Manual provides that, in internal armed conflicts, the wounded and sick shall be collected.[55]

58. Nigeria's Military Manual states that "as soon as the tactical situation permits, necessary measures shall be taken to search for [and] collect ... the wounded [and] shipwrecked".[56]

59. Nigeria's Manual on the Laws of War states that "at all times and particularly after a campaign, the belligerents must immediately take all possible measures to search for and collect the wounded and sick".[57]

60. Nigeria's Soldiers' Code of Conduct states that "the wounded enemy shall be collected".[58] It adds that "the wounded and shipwrecked enemies at sea shall be accorded similar respect and protection".[59]

61. The Soldier's Rules of the Philippines instruct soldiers to "care for the wounded and sick, be they friendly or foe".[60]

62. Romania's Soldiers' Manual requires that wounded and sick enemy combatants be collected.[61]

63. Russia's Military Manual provides that:

> Military commanders may appeal to the charity of the local population to voluntarily collect ... the wounded and sick. The military authorities must permit the

[49] Netherlands, *Military Manual* (1993), p. XI-5.
[50] Netherlands, *Military Handbook* (1995), p. 7-40.
[51] Netherlands, *IFOR Instructions* (1995), § 6.
[52] New Zealand, *Military Manual* (1992), § 1003(1).
[53] New Zealand, *Military Manual* (1992), § 1003(4).
[54] New Zealand, *Military Manual* (1992), § 1817(1).
[55] Nicaragua, *Military Manual* (1996), Article 6.
[56] Nigeria, *Military Manual* (1994), p. 13, § 4, see also p. 39, § 5(f) and (h) and p. 46, § 16(g).
[57] Nigeria, *Manual on the Laws of War* (undated), § 34.
[58] Nigeria, *Soldiers' Code of Conduct* (undated), § 6.
[59] Nigeria, *Soldiers' Code of Conduct* (undated), § 8.
[60] Philippines, *Soldier's Rules* (1989), § 5.
[61] Romania, *Soldiers' Manual* (1991), p. 9.

inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect . . . wounded or sick.[62]

64. Senegal's Disciplinary Regulations provides that "the wounded, sick and shipwrecked shall be collected".[63]
65. Senegal's IHL Manual provides that during internal disturbances, local agreements may be concluded to search for and collect the wounded.[64]
66. Spain's LOAC Manual provides that "at all times, but particularly after an engagement, parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded . . . during combat".[65]
67. Sweden's IHL Manual considers that Article 17 AP I on the role of aid organisations has the status of customary law.[66]
68. Switzerland's Basic Military Manual provides that "at all times, and especially following an engagement, all means should be taken to search for and collect the wounded".[67] It also provides that "appeal may be made to civilians or civilian relief societies to collect . . . the wounded".[68]
69. According to Togo's Military Manual, "combatants shall participate in the search for . . . the wounded and sick".[69] It instructs soldiers "to collect and care for the wounded and sick, whether friend or foe".[70]
70. The UK Military Manual provides that "at all times, and particularly after an engagement, the belligerents must immediately take all possible measures to search for and collect the wounded and sick".[71] It also provides that:

> The military authorities may appeal to the charitable zeal of local inhabitants to collect . . . the wounded and sick, under their direction, granting to those who respond to this appeal special protection and facilities. The inhabitants, as also relief societies, must be permitted spontaneously to collect . . . wounded and sick, whatever nationality.[72]

71. The UK LOAC Manual states that "combatants are required to search for and collect the shipwrecked, wounded and sick and to ensure their adequate care".[73] It also provides that "military authorities must allow the local population and relief societies to collect . . . the wounded and sick".[74] The manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.[75]

[62] Russia, *Military Manual* (1990), § 15.
[63] Senegal, *Disciplinary Regulations* (1990), Article 34(1).
[64] Senegal, *IHL Manual* (1999), p. 20.
[65] Spain, *LOAC Manual* (1996), Vol. I, § 7.5.a, see also §§ 5.2.d.(5), 10.6.b.(3) and 10.6.c.
[66] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.
[67] Switzerland, *Basic Military Manual* (1987), Article 71.
[68] Switzerland, *Basic Military Manual* (1987), Article 75.
[69] Togo, *Military Manual* (1996), Fascicule II, p. 10.
[70] Togo, *Military Manual* (1996), Fascicule II, p. 18.
[71] UK, *Military Manual* (1958), § 342.
[72] UK, *Military Manual* (1958), § 345.
[73] UK, *LOAC Manual* (1981), Section 7, p. 26, § 2.
[74] UK, *LOAC Manual* (1981), Section 6, p. 22, § 6.
[75] UK, *LOAC Manual* (1981), Section 12, p. 42, § 2.

72. The US Field Manual reproduces common Article 3 of the 1949 Geneva Conventions and Articles 15 and 18 GC I.[76]

73. The US Air Force Pamphlet refers to Article 15 GC I and states that it "includes, *inter alia*, an obligation to search for and collect wounded and sick".[77] The manual also refers to Article 12 GC II and defines shipwreck as "a shipwreck from any cause, including forced landings at sea by or from an aircraft". The manual specifies that "it is important to the Air Force since it provides a fully protected status for pilots downed or forced to land at sea".[78] It also provides that "military authorities shall permit the inhabitants and relief societies spontaneously to collect . . . wounded of all nationalities".[79]

74. The US Naval Handbook states that:

> Parties to the conflict must, after each engagement and without delay, take all possible measures to search for and collect the wounded and sick on the field of battle . . . Shipwrecked persons include those in peril at sea or in other waters as a result of either the sinking, grounding, or other damage to the vessel in which they are embarked, or of the downing or distress of an aircraft. It is immaterial whether the peril was the result of enemy action or nonmilitary causes.[80]

75. The YPA Military Manual of the SFRY (FRY) provides that:

> 164. At all times and especially after an engagement, all necessary measures shall be taken without delay to search for and collect the wounded and sick.
> . . .
> Whenever circumstances permit, a cease-fire may be arranged in order to collect, exchange or transport wounded and sick left on the battlefield . . .
> 165. The civilian population or humanitarian societies may, of their own initiative, collect . . . the wounded and sick, whether friend or foe, even in occupied territory. Military commanders are obliged to permit such humanitarian activities while retaining the right of supervision.[81]

National Legislation

76. Argentina's Draft Code of Military Justice punishes any soldier who fails to search for and rescue the wounded, sick and shipwrecked of any party to the conflict.[82]

77. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in both international and non-international armed conflicts, at any time and especially after an engagement, the wounded and sick shall be searched for.[83]

[76] US, *Field Manual* (1956), §§ 11, 216 and 219.
[77] US, *Air Force Pamphlet* (1976), § 12-2(a).
[78] US, *Air Force Pamphlet* (1976), § 12-3(a).
[79] US, *Air Force Pamphlet* (1976), § 12-2(a).
[80] US, *Naval Handbook* (1995), § 11-4.
[81] SFRY (FRY), *YPA Military Manual* (1988), §§ 164–165.
[82] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(1) in the *Code of Military Justice as amended* (1951).
[83] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 24.

78. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[84]
79. Botswana's Geneva Conventions Act provides for the obligation to search for the wounded and sick.[85]
80. China's Criminal Code as amended punishes those who are directly responsible for the deliberate abandonment of the wounded and sick on the battlefield.[86]
81. Colombia's Penal Code provides for the punishment of "anyone who, during an armed conflict, . . . abandons the wounded and sick".[87]
82. The DRC Code of Military Justice as amended provides for the punishment of any member of the armed forces who does not assist persons in danger.[88]
83. Under the Draft Amendments to the Penal Code of El Salvador provide a prison sentence for "anyone who, during an international or non-international armed conflict, fails to rescue and provide assistance to protected persons, while having an obligation to do so".[89]
84. Iraq's Military Penal Code punishes any person who abandons the wounded.[90]
85. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 4 and 15 GC I, 5 and 18 GC II and 16 GC IV, and of AP I, including violations of Article 19 AP I, as well as any "contravention" of AP II, including violations of Article 8 AP II, are punishable offences.[91]
86. Italy's Wartime Military Penal Code provides for the punishment of any military medical personnel who, during or after an engagement, fail to provide assistance to the wounded, sick or shipwrecked.[92]
87. Nicaragua's Military Penal Code provides for the punishment of the soldier who fails to search for and rescue the wounded, sick and shipwrecked, irrespective of the party to which they belong.[93]
88. Nicaragua's Draft Penal Code provides for the punishment of a civilian not subject to military jurisdiction who "violates the duty of humanity towards the . . . wounded and sick, or those placed in hospital or camps for the wounded". It also provides a prison sentence for "anyone who, during an international

[84] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[85] Botswana, *Geneva Conventions Act* (1970), Schedule 1, Article 15.
[86] China, *Criminal Code as amended* (1997), Article 444.
[87] Colombia, *Penal Code* (2000), Article 145.
[88] DRC, *Code of Military Justice as amended* (1972), Article 519.
[89] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Omision y obstaculización de medidas de socorro y asistencia humanitaria".
[90] Iraq, *Military Penal Code* (1940), Article 115(c).
[91] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[92] Italy, *Wartime Military Penal Code* (1941), Article 190.
[93] Nicaragua, *Military Penal Code* (1996), Article 56(2).

or non-international armed conflict, fails to rescue and provide assistance to protected persons, while having an obligation to do so".[94]

89. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[95]

90. Spain's Royal Ordinance for the Armed Forces punishes the failure to search for and rescue the wounded and sick of both parties.[96]

91. Under Spain's Military Criminal Code, failure to use the available means to search and rescue the wounded, sick and shipwrecked constitutes an offence against the laws and customs of war.[97]

92. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions are war crimes.[98]

93. Uruguay's Military Penal Code as amended provides for the punishment of "failure to assist, when possible, an enemy who surrenders in case of shipwreck, fire, explosion, earthquake or similar circumstances".[99]

94. Venezuela's Code of Military Justice as amended provides for the punishment of anyone who denies or obstructs assistance to the wounded and sick.[100]

95. Vietnam's Penal Code provides for the punishment of anyone who "intentionally leaves behind a soldier killed or wounded on the battlefield" or for the failure to "care for or give medical treatment to a wounded soldier".[101]

National Case-law

96. No practice was found.

Other National Practice

97. The Report on the Practice of Egypt states that "in application of its long dated experience, Egypt considers the search for and care of wounded [and] sick ... as a tradition which should be respected at all times and in any circumstance, particularly in time of military operations".[102]

98. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "the wounded

[94] Nicaragua, *Draft Penal Code* (1999), Articles 456 and 463.
[95] Norway, *Military Penal Code as amended* (1902), § 108.
[96] Spain, *Royal Ordinance for the Armed Forces* (1978), Article 140.
[97] Spain, *Military Criminal Code* (1985), Article 77(1).
[98] US, *War Crimes Act as amended* (1996), Section 2441(c).
[99] Uruguay, *Military Penal Code as amended* (1943), Article 58(20), see also Article 58(21).
[100] Venezuela, *Code of Military Justice as amended* (1998), Article 474(4).
[101] Vietnam, *Penal Code* (1990), Article 271(1).
[102] Report on the Practice of Egypt, 1997, Chapter 5.1.

and sick, whether civilian or military, must be respected, collected, protected and cared for".[103]

99. The Report on the Practice of Jordan states that "Jordan recognizes that its armed forces are under an obligation to search for the wounded . . . as soon as circumstances permit".[104]

100. On the basis of an interview with the Ministry of Home Affairs, the Report on the Practice of Malaysia states that "there exists a practice of searching for the wounded after any confrontation".[105] Furthermore, on the basis of interviews with members of the armed forces, the report states that:

> The Maritime Police Unit is responsible for the rescue of any shipwrecked vessel notwithstanding the fact that the vessel is an enemy vessel. Enemy vessels, which are shipwrecked in the course of battle, are only provided with assistance upon surrender. Once enemy ships are no longer seaworthy, no further attack is permitted. Enemy personnel are left to carry out their own evacuation and life saving procedures.
>
> There exists a practice of searching for those parachuting in distress.[106]

101. According to the Report on the Practice of the Philippines:

> In an armed conflict where guerilla warfare is the strategy used, distinguishing between civilians and combatants is very difficult. This is precisely the reason why the Philippines have adopted the same rules for both civilians and combatants with regard to the search for . . . the wounded [and] sick.[107]

102. In 1984, in reply to a question in the House of Commons regarding the war in the South Atlantic in 1982 and in particular the sinking of the Argentine warship *Belgrano* by HMS *Conqueror*, the UK Prime Minister wrote that:

> Immediately after the attack upon the Belgrano, Conqueror herself came under attack from the Argentine escorting destroyers and, to evade this, moved away from the area . . . When on 4th May Conqueror signalled she was returning to that area, she was ordered not to attack warships engaged in rescuing survivors from the Belgrano.[108]

103. According to the Report on US Practice, it is the *opinio juris* of the US that, whenever circumstances permit, all possible measures should be taken to search for the wounded and sick in accordance with Article 8 AP II.[109]

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[103] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.
[104] Report on the Practice of Jordan, 1997, Chapter 5.1.
[105] Report on the Practice of Malaysia, 1997, Interview with the Ministry of Home Affairs, Chapter 5.1.
[106] Report on the Practice of Malaysia, 1997, Interviews with members of the armed forces, Chapter 5.1.
[107] Report on the Practice of the Philippines, 1997, Chapter 5.1.
[108] UK, House of Commons, Annex to a letter of the Prime Minister in reply to a question, *Hansard*, 29 October 1984, Vol. 65, Written Answers, cols. 786–9, § 13.
[109] Report on US Practice, 1997, Chapter 5.1.

104. According to the Report on the Practice of Zimbabwe, "Zimbabwe seems to regard as customary, the rules of international practice codified in the Geneva Conventions as regards the search for . . . the wounded".[110]

III. Practice of International Organisations and Conferences

United Nations
105. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".[111]

Other International Organisations
106. No practice was found.

International Conferences
107. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

108. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what in 1949 in the *Corfu Channel case (Merits)* the Court had called "elementary considerations of humanity".[112]

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

109. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

As soon as the tactical situation permits, necessary measures shall be taken . . . to search for [and] collect . . . the wounded and shipwrecked . . .

[C]ivil defence units and personnel shall participate in the search for victims, particularly when there are civilian casualties . . .

Commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft, to collect . . . the wounded and shipwrecked . . .

Civilian persons and aid societies such as National Red Cross or Red Crescent Societies shall be permitted, even on their own initiative, to search for [and] collect . . . the wounded and shipwrecked. No one shall be harmed, prosecuted or punished for such acts . . .

[110] Report on the Practice of Zimbabwe, 1998, Chapter 5.1.
[111] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[112] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

Local arrangements shall be concluded for the search [and] removal . . . of the wounded and shipwrecked.[113]

110. In an appeal issued in 1983 in the context of the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including "abandoning of enemy wounded on the battlefield".[114]

111. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the following principles in particular must be respected: . . . the wounded, the sick and the shipwrecked must be collected . . . regardless of the party to which they belong".[115]

112. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia "to collect . . . wounded and sick".[116]

113. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all the wounded and sick, both civilian and military, must be collected".[117]

114. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised that "all the wounded and sick must be collected . . . without distinction, in accordance with the provisions laid down primarily in the First and Fourth Geneva Conventions".[118]

115. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that "the wounded and sick must be collected . . . regardless of the party to which they belong".[119]

VI. Other Practice

116. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "the wounded and sick shall be collected . . . by the party in conflict which has them in its power".[120]

[113] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 483–486 and 535.
[114] ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.
[115] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.
[116] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.
[117] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.
[118] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.
[119] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.
[120] ICRC archive document.

117. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that "every possible measure shall be taken, without delay, to search for and collect wounded [and] sick".[121]

Evacuation

I. Treaties and Other Instruments

Treaties

118. Article 15, second and third paragraphs, GC I provides that:

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

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

119. Article 18, second paragraph, GC II provides that:

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

120. Article 17 GC IV provides that:

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded [and] sick . . . and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

121. Paragraph 7(b)(2) of the 1987 NATO STANAG 2067 provides that "stragglers requiring medical care should be treated and, if necessary, evacuated through medical channels".

Other Instruments

122. Article 11 of the 1880 Oxford Manual provides that "commanders in chief have power to deliver immediately to the enemy outposts hostile soldiers who have been wounded in an engagement, when circumstances permit and with the consent of both parties". Article 12 provides that "evacuations, together

[121] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, 1991, p. 335.

with the persons under whose direction they take place, shall be protected by neutrality".

123. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention".

124. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949".

125. Section III(2)(b) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina provides that "appropriate measures will be taken to permit the evacuation of the wounded, the sick and other vulnerable persons".

126. Section 9.2 of the 1999 UN Secretary-General's Bulletin states that "whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the [removal, exchange and transport] of the wounded [and] the sick . . . left on the battlefield".

II. National practice

Military Manuals

127. Argentina's Law of War Manual restates the provisions of Article 15 GC I.[122]

128. Australia's Commanders' Guide provides that:

> Belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded [and] sick . . . and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.[123]

129. Australia's Defence Force Manual states that "commanders may make agreements for the exchange, removal and transport of the wounded left on the field, besieged or encircled areas and to allow the passage of medical personnel and chaplains proceeding to any such area".[124] It also states that:

> The opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of wounded [and] sick . . . and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.[125]

[122] Argentina, *Law of War Manual* (1969), § 3.003.
[123] Australia, *Commanders' Guide* (1994), § 926.
[124] Australia, *Defence Force Manual* (1994), § 986.
[125] Australia, *Defence Force Manual* (1994), § 735.

130. Belgium's Teaching Manual for Soldiers states that "if operations so permit, the wounded must be ... evacuated from the combat zone".[126]
131. Benin's Military Manual provides that "combatants shall participate in the ... evacuation of the wounded and sick".[127] It further provides that "as soon as the tactical situation permits, the wounded and sick shall be evacuated by the appropriate channel".[128]
132. Canada's LOAC Manual provides that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of wounded [and] sick".[129] It adds that:

> In the case of land engagement, agreements between commanders, whether by armistice or cease-fire, may be made for the exchange, removal and transport of the wounded left on the field. In both land and sea engagements, arrangements may also be made for the removal of the wounded and sick from a besieged area and for the passage of medical personnel and chaplains proceeding to such an area.[130]

133. Canada's Code of Conduct states that "whenever circumstances permit, a suspension of fire shall be arranged or local arrangements made to permit the removal of the sick, wounded and dead, and the exchange and transport of the wounded and sick".[131]
134. Cameroon's Instructors' Manual provides that evacuation of wounded and sick can take place during combat, after combat or during a cease-fire.[132]
135. Croatia's LOAC Compendium provides that "whenever the tactical situation permits, all wounded and sick must be ... evacuated".[133]
136. The Military Manual of the Dominican Republic states that "wounded prisoners and captives shall be evacuated as soon as possible to the rear through medical channels".[134]
137. Ecuador's Naval Manual provides that "whenever circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care".[135]
138. France's LOAC Manual restates Articles 15 GC I and 18 GC II.[136]
139. Hungary's Military Manual states that "whenever the tactical situation permits, the wounded, sick and shipwrecked shall be ... evacuated".[137]
140. According to India's police regulations, police forces "should make arrangements for the rapid evacuation to hospital by ambulance of the sick and of persons injured by police fire".[138]

[126] Belgium, *Teaching Manual for Soldiers* (undated), p. 17.
[127] Benin, *Military Manual* (1995), Fascicule II, p. 10.
[128] Benin, *Military Manual* (1995), Fascicule II, p. 12.
[129] Canada, *LOAC Manual* (1999), p. 6-4, § 35. [130] Canada, *LOAC Manual* (1999), p. 9-1, § 10.
[131] Canada, *Code of Conduct* (2001), Rule 7, § 3.
[132] Cameroon, *Instructors' Manual* (1992), p. 67.
[133] Croatia, *LOAC Compendium* (1991), p. 45.
[134] Dominican Republic, *Military Manual* (1980), p. 8.
[135] Ecuador, *Naval Manual* (1989), § 11.4.
[136] France, *LOAC Manual* (2001), pp. 37 and 64. [137] Hungary, *Military Manual* (1992), p. 73.
[138] India, *Police Manual* (1986), Article 13(xvi); *West Bengal Police Regulations* (1962), Article 156(a); *Madras Police Standing Orders* (1951), Article 667.

141. Italy's LOAC Elementary Rules Manual states that "wounded enemy combatants and shipwrecked shall be evacuated".[139]

142. Kenya's LOAC Manual states that "arrangements may be made between the Parties to permit the removal, exchange and transport of the wounded left on the battlefield".[140] The manual further states that "a local cease-fire may be arranged for the removal from the besieged or encircled areas of the wounded and sick".[141]

143. Madagascar's Military Manual provides that the wounded and shipwrecked shall be evacuated.[142] It further notes that "local arrangements may be concluded for . . . evacuation of the wounded and shipwrecked".[143]

144. The Military Manual of the Netherlands provides that "whenever circumstances permit, a cease-fire or a suspension of fire should be sought to enable the . . . removal of the wounded".[144]

145. New Zealand's Military Manual provides that:

> In the case of a land engagement, agreements between the commanders, whether by armistice or cease-fire, may be made for the exchange, removal and transport of the wounded left on the field. In both land and sea engagements, arrangements may be made for the removal of the wounded and sick from a besieged or encircled area and for the passage of medical personnel and chaplains proceeding to such an area.[145]

146. Nigeria's Manual on the Laws of War provides that "whenever possible, an armistice or cease-fire should be arranged or local arrangements should be made to enable the transfer, exchange and carriage of the wounded who have been left on the battlefield".[146]

147. The Military Directive to Commanders of the Philippines provides that:

> Medical teams must be made available to provide . . . evacuation to injured civilians caught in the crossfire . . .
>
> Coordination and liaison with national and local government agencies should be pursued in undertaking the following immediate tasks after [the] conduct of operations . . . rescue, evacuation and hospitalization.[147]

148. The Military Instructions of the Philippines provides that:

> In the aftermath of military or law enforcement operations involving a firefight that results in unavoidable casualties, caring for the wounded . . . must be a paramount concern of all commanders and troops at all levels . . . To increase their chances of survival, their immediate evacuation to the nearest clinic or hospital must be ensured.[148]

[139] Italy, *LOAC Elementary Rules Manual* (1991), § 75.
[140] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
[141] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.
[142] Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 22.
[143] Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § B.
[144] Netherlands, *Military Manual* (1993), p. VI-2.
[145] New Zealand, *Military Manual* (1992), § 1003(1), see also § 314(2).
[146] Nigeria, *Manual on the Laws of War* (undated), § 34.
[147] Philippines, *Military Directive to Commanders* (1988), Guideline 4(d) and (h).
[148] Philippines, *Military Instructions* (1989), § 4.

149. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that members of the AFP and PNP must at the earliest possible opportunity turn the enemy *hors de combat* (e.g. wounded, surrendered/captured) "over to higher echelons of command/office for proper disposition".[149]

150. Romania's Soldiers' Manual provides that wounded and sick enemy combatants shall be evacuated from the combat zone.[150]

151. Rwanda's Military Instructions states that immediate evacuation of wounded persons to the nearest clinic or hospital should be ensured.[151]

152. Senegal's IHL Manual provides that during internal disturbances, local agreements may be concluded to evacuate the wounded and allow the passage of medical assistance.[152]

153. Spain's LOAC Manual provides that "'as far as circumstances permit', agreements shall be concluded to facilitate the search, removal, exchange and transport of wounded left on the battlefield".[153] It further states that "wounded and sick enemies shall be evacuated as soon as possible" and "in the same conditions as our own troops".[154] The manual specifies that "in besieged or encircled areas where there is civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of the wounded [and] sick . . . and the passage of medical and religious personnel".[155]

154. Switzerland's Basic Military Manual states that "local arrangements or a temporary cease-fire shall be concluded to permit the removal, exchange and transport of wounded and sick left on the battlefield and for the evacuation or exchange of wounded and sick from a besieged or encircled area".[156]

155. According to Togo's Military Manual, "combatants shall participate in the . . . evacuation of the wounded and sick".[157] It adds that "as soon as the tactical situation permits, the wounded and sick shall be evacuated by the appropriate channel".[158]

156. The UK Military Manual states that "belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded [and] sick . . . and for the passage of ministers of all religions and medical personnel and medical equipment on their way to such areas".[159] It further states that "whenever circumstances permit, a local armistice or suspension

[149] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(3).
[150] Romania, *Soldiers' Manual* (1991), p. 9.
[151] Rwanda, *Military Instructions* (1987), pp. 41–42.
[152] Senegal, *IHL Manual* (1999), p. 20.
[153] Spain, *LOAC Manual* (1996), Vol. I, § 2.4.a.(1), see also § 2.6.b.(1).
[154] Spain, *LOAC Manual* (1996), Vol. I, §§ 5.2.(d).4 and 7.3.(a).11.
[155] Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.
[156] Switzerland, *Basic Military Manual* (1987), Article 71, see also Article 12(2).
[157] Togo, *Military Manual* (1996), Fascicule II, p. 10.
[158] Togo, *Military Manual* (1996), Fascicule II, p. 12.
[159] UK, *Military Manual* (1958), § 29, see also § 343.

of fire must be arranged to permit the removal of the wounded left on the battlefield".[160]

157. The UK LOAC Manual provides that "arrangements may be made between the parties to permit the removal, exchange and transport of the wounded left on the battlefield".[161] It also states that "in appropriate local circumstances, arrangements should be made for the evacuation by sea of the wounded and sick and for the passage of medical and religious personnel and equipment especially to besieged areas" and that "a local cease-fire may be arranged for the removal from besieged or encircled areas of the wounded and sick".[162]

158. The US Field Manual reproduces Articles 15 GC I and 18 GC II.[163]

159. The US Air Force Pamphlet states that "Article 15 [GC I] . . . authorizes the conclusion of local arrangements between the parties for removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way thereto".[164] It adds that "parties are encouraged to conclude local arrangements for the removal of the wounded and sick by sea from besieged or encircled areas, and for the passage of medical and religious personnel and equipment on their way thereto".[165]

160. The US Soldier's Manual instructs soldiers to evacuate sick and wounded captives to the rear through medical channels "as soon as possible".[166]

161. The US Naval Handbook states that:

> When circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care.
> . . .
> Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.[167]

162. The YPA Military Manual of the SFRY (FRY) provides that:

> At all times and especially after an engagement, all appropriate measures shall be taken without delay to . . . transport [the wounded and sick] to appropriate medical units . . . A cease-fire may be arranged in order to . . . transport wounded and sick left on the battlefield.[168]

National Legislation

163. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in both international and

[160] UK, *Military Manual* (1958), § 342.
[161] UK, *LOAC Manual* (1981), Section 6, p. 22, § 3.
[162] UK, *LOAC Manual* (1981), Section 7, p. 26, § 2 and Section 9, p. 34, § 3.
[163] US, *Field Manual* (1956), §§ 216 and 256.
[164] US, *Air Force Pamphlet* (1976), § 12-2a.
[165] US, *Air Force Pamphlet* (1976), § 12-3a.
[166] US, *Soldier's Manual* (1984), p. 17.
[167] US, *Naval Handbook* (1995), § 11-4.
[168] SFRY (FRY), *YPA Military Manual* (1988), § 164.

non-international armed conflicts, at any time and especially after an engagement, the wounded and sick shall be evacuated from the battlefield.[169]

164. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[170]

165. Under Iraq's Military Penal Code, failure to bring a wounded person to a designated location is an offence.[171]

166. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GC I, 18 GC II and 17 GC IV, is a punishable offence.[172]

167. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... is liable to imprisonment".[173]

National Case-law

168. No practice was found.

Other National Practice

169. The Report on the Practice of Bosnia and Herzegovina provides the following examples concerning the evacuation and transportation of the wounded and sick: instructions of the army general in November 1993 to the command of the 4th Corps regarding the evacuation of the wounded and sick;[174] approval given by the army general to the command of the 3rd Corps in December 1993 for the evacuation of 11 seriously ill persons from Vitez, with the assistance of the ICRC, as well as for the evacuation of 15 wounded HVO members;[175] and instructions of the army general to the 5th Corps in December 1993 regarding the evacuation of the wounded and sick.[176]

170. In February 1987, the French government issued a communiqué in relation to the besieged Palestinian camps in southern Lebanon and invited "the entire

[169] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 24.
[170] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[171] Iraq, *Military Penal Code* (1940), Article 115C.
[172] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[173] Norway, *Military Penal Code as amended* (1902), § 108(a).
[174] Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Instructions to the 4th Corps, No. 1/297-536, 13 November 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.1.
[175] Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Instructions to the 3rd Corps, No. 1/297-590, 5 December 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.1.
[176] Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Instructions to the 5th Corps, No. 1/297-625, 13 December 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.1.

international community to mobilise and act in solidarity so that . . . wounded can be safely evacuated".[177]

171. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran evacuated wounded Iraqi combatants to safe places, in accordance with the principles of Islamic law.[178]

172. The Guidelines on Evacuations adopted in 1991 by the Presidential Human Rights Committee of the Philippines provided that "non-Government health workers . . . shall be permitted to go to evacuation centers to render medical/relief assistance to evacuees".[179]

III. Practice of International Organisations and Conferences

United Nations

173. In a resolution adopted in 1978 in the context of the conflict in Lebanon, the UN Security Council called upon the belligerents to allow ICRC units into the conflict area to evacuate the wounded.[180]

174. In a resolution adopted in 1985, the UN General Assembly appealed to the government of El Salvador to "permit the International Committee of the Red Cross to continue to evacuate those wounded and maimed by war to where they can receive needed medical attention".[181]

175. In a resolution adopted in 1986, the UN Commission on Human Rights reiterated the request to:

> the Government of El Salvador and the opposition forces to co-operate fully with the humanitarian organizations dedicated to alleviating the suffering of the civilian population, wherever these organizations operate in the country, and to permit the International Committee of the Red Cross to continue to evacuate those wounded and maimed by the war to places where they can receive medical attention they need.[182]

176. In a resolution adopted in 1988, the UN Commission on Human Rights requested the government of El Salvador and the FMLN "with the intention of humanizing the conflict, to continue to apply the agreements for the evacuation of war-wounded for medical attention unaffected by new [ex]changes and negotiations".[183] This request was reiterated in a subsequent resolution adopted in 1989.[184]

[177] France, Ministry of Foreign Affairs, Communiqué on Palestinian camps under siege in Lebanon, 11 February 1987, *Politique étrangère de la France*, February 1987, p. 103.
[178] Report on the Practice of Iran, 1997, Chapter 5.1.
[179] Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, 26 March 1991, § 5.
[180] UN Security Council, Res. 436, 6 October 1978, § 2.
[181] UN General Assembly, Res. 40/139, 13 December 1985, § 9; see also Res. 41/157, 4 December 1986, § 8.
[182] UN Commission on Human Rights, Res. 1986/39, 12 March 1986, § 6.
[183] UN Commission on Human Rights, Res. 1988/65, 10 March 1988, § 11.
[184] UN Commission on Human Rights, Res. 1989/68, 8 March 1989, § 11.

177. In a resolution adopted in 1991, the UN Commission on Human Rights called upon the parties to the conflict in El Salvador to guarantee respect for IHL, "particularly with regard to the evacuation of the war-wounded and maimed in order that they may receive prompt medical attention".[185]
178. In a resolution adopted in 1987 on the situation in El Salvador, the UN Sub-Commission on Human Rights welcomed:

> the implementation of the agreement reached by both contending parties to allow the International Committee of the Red Cross to evacuate the war-wounded and disabled of the Farabundo Marti National Liberation Front without the need for exchanges or prior negotiations in order for them to receive the necessary medical care.[186]

179. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights expressed regret that "the Government of El Salvador has continued to prevent the International Committee of the Red Cross from evacuating the war-wounded and maimed to other countries and frequently does not even allow it to transfer the seriously wounded to a local emergency hospital". It reminded "the Government of El Salvador that in accordance with Additional Protocol II to the Geneva Conventions . . . it may not prevent [the] evacuation [of the war-wounded and disabled] by the International Committee of the Red Cross so that they may receive the medical attention they require".[187]
180. In 1996, in a report concerning Liberia, the UN Secretary-General reported that UNOMIL had facilitated discussions on the evacuation of the wounded.[188]

Other International Organisations
181. In two resolutions adopted in 1995 in the context of the conflict in Chechnya, the European Parliament called on "the Russian and Chechen sides to call an immediate humanitarian ceasefire to permit the retrieval of the . . . wounded".[189]

International Conferences
182. No practice was found.

[185] UN Commission on Human Rights, Res. 1991/75, 6 March 1991, § 9.
[186] UN Sub-Commission on Human Rights, Res. 1987/18, 2 September 1987, § 4.
[187] UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble and § 4, see also § 7.
[188] UN Secretary-General, 15th progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 26.
[189] European Parliament, Resolution on the humanitarian situation in Chechnya and the neighbouring republics of Ingushetia, Daghestan and Northern Ossetia, 16 February 1995, § 1; Resolution on human rights in Chechnya, 16 March 1995, § 2.

IV. Practice of International Judicial and Quasi-judicial Bodies

183. In the *Aloeboetoe and Others case* before the IACtHR in 1988, the facts as stated in the petition alleged that following an incident in which a group of soldiers arrested and shot a number of "unarmed maroons (bushnegroes)" on suspicion of membership of the Jungle Commando, "the representative of the International Red Cross received a permit to evacuate Mr. Aside [a seriously injured man] after negotiating with the authorities [of Suriname] for 24 hours".[190]

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

184. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "evacuation through the appropriate channel shall be organised and start as rapidly as the tactical situation permits" and that "local arrangements shall be concluded for the . . . evacuation of the wounded and shipwrecked".[191]

185. On numerous occasions, the ICRC has acted as a neutral intermediary and provided its good offices in order to facilitate the negotiation of truces or ceasefire agreements for the removal of wounded and sick.[192] It has been the case, in particular, in the following situations: in the Palestinian conflict (between June and August 1948);[193] during the clashes in Budapest (November 1956);[194] in the conflict between the armed forces of France and Tunisia in Bizerte (July 1961);[195] during the civil war in the Dominican Republic (May 1961);[196] during the events in Kisangani between European mercenaries and the Congolese army (July 1967);[197] during the hostilities opposing the Jordanian armed forces and Palestinian movements (September 1967);[198] during the 1973 war between Egypt and Israel (November 1973 and January 1974);[199] during the civil

[190] IACtHR, *Aloeboetoe and Others case*, Judgement, 4 December 1991, § 15.
[191] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 507 and 535, see also § 581.
[192] François Bugnion, *Le Comité International de la Croix-Rouge et la Protection des Victimes de la Guerre*, ICRC, Geneva, 1994, pp. 557–564.
[193] *IRRC*, No. 354, June 1948, pp. 401–407; *IRRC*, No. 356, August 1948, pp. 552–553; *IRRC*, No. 357, September 1948, pp. 618–620; ICRC, Report of Mission of Mr de Reyner, 31 March 1948; ICRC, Report of Mission of Dr Lehner and Mrs Torin, 15 June 1948; ICRC, Report of Mission of Mr de Reyner, January 1948–July 1949.
[194] *IRRC*, No. 456, December 1956, p. 720.
[195] *IRRC*, No. 515, November 1961, p. 530; *Keesing's Contemporary Archives*, 1961, pp. 18341–18343.
[196] *IRRC*, No. 558, June 1965, p. 283; *IRRC*, No. 559, July 1965, pp. 335–337; ICRC, *Annual Report 1965*, Geneva, 1966, pp. 39–42; *Keesing's Contemporary Archives*, 1965, pp. 20813–20818.
[197] *IRRC*, No. 584, August 1967, pp. 371–372; *Keesing's Contemporary Archives*, 1967, p. 22188.
[198] *IRRC*, No. 622, October 1970, pp. 618–624; *Keesing's Contemporary Archives*, 1970, p. 24230.
[199] *IRRC*, No. 660, December 1973, pp. 728–729; *IRRC*, No. 662, February 1974, pp. 92–93; ICRC, *Annual Report 1973*, Geneva, 1974, pp. 12–13; ICRC, *Annual Report 1974*, Geneva, 1975, p. 20; *Keesing's Contemporary Archives*, 1973, pp. 26202–26203.

war in Lebanon (August 1976 and 1981),[200] during the civil war in Nicaragua (September 1978);[201] during the civil war in Chad (February and March 1979);[202] and during the Israeli offensive in Lebanon (August and September 1982).[203]

186. In a communication to the press in 1991, the ICRC urged all the parties to the conflict in Somalia to help the Red Cross and Red Crescent "in evacuating the wounded".[204]

187. In 1992, the ICRC reminded a State of its obligation to transfer the wounded to places where they could receive adequate medical care.[205]

188. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "when [the wounded and sick] cannot receive the care needed for their survival on the spot, their evacuation shall be organized and facilitated, insofar as the security situation permits".[206]

189. In a communication to the press issued in 1996 in the context of the conflict in Chechnya, the ICRC called upon the parties to do everything possible to facilitate the evacuation of the wounded and sick to hospitals.[207] In another communication to the press later the same year, the ICRC appealed to the parties to provide security guarantees to enable its delegates to evacuate the wounded.[208]

VI. Other Practice

190. In 1984, in the context of the conflict in East Timor, a statement issued by the head of the FRETILIN external delegation referred to an incident in which a FALINTIL unit was forced to withdraw when Indonesian helicopters intervened to evacuate the wounded after an attack.[209]

[200] *IRRC*, No. 692, August 1976, pp. 477–478; *IRRC*, No. 693, September 1976, pp. 545–546; ICRC, *Annual Report 1976*, Geneva, 1977, p. 6; ICRC, *Annual Report 1981*, Geneva, 1982, pp. 52–53; *Keesing's Contemporary Archives*, 1976, pp. 28119–28121.

[201] *IRRC*, No. 713, September–October 1978, p. 293; *IRRC*, No. 717, May–June 1979, pp. 160–161; *IRRC*, No. 718, July–August 1979, pp. 206–207; *Keesing's Contemporary Archives*, 1978, p. 29375.

[202] *IRRC*, No. 716, March–April 1979, pp. 95–96; *IRRC*, No. 723, May–June 1980, pp. 148–150; *Keesing's Contemporary Archives*, 1981, p. 30693.

[203] *IRRC*, No. 737, September–October 1982, p. 305; ICRC, *Annual Report 1982*, Geneva, 1983, pp. 56–57; *Keesing's Contemporary Archives*, 1983, pp. 31914–31920.

[204] ICRC, Communication to the Press No. 91/49, Desperate situation in Mogadishu, 29 November 1991.

[205] ICRC archive document.

[206] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

[207] ICRC, Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996, § 2.

[208] ICRC, Communication to the Press No. 96/25, Russian Federation/Chechnya: ICRC calls on all parties to observe a truce, 10 August 1996, § 1.

[209] São Tomé and Principe, Documents on the question of East Timor submitted to the UN Secretariat, UN Doc. A/39/345-S/16668, 16 July 1984, Annex, p. 14.

B. Treatment and Care of the Wounded, Sick and Shipwrecked

Medical care

Note: *For practice concerning humane treatment of the wounded and sick, see Chapter 32, section A. For practice concerning the provision of basic necessities to persons deprived of their liberty, including medical care, see Chapter 37, section A.*

I. Treaties and Other Instruments

Treaties

191. Article 6 of the 1864 GC provides that "wounded or sick combatants, to whatever nation they may belong, shall be . . . cared for".

192. Common Article 3 of the 1949 Geneva Conventions provides that "the wounded and sick shall be . . . cared for". (Article 3 GC II adds the shipwrecked)

193. Article 12, second paragraph, GC I and Article 12, second paragraph, GC II provide that members of the armed forces who are wounded, sick or shipwrecked shall be "cared for by the Party to the conflict in whose power they may be . . . [T]hey shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created".

194. Article 15, first paragraph, GC I provides that "at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to ensure . . . adequate care" of the wounded and sick.

195. Article 18, first and second paragraphs, GC I states that:

> The military authorities may appeal to the charity of the inhabitants voluntarily to . . . care for, under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities . . .
>
> The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality.

196. Article 18, first paragraph, GC II provides that "after each engagement, Parties to the conflict shall, without delay, take all possible measures . . . to ensure . . . adequate care" of the shipwrecked, wounded and sick.

197. Article 21, first paragraph, GC II states that "the Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board . . . wounded, sick or shipwrecked persons".

198. Article 16, first paragraph, GC IV provides that the wounded and sick "shall be the object of particular protection and respect".

199. Article 10 AP I provides that:

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
2. In all circumstances, they shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.

Article 10 AP I was adopted by consensus.[210]

200. Article 17(2) AP I provides that "the Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 [i.e. aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies] to . . . care for the wounded, sick and shipwrecked". Article 17 AP I was adopted by consensus.[211]

201. Article 7 AP II provides with regard to the wounded, sick and shipwrecked that:

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.

Article 7 AP II was adopted by consensus.[212]

202. Article 8 AP II provides that "whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay . . . to ensure . . . adequate care" of the wounded and sick. Article 8 AP II was adopted by consensus.[213]

203. Article 18(1) AP II provides that "the civilian population may, even on its own initiative, offer to . . . care for the wounded, sick and shipwrecked". Article 18 AP II was adopted by consensus.[214]

204. Article 7(b)(2) of the 1987 NATO STANAG 2067 provides that "stragglers requiring medical care should be treated".

Other Instruments

205. Article 79 of the 1863 Lieber Code provides that "every captured wounded enemy shall be medically treated, according to the ability of the medical staff".

206. Article 10 of the 1880 Oxford Manual provides that "wounded or sick soldiers shall be brought in and cared for".

207. Article 6 of the 1979 Code of Conduct for Law Enforcement Officials provides that "law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required". The commentary on the Article states that:

While the medical personnel are likely to be attached to the law enforcement operation, law enforcement officials must take into account the judgement of such personnel when they recommend providing the person in custody with appropriate

[210] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.
[211] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.
[212] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.
[213] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.
[214] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

treatment through, or in consultation with, medical personnel from outside the law enforcement operation.

208. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict . . . the wounded and the sick shall have the right to medical treatment".
209. In paragraphs 1 and 2 of the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook to apply the principle that "wounded and ill persons must be helped and protected in all circumstances".
210. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention".
211. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that in all circumstances, the wounded, sick and shipwrecked "shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition".
212. Article 4(2) and (9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "the wounded and the sick shall be collected and cared for by the party to the armed conflict which has them in its custody or responsibility" and that "every possible measure shall be taken, without delay, . . . to ensure their adequate care".
213. Section 9.1 of the 1999 UN Secretary-General's Bulletin states that "members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall . . . receive the medical care and attention required by their condition".

II. National Practice

Military Manuals

214. Argentina's Law of War Manual (1969) provides that "appeal can be made to the civilian population for the . . . care of the wounded and sick".[215]
215. Argentina's Law of War Manual (1989) refers to Articles 10 AP I and 7 AP II and states that "in all circumstances, the wounded, sick and shipwrecked of either party shall be respected, protected . . . and shall receive, to the fullest extent practicable and with the least possible delay, appropriate medical care".[216]
216. Australia's Commanders' Guide provides that "wounded, sick and shipwrecked combatants are to be afforded necessary medical care".[217] It also

[215] Argentina, *Law of War Manual* (1969), § 3.006.
[216] Argentina, *Law of War Manual* (1989), § 2.03.
[217] Australia, *Commanders' Guide* (1994), § 622.

provides that "civilians in enemy territory are protected persons and as such must be afforded necessary medical treatment".[218]

217. Australia's Defence Force Manual provides that "parties to a conflict must take all possible measures to ... ensure ... care" of the wounded, sick and shipwrecked.[219] It adds that wounded, sick and shipwrecked combatants shall not be "left without proper medical care and attention, or ... exposed to conditions which might result in contagion or infection".[220]

218. Belgium's Law of War Manual refers to common Article 3 of the 1949 Geneva Conventions and provides that the wounded and sick shall be cared for.[221]

219. Belgium's Teaching Manual for Soldiers states that "if operations so permit, the wounded must be ... cared for".[222]

220. Benin's Military Manual provides that "the wounded and sick shall be ... cared for by the party to the conflict in whose power they may be".[223] The manual instructs soldiers to "care for and protect" wounded enemy combatants.[224]

221. Bosnia and Herzegovina's Military Instructions provides that "the wounded and sick who have ceased to resist ... must be provided with medical care and assistance".[225]

222. Burkina Faso's Disciplinary Regulations provides that "whenever circumstances permit, the wounded, sick and shipwrecked shall be ... protected and cared for".[226]

223. Cameroon's Disciplinary Regulations states that "when circumstances so permit, the wounded, sick and shipwrecked shall be ... cared for".[227]

224. Cameroon's Instructors' Manual states that "wounded enemy combatants shall be cared for".[228] It also states that "an appeal may be launched to the civilian population to help National Societies of the Red Cross and Red Crescent to ... care for the wounded, sick and shipwrecked".[229]

225. Canada's LOAC Manual states that AP I "also contains provisions amplifying the obligation to care for persons protected by GC I and GC II" and that "the innovation of AP I in this area is to extend the scope of the earlier Conventions so that civilians as well as military personnel are entitled to protection".[230] It also provides that "the wounded, sick and shipwrecked shall not

[218] Australia, *Commanders' Guide* (1994), § 609.
[219] Australia, *Defence Force Manual* (1994), § 986.
[220] Australia, *Defence Force Manual* (1994), § 990(b)–(c).
[221] Belgium, *Law of War Manual* (1983), p. 17.
[222] Belgium, *Teaching Manual for Soldiers* (undated), pp. 16–17, see also p. 32.
[223] Benin, *Military Manual* (1995), Fascicule II, p. 4, see also pp. 9 and 12.
[224] Benin, *Military Manual* (1995), Fascicule I, p. 16, see also Fascicule III, p. 5.
[225] Bosnia and Herzegovina, *Military Instructions* (1992), § 14(1)
[226] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).
[227] Cameroon, *Disciplinary Regulations* (1975), Article 31.
[228] Cameroon, *Instructors' Manual* (1992), p. 40, § 152, p. 44, § 163(1) and p. 149, § 531(2).
[229] Cameroon, *Instructors' Manual* (1992), p. 96.
[230] Canada, *LOAC Manual* (1999), p. 9-1, § 2.

be left without proper medical care".[231] The manual further states that "appeals may be made to local inhabitants and relief societies to . . . care for the wounded and sick. Such inhabitants and relief societies, even in occupied or invaded territory, shall be permitted spontaneously to . . . care for such personnel."[232] In the case of non-international armed conflicts, the manual states that "after an engagement and whenever circumstances permit, all possible steps must be taken without delay . . . to ensure . . . adequate care" of the wounded, sick and shipwrecked".[233]

226. Canada's Code of Conduct provides that "in all circumstances [the wounded, sick and shipwrecked] shall . . . receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition".[234] It also provides that "military authorities may ask the inhabitants in the area of conflict to voluntarily . . . care for the wounded under their direction".[235]

227. Colombia's Basic Military Manual provides that all wounded and sick combatants shall be cared for.[236]

228. Colombia's Instructors' Manual provides that "wounded enemy combatants must be cared for".[237]

229. Colombia's Circular on Fundamental Rules of IHL provides that "the wounded and sick shall be . . . cared for by the parties to the conflict".[238]

230. Congo's Disciplinary Regulations states that "when circumstances so permit, the wounded, sick and shipwrecked shall be . . . cared for".[239]

231. Croatia's Commanders' Manual states that adequate care must be taken of the wounded and shipwrecked.[240]

232. Croatia's LOAC Compendium, Commanders' Manual and Soldiers' Manual instruct soldiers to protect civilian boats that rescue the shipwrecked.[241]

233. Croatia's Instructions on Basic Rules of IHL requires that the wounded and sick be cared for.[242]

234. Ecuador's Naval Manual provides that wounded and sick members of the armed forces shall be cared for.[243]

235. El Salvador's Soldiers' Manual provides that wounded and sick persons shall be assisted and cared for in all circumstances.[244]

[231] Canada, *LOAC Manual* (1999), p. 9-1, § 18.
[232] Canada, *LOAC Manual* (1999), p. 9-2, § 12.
[233] Canada, *LOAC Manual* (1999), p. 17-4, § 32.
[234] Canada, *Code of Conduct* (2001), Rule 7, § 1.
[235] Canada, *Code of Conduct* (2001), Rule 10, § 8.
[236] Colombia, *Basic Military Manual* (1995), p. 21.
[237] Colombia, *Instructors' Manual* (1999), p. 24; see also *Soldiers' Manual* (1999), p. 20.
[238] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.
[239] Congo, *Disciplinary Regulations* (1986), Article 32.
[240] Croatia, *Commanders' Manual* (1992), Rule 16.
[241] Croatia, *LOAC Compendium* (1991), p. 45; *Commanders' Manual* (1992), Rules 71 and 75–76; *Soldiers' Manual* (1992), p. 3.
[242] Croatia, *Instructions on Basic Rules of IHL* (1993), Nos. 1–3.
[243] Ecuador, *Naval Manual* (1989), § 11.4.
[244] El Salvador, *Soldiers' Manual* (undated), p. 7.

236. France's LOAC Summary Note provides that the "wounded, sick and shipwrecked shall be . . . cared for . . . by the Party to the conflict in whose power they may be".[245]

237. France's LOAC Teaching Note provides that the "wounded, sick and shipwrecked shall be . . . cared for . . . by the Party to the conflict in whose power they may be".[246]

238. France's LOAC Manual provides that the "authorities are responsible for the health and physical integrity of the persons in their power. They commit war crimes if they refuse to provide them with medical care or if they deliberately place their health in danger."[247]

239. Germany's Soldiers' Manual provides that the wounded, sick and shipwrecked shall be cared for.[248]

240. Germany's Military Manual states that the wounded, sick and shipwrecked shall be cared for.[249] It adds that "at all times all possible measures shall be taken to . . . ensure their adequate medical assistance".[250] The manual also provides that "civilians and help organisations such as, for example, the National Red Cross or Red Crescent Society are permitted to . . . care for the wounded, sick and shipwrecked".[251]

241. Hungary's Military Manual makes an explicit reference to GC I as being the regime applicable to the wounded and sick.[252]

242. India's Police Manual states that "police should be ready to render First Aid to the injured and should make arrangements for the speedy transport of such injured persons to the hospital".[253]

243. India's Army Training Note states that "on humanitarian grounds, medical help and care has to be provided to sick and wounded of even an enemy as laid down in [the] Geneva Conventions". The manual explains that the denial of medical care is most likely to occur because of a shortage of medicine and doctors; because troops may give priority to their own wounded and sick; because wounded insurgents or terrorists may have themselves killed or injured armed forces personnel in an ambush or a raid; and because the sick and wounded may sympathise with or harbour insurgents or terrorists. The manual warns, however, that the denial of medical care may lead to allegations and charges of "(a) inhuman behaviour, (b) cruelty to fellow human beings, [or] (c) death due to the carelessness and negligence of Armed Forces personnel".[254] With respect to a situation where the armed forces are called upon to assist the civilian authorities, the manual states that, after firing, "immediate steps should be taken to succour the wounded rioters" and that "it is most important that

[245] France, *LOAC Summary Note* (1992), § 2.1.
[246] France, *LOAC Teaching Note* (2000), p. 3.
[247] France, *LOAC Manual* (2001), p. 32.
[248] Germany, *Soldiers' Manual* (1991), p. 5.
[249] Germany, *Military Manual* (1992), § 601.
[250] Germany, *Military Manual* (1992), § 605.
[251] Germany, *Military Manual* (1992), § 632.
[252] Hungary, *Military Manual* (1992), p. 86.
[253] India, *Police Manual* (1986), p. 39, Article 13(xvi).
[254] India, *Army Training Note* (1995), Appendix Y, § 5.

the best possible arrangements for first aid, medical attention and evacuation to hospital of injured rioters are made".[255]

244. Indonesia's Military Manual provides that the wounded and sick must be cared for.[256]

245. According to Israel's Manual on the Laws of War, "it is imperative to tend to the enemy's wounded".[257] The manual further provides that:

> Belonging to combatant forces entitles the combatant to special rights when he steps out of the sphere of hostilities by surrendering, being taken as a prisoner of war, injury or loss of fighting ability. Such a combatant is entitled to the status of a prisoner of war, according him medical treatment.[258]

246. Italy's LOAC Elementary Rules Manual provides that "wounded and shipwrecked enemy combatants shall be cared for and evacuated to the rear".[259]

247. Kenya's LOAC Manual provides that as soon as the tactical situation permits, "the wounded, sick and shipwrecked shall be cared for".[260] The manual contains the same provision with regard to captured enemy combatants.[261] It also provides that "commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies . . . [to] care for the wounded and shipwrecked".[262]

248. Lebanon's Teaching Manual instructs combatants to care for the wounded and shipwrecked.[263]

249. Madagascar's Military Manual provides that one of the seven fundamental rules of IHL is that "the wounded and sick shall be cared for by the power in whose hands they are". It instructs soldiers: "Care for them . . . Hand them over to your superior . . . or to the nearest medical personnel."[264]

250. Under Mali's Army Regulations, "refusal to . . . care for the wounded, sick and shipwrecked, when the circumstances so permit," constitutes a breach of the laws and customs of war.[265]

251. Morocco's Disciplinary Regulations provides that "when circumstances so permit, the wounded, sick and shipwrecked shall be . . . cared for".[266]

252. The Military Manual of the Netherlands states that "the wounded and sick may not be left without medical care and attention".[267] With respect to

[255] India, *Army Training Note* (1995), p. 13, § 19(b).
[256] Indonesia, *Military Manual* (1982), §§ 36–37.
[257] Israel, *Manual on the Laws of War* (1998), p. 44.
[258] Israel, *Manual on the Laws of War* (1998), p. 46.
[259] Italy, *LOAC Elementary Rules Manual* (1991), § 75.
[260] Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 10–11.
[261] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15 and Précis No. 3, p. 7.
[262] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
[263] Lebanon, *Teaching Manual* (1997), pp. 77–78.
[264] Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 2.2(22) and p. 91, Rule 3, see also Fiche No. 2-T, § 21.
[265] Mali, *Army Regulations* (1979), Article 36.
[266] Morocco, *Disciplinary Regulations* (1974), Article 25(4).
[267] Netherlands, *Military Manual* (1993), p. VI-2.

non-international armed conflicts, the manual states that the "wounded, sick and shipwrecked shall receive medical care".[268]

253. The Military Handbook of the Netherlands provides that "all wounded and sick must be cared for".[269]

254. The IFOR Instructions of the Netherlands instructs soldiers to "care for [the wounded] whether friend or foe".[270]

255. New Zealand's Military Manual provides that "the sick, wounded and shipwrecked members of the armed forces and others entitled to be treated as combatants ... shall not be ... left without proper medical care and attention; nor exposed to conditions which might result in contagion or infection".[271] It also provides that "appeals may be made to the charity and humanity of the local inhabitants and relief societies to ... care for the wounded and sick".[272] In the case of non-international armed conflicts, the manual states that all possible steps must be taken to ensure the adequate care of the wounded, sick and shipwrecked.[273]

256. Nicaragua's Military Manual provides that in both internal and international armed conflicts, the wounded and sick shall be cared for.[274]

257. Nigeria's Operational Code of Conduct states that "all wounded military and civilians will be given necessary medical attention and care".[275]

258. Nigeria's Military Manual provides that "the wounded and sick shall be cared for by the party to the conflict in whose power they may be".[276] It further states that "as soon as the tactical situation permits, necessary measures shall be taken to ... care for the wounded [and] shipwrecked".[277]

259. Nigeria's Manual on the Laws of War provides that the wounded and sick who are in the power of a belligerent must be cared for and that it is prohibited to leave the wounded and sick "without assistance and care or to create conditions that could lead to epidemics or infections".[278]

260. Nigeria's Soldiers' Code of Conduct states that the wounded and shipwrecked enemies "shall be ... treated or handed over to a superior or the nearest medical personnel".[279]

261. The Military Directive to Commanders of the Philippines provides that:

> Medical teams must be made available to provide emergency medical attention ... to injured civilians caught in the crossfire ...

[268] Netherlands, *Military Manual* (1993), p. XI-5.
[269] Netherlands, *Military Handbook* (1995), p. 7-37.
[270] Netherlands, *IFOR Instructions* (1995), § 6.
[271] New Zealand, *Military Manual* (1992), § 1004(1).
[272] New Zealand, *Military Manual* (1992), § 1003(4).
[273] New Zealand, *Military Manual* (1992), § 1817.
[274] Nicaragua, *Military Manual* (1996), Articles 6 and 14.
[275] Nigeria, *Operational Code of Conduct* (1967), § 4(k).
[276] Nigeria, *Military Manual* (1994), p. 13, § 4.
[277] Nigeria, *Military Manual* (1994), p. 46, § 16(g), see also p. 39, § 5(f) and (h).
[278] Nigeria, *Manual on the Laws of War* (undated), § 35.
[279] Nigeria, *Soldiers' Code of Conduct* (undated), § 6.

To demonstrate AFP and government concern for the population, military civic action shall be undertaken immediately after the operation. This includes such immediate tasks as providing medical aid to sick and wounded civilians; procuring and distributing food and shelter to displaced persons; and, restoring vital facilities.[280]

262. The Military Instructions of the Philippines provides that:

In the aftermath of military or law enforcement operations involving firefight that results in unavoidable casualties, caring for the wounded . . . which includes our own troops, the enemy and particularly innocent civilians must be a paramount concern of all commanders and troops at all levels. In the scene of the incident, all wounded must be treated with care and their wounds attended by providing them with first aid.[281]

263. The Soldier's Rules of the Philippines requires soldiers to care for the wounded and sick.[282]

264. The Police Rules of Engagement of the Philippines states that, after a shoot-out and "in case the suspect has been wounded and disabled, he shall be brought . . . to the nearest hospital for medical treatment".[283]

265. Romania's Soldiers' Manual provides that "wounded and sick enemy combatants shall be given first aid and brought to superiors or nearest sanitary personnel".[284]

266. Russia's Military Manual provides that "military commanders may appeal to the charity of the local population to voluntarily . . . care for the wounded and sick. The military authorities must permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to . . . care for wounded or sick."[285]

267. Rwanda's Military Instructions provides that those wounded and sick during combat must be hospitalised.[286]

268. Senegal's Disciplinary Regulations provides that "when circumstances so permit, the wounded, sick and shipwrecked shall be . . . cared for".[287]

269. South Africa's LOAC Manual states that the wounded and sick "shall receive, to the fullest possible extent and with the least possible delay, the medical care and attention required by their condition".[288]

270. Spain's LOAC Manual provides that "as soon as the tactical situation permits, all measures shall be taken to care for the wounded and shipwrecked".[289]

[280] Philippines, *Military Directive to Commanders* (1988), p. 28, Guidelines 4(d)–(e).
[281] Philippines, *Military Instructions* (1989), § 4.
[282] Philippines, *Soldier's Rules* (1989), § 5.
[283] Philippines, *Police Rules of Engagement* (1993), Section 4(f).
[284] Romania, *Soldiers' Manual* (1991), pp. 10–12, see also p. 32.
[285] Russia, *Military Manual* (1990), § 15.
[286] Rwanda, *Military Instructions* (1987), pp. 41–42.
[287] Senegal, *Disciplinary Regulations* (1990), Article 34(1).
[288] South Africa, *LOAC Manual* (1996), § 31.
[289] Spain, *LOAC Manual* (1996), Vol. I, § 5.d.2.(5).

It adds that enemy wounded must be brought to the commander or to the nearest medical post.[290]

271. Sweden's Military Manual provides that the wounded and sick, whether civilians or combatants, shall receive medical care.[291]

272. Sweden's IHL Manual considers that Article 10 AP I on the protection of the wounded, the sick and the shipwrecked and Article 17 AP I on the role of aid organisations have the status of customary law.[292]

273. Switzerland's Basic Military Manual provides that the wounded and sick shall be cared for and states that the refusal to provide care to the wounded is a grave breach of the Geneva Conventions.[293] It also states that "appeal may be made to civilians or civilian relief societies to ... care for the wounded".[294]

274. Togo's Military Manual provides that the "wounded and sick shall be cared for by the Party to the conflict in whose power they may be".[295] The manual instructs soldiers to "care for and protect" wounded enemy combatants.[296]

275. Uganda's Code of Conduct instructs soldiers to render medical treatment to members of the public who may be in the territory of the unit.[297]

276. The UK Military Manual states that in international armed conflicts, "the wounded and sick must be cared for by the belligerents in whose power they are".[298] It also provides that:

> The military authorities may appeal to the charitable zeal of local inhabitants to ... care for the wounded and sick, under their direction, granting to those who respond to this appeal special protection and facilities. The inhabitants, as also relief societies, must be permitted spontaneously to ... care for wounded and sick, whatever nationality.[299]

277. The UK LOAC Manual states that "combatants are required to ... ensure ... adequate care" of the shipwrecked, wounded and sick.[300] It also provides that "military authorities must allow the local population and relief societies to ... tend the wounded and sick".[301] The manual also restates the provisions of common Article 3 of the 1949 Geneva Conventions and specifies that, in the case of non-international armed conflicts, the wounded and sick shall be cared for.[302]

278. The US Field Manual provides that the "wounded and sick shall be cared for by the party to the conflict in whose power they may be" and that "they shall not wilfully be left without medical assistance and care, nor shall conditions

[290] Spain, *LOAC Manual* (1996), Vol. I, § 10.6.b.(3) and 10.6.c.
[291] Sweden, *Military Manual* (1976), p. 16.
[292] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.
[293] Switzerland, *Basic Military Manual* (1987), Articles 69, 70(1) and 192(1).
[294] Switzerland, *Basic Military Manual* (1987), Article 75.
[295] Togo, *Military Manual* (1996), Fascicule II, p. 4, see also pp. 8 and 12.
[296] Togo, *Military Manual* (1996), Fascicule I, p. 17, see also Fascicule III, p. 5.
[297] Uganda, *Code of Conduct* (1986), Rule 7.
[298] UK, *Military Manual* (1958), § 339.
[299] UK, *Military Manual* (1958), § 345.
[300] UK, *LOAC Manual* (1981), Section 7, p. 26, § 2.
[301] UK, *LOAC Manual* (1981), Section 6, p. 22, § 6.
[302] UK, *LOAC Manual* (1981), Section 12, p. 42, § 2.

exposing them to contagion or infection be created".[303] The manual reproduces Articles 15 and 18 GC I.[304]

279. The US Air Force Pamphlet provides that "military authorities shall permit the inhabitants and relief societies spontaneously to . . . care for wounded of all nationalities". It also reproduces Article 12 GC I.[305]

280. The US Instructor's Guide reproduces Article 12 GC I.[306]

281. The US Naval Handbook provides that parties shall take all possible measures to ensure the care of the wounded, sick and shipwrecked.[307]

National Legislation

282. Argentina's Draft Code of Military Justice punishes any soldier who "deprives a protected person of, or does not provide, necessary medical care".[308]

283. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in both international and non-international armed conflicts, "the Armed Forces of the Azerbaijan Republic and appropriate authorities and governmental bodies shall ensure [in all circumstances and with the least possible delay] medical assistance and care needed for the wounded and sick".[309]

284. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[310]

285. China's Criminal Code as amended provides for the punishment of "those working in medical aid or medical treatment positions during wartime who refuse to save or treat seriously injured or critically sick servicemen when conditions permit them to do so".[311]

286. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, fails to rescue and provide assistance to protected persons, while having an obligation to do so".[312]

287. Cuba's Military Criminal Code punishes the failure to fulfil the obligations concerning care and treatment of the wounded and sick.[313]

288. The Czech Republic's Criminal Code as amended provides for the punishment of anyone who does not take measures or obstructs measures to protect or provide assistance to the wounded.[314]

[303] US, *Field Manual* (1956), § 215. [304] US, *Field Manual* (1956), §§ 216 and 219.
[305] US, *Air Force Pamphlet* (1976), § 12-2(a). [306] US, *Instructor's Guide* (1985), p. 8.
[307] US, *Naval Handbook* (1995), § 11.4.
[308] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[309] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 25.
[310] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[311] China, *Criminal Code as amended* (1997), Article 445.
[312] Colombia, *Penal Code* (2000), Article 152.
[313] Cuba, *Military Criminal Code* (1979), Article 42(2).
[314] Czech Republic, *Criminal Code as amended* (1961), Article 263(2)(a).

289. Under the Draft Amendments to the Penal Code of El Salvador, anyone who prevents medical personnel from providing the medical and humanitarian relief that according to IHL they are entitled to provide is punishable.[315]
290. Under Estonia's Penal Code, "refusal to provide assistance to a sick, wounded or shipwrecked person in a war zone, if such refusal causes the death of or damage to the health of that person" is a war crime.[316]
291. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 and 15 GC I, 12 and 18 GC II and 16 GC IV, and of AP I, including violations of Article 10 AP I, as well as any "contravention" of AP II, including violations of Articles 7(2) and 8 AP II, are punishable offences.[317]
292. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[318]
293. Slovakia's Criminal Code as amended provides for the punishment of anyone who does not take measures or obstructs measures to protect or provide assistance to the wounded.[319]
294. Spain's Penal Code punishes the deprivation of necessary medical aid.[320]
295. Under Ukraine's Criminal Code, failure to fulfil the obligation to provide medical treatment and care to the wounded and sick constitutes a war crime.[321]
296. Uruguay's Military Penal Code as amended provides for the punishment of the soldier who "fails to assist a surrendered enemy in cases of shipwreck, fire, explosion, earthquake or similar accidents". It also punishes the soldier who does not assist, when possible, his own comrades in distress.[322]
297. Venezuela's Code of Military Justice as amended punishes "those who deny or impede assistance to the wounded and sick".[323]
298. Vietnam's Penal Code provides for the punishment of "any person who . . . fails to care for or give medical treatment to a wounded soldier".[324]

National Case-law

299. In the *Military Junta case* in 1985, Argentina's National Court of Appeals established that, in a situation of internal violence, wounded persons should receive adequate treatment.[325]

[315] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Omision y obstaculización de medidas de socorro y asistencia humanitaria".
[316] Estonia, *Penal Code* (2001), § 100.
[317] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[318] Norway, *Military Penal Code as amended* (1902), § 108.
[319] Slovakia, *Criminal Code as amended* (1961), Article 263(2)(a).
[320] Spain, *Penal Code* (1995), Article 609.
[321] Ukraine, *Criminal Code* (2001), Article 434.
[322] Uruguay, *Military Penal Code as amended* (1943), Article 58(20)–(21)
[323] Venezuela, *Code of Military Justice as amended* (1998), Article 474(4).
[324] Vietnam, *Penal Code* (1990), Article 271(1).
[325] Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

Other National Practice

300. The briefing notes prepared by the Office of the Attorney General of Australia and cleared by the Defence Forces for debate on the 1991 Geneva Conventions Amendment Bill stated that AP II had produced some important principles, including "general duties of care for the wounded and sick".[326]

301. The Report on the Practice of Colombia states that Colombia authorizes the Colombian Red Cross or the ICRC to render aid to the wounded.[327]

302. According to the Report on the Practice of Egypt "in application of its long dated experience, Egypt considers the . . . care for wounded [and] sick . . . as a tradition which should be respected at all times and in any circumstance, particularly in time of military operations".[328]

303. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, "the wounded and sick, whether civilian or military, must be respected, collected, respected and cared for".[329]

304. In 1985, the government of Honduras reported to the IACiHR that medical professionals were caring for an individual wounded during an incident in a refugee camp by a member of a Honduran patrol.[330]

305. According to the Report on the Practice of India, there is an obligation to provide immediate medical treatment to those who are injured in police firing.[331]

306. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran brought wounded Iraqi combatants to safe places and treated them in accordance with Islamic principles which, according to Iran's *opinio juris*, require that wounded and sick combatants be cared for.[332]

307. With reference to two communiqués issued by the General Military Commander in September 1970, the Report on the Practice of Jordan states that Jordan "made sure that adequate care to the wounded during the internal armed conflict which occurred in its territory in 1970 was provided".[333]

308. According to the Report on the Practice of Malaysia, enemy sick or wounded are handed over to the police, who are under an obligation to provide the necessary medical treatment.[334]

[326] Australia, Department of Foreign Affairs and Trade, Geneva Protocols: Geneva Convention Amendment Bill, Doc. DFAT-92/013031 Pt 8, 13 February 1991, p. 2.
[327] Report on the Practice of Colombia, 1998, Chapter 5.1, referring to Program Presidencial para la defensa de la libertad personal, Bogotá, April 1996, p. 17.
[328] Report on the Practice of Egypt, 1997, Chapter 5.7.
[329] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.
[330] IACiHR, *Case 9619* (Honduras), Resolution, 28 March 1987, § 4.
[331] Report on the Practice of India, 1997, Chapter 5.1.
[332] Report on the Practice of Iran, 1997, Chapter 5.1.
[333] Report on the Practice of Jordan, 1997, Chapter 5.1, referring to Communiqué from the General Military Commander, 18 September 1970 and Communiqué from the General Military Commander, 24 September 1970.
[334] Report on the Practice of Malaysia, 1997, Chapter 5.1.

309. According to the Report on the Practice of the Philippines:

> In an armed conflict where guerilla warfare is the strategy used, distinguishing between civilians and combatants is very difficult. This is precisely the reason why the Philippines have adopted the same rules for both civilians and combatants with regard to the ... care of the wounded [and] sick.[335]

310. In 1989, when submitting information on the rights of detainees for consideration by the UN Sub-Commission on Human Rights, Portugal stated that where firearms were used, those wounded had to be given first aid as soon as possible.[336]

311. In 1997, a senior officer of the RPF in Rwanda declared to a gathering of diplomats and NGO representatives that civilians caught in crossfire were being brought to hospital by members of the RPF in order to receive care.[337]

312. In its report on "Gross violations of human rights" committed between 1960 and 1993, South Africa's Truth and Reconciliation Commission stated that it had evidence from the war in south-west Africa that "on occasion, badly wounded SWAPO fighters were ... not given medical treatment".[338]

313. According to the Report on US Practice, it is the *opinio juris* of the US that the wounded and sick in internal armed conflicts should be respected and protected in accordance with Article 7 AP II. They must receive the medical care required by their condition.[339]

314. In 1975, the government of Uruguay informed the IACiHR that a prisoner who was shot and seriously injured during an escape attempt was immediately given first aid and brought to a military hospital for surgery.[340]

315. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY (FRY) included the following example: "It was quite normal to prevent assistance to be provided to the wounded YPA soldiers ... Civilian hospitals and clinics have refused to provide medical assistance to the wounded and sick soldiers and their dependants."[341]

316. According to the Report on the Practice of Zimbabwe, "Zimbabwe seems to regard as customary, the rules of international practice codified in the Geneva Conventions as regards the ... care of the wounded".[342]

[335] Report on the Practice of the Philippines, 1997, Chapter 5.1.
[336] Portugal, Report on the Administration of Justice and the Human Rights of Detainees submitted to the UN Sub-Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1989/20/Add.1, 15 June 1989, §§ 54 and 61(d).
[337] "Vers la fin de l'aventure des infiltrés", *La Nouvelle Relève*, No. 346, 15 August 1997, pp. 1–2.
[338] South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, p. 54, § 47.
[339] Report on US Practice, 1997, Chapter 5.1.
[340] IACiHR, *Case 1954* (Uruguay), Resolution, 6 March 1981, § 5.
[341] SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 3(i)–(ii); see also Secretariat of the Federal Executive Council, Press Release, Statement by Lieutenant-General Marko Negovanovic, Belgrade, 2 July 1991.
[342] Report on the Practice of Zimbabwe, 1998, Chapter 5.1.

III. Practice of International Organisations and Conferences

United Nations

317. In a resolution adopted in 1984, the UN Commission on Human Rights called on all parties to the conflict in El Salvador to respect and protect the wounded from all sides.[343]

318. In a resolution adopted in 1991, the UN Commission on Human Rights called upon the parties "to guarantee respect for the humanitarian rules applicable to non-international armed conflicts such as that in El Salvador, particularly with regard to the evacuation of the war wounded and maimed in order that they receive prompt medical attention".[344]

319. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights reminded:

> the Government of El Salvador that in accordance with Additional Protocol II to the Geneva Conventions, it must respect and give protection to the war-wounded and disabled, it may not prevent their evacuation by the International Committee of the Red Cross so that they may receive the medical attention they require.[345]

320. In 1995, in a report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights condemned the alleged practice of both parties of refusing to provide medical care to the wounded brought to clinics or hospitals.[346]

321. In 1997, in a report on the situation of human rights in Nigeria, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the UN Special Rapporteur on the Independence of Judges and Lawyers expressed their particular concern that the government of Nigeria had "reportedly denied medical care to detainees suffering from allegedly life-threatening conditions".[347]

322. In 1992, in a report concerning El Salvador, the Director of the Human Rights Division of ONUSAL reported that the wounded and sick were entitled to immediate care, failure to observe this rule of conduct being a serious violation of the norms of IHL.[348]

[343] UN Commission on Human Rights, Res. 1984/52, 14 March 1984, § 5.
[344] UN Commission on Human Rights, Res. 1991/75, 6 March 1991, § 9.
[345] UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 4, see also § 3.
[346] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Initial report, UN Doc. E/CN.4/1996/16, 14 November 1995, § 121.
[347] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and Special Rapporteur on the Independence of Judges and Lawyers, Report on the situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/Add.1, 24 March 1997, § 76.
[348] ONUSAL, Director of the Human Rights Division, Report for November and December 1991, UN Doc. A/46/876-S/23580, 19 February 1992, Annex, § 170.

Other International Organisations

323. In 1995, the Rapporteur of the Council of Europe on the human rights situation in Chechnya reported two cases in which wounded Russian soldiers were attacked in hospitals but noted that these incidents were isolated and did not derive from a deliberate policy of the Chechen authorities.[349]

324. In a resolution adopted in 1985 on the situation in Afghanistan, the European Parliament demanded that the USSR allow the ICRC access to care for the wounded.[350]

325. In a resolution on Yemen adopted in 1964, the Council of the League of Arab States decided "to call upon the International Committee of the Red Cross to take the initiative of providing care for the wounded and help for the victims".[351]

International Conferences

326. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

327. No practice was found.

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

328. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

> Commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft, to . . . care for the wounded and shipwrecked . . .
>
> Civilian persons and aid societies such as National Red Cross or Red Crescent Societies shall be permitted, even on their own initiative, to . . . care for the wounded and shipwrecked. No one shall be harmed, prosecuted or punished for such acts . . .
>
> The wounded, sick and shipwrecked shall be . . . cared for . . .
>
> The wounded and sick shall receive the medical care and attention required by their state of health.[352]

329. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the wounded, the sick and the shipwrecked must be . . . cared for".[353]

[349] Council of Europe, Parliamentary Assembly, Opinion on Russia's request for membership in the light of the situation in Chechnya, Doc. 7231, 2 February 1995, § 75.
[350] European Parliament, Resolution on the situation in Afghanistan, 31 December 1985, § 1.
[351] League of Arab States, Council, Res. 1984, 31 March 1964, § 3.
[352] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 485, 486, 504 and 728.
[353] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

330. In two press releases issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that "the wounded, sick and shipwrecked members of the armed forces must be cared for; [and] the wounded, whether civilian or military, . . . must receive special consideration and protection".[354]

331. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan to ensure the protection of civilian and military victims and in particular "to ensure that the wounded and sick were cared for in all circumstances, regardless of the side to which they belong".[355]

332. In a press release in 1992, the ICRC urged all parties to the conflict in Nagorno-Karabakh "to ensure that the wounded and sick are cared for in all circumstances".[356]

333. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia to "care for wounded and sick".[357]

334. In a press release in 1994, the ICRC reminded the parties to the conflict in Afghanistan that the sick and wounded must be respected in all circumstances.[358]

335. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross, basing itself on the Geneva Conventions and AP I, which it considered applicable to the situation in Chiapas, stated that the parties were under an obligation to protect and care for wounded persons in their power.[359]

336. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all the wounded and sick, both civilian and military, must be . . . cared for".[360]

337. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised that "all the wounded and sick must be . . . cared for, without distinction, in accordance with the provisions laid down primarily in the First and Fourth Geneva Conventions".[361]

[354] ICRC, Press Release No. 1658, Gulf War: ICRC Reminds States of their Obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26; Press Release No. 1659, Middle East Conflict: ICRC Appeals to Belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

[355] ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 25 November 1992.

[356] ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

[357] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

[358] ICRC, Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994.

[359] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de enero de 1994, 3 January 1994, § 2(B).

[360] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

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

338. In a press release in 1994, the ICRC called on parties to the conflict in Chechnya to ensure that the wounded and sick were cared for.[362]
339. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey's military operations in northern Iraq "to care for the wounded and sick".[363]
340. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that "the wounded and sick must be . . . cared for regardless of the party to which they belong".[364]

VI. Other Practice

341. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "the wounded and sick shall be . . . cared for by the party in conflict which has them in its power".[365]
342. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that "in every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, . . . shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition".[366]
343. With reference to the Penal and Disciplinary Rules and OLS Ground Rules, the Report on SPLM/A Practice states that "the SPLM/A has a long-standing practice of care for the sick and wounded. This practice has been expressed in outstanding legal instruments of the SPLM/A."[367]

Distinction between the wounded and the sick

Note: *For practice concerning non-discrimination between the wounded and the sick in general, see Chapter 32, section B.*

[362] ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.
[363] ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and Northern Iraq, 22 March 1995.
[364] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.
[365] ICRC archive document.
[366] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 12, *IRRC*, No. 282, 1991, p. 334.
[367] Report on SPLM/A Practice, 1998, Chapter 5, referring to SPLM/A, Penal and Disciplinary Rules, 4 July 1984, Section 30(2) ("The SPLA as an organised and disciplined Army, shall observe and be bound by internationally recognized humanitarian standards for the conduct of warfare.") and Agreement on Ground Rules for Operation Lifeline Sudan, 1995, preamble (expressing support for the Geneva Conventions and their Additional Protocols).

I. Treaties and Other Instruments

Treaties

344. Article 12, third paragraph, GC I provides that "only urgent medical reasons will authorize priority in the order of treatment to be administered".

345. Article 12, third paragraph, GC II provides that "only urgent medical reasons will authorize priority in the order of treatment to be administered".

346. Article 10(2) AP I provides that "there shall be no distinction among [the wounded, sick and shipwrecked] founded on any grounds other than medical ones". Article 10 AP I was adopted by consensus.[368]

347. Article 15(3) AP I states that "the Occupying Power may not require that, in the performance of [humanitarian] functions, [civilian medical] personnel shall give priority to the treatment of any person except on medical grounds". Article 15 AP I was adopted by consensus.[369]

348. Article 7(2) AP II provides that "there shall be no distinction among [the wounded, sick and shipwrecked] founded on any grounds other than medical ones". Article 7 AP II was adopted by consensus.[370]

349. Article 9(2) AP II states that "in the performance of their duties, medical personnel may not be required to give priority to any person except on medical grounds". Article 9 AP II was adopted by consensus.[371]

Other Instruments

350. Article 10 of the 1880 Oxford Manual provides that "wounded or sick soldiers shall be brought in and cared for, *to whatever nation they belong*". (emphasis added)

351. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention".

352. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "there shall be no distinction among [the wounded, sick and shipwrecked] founded on any grounds other than medical ones".

353. Section 9.1 of the 1999 UN Secretary-General's Bulletin specifies that "*only* urgent medical reasons will authorize priority in the order of treatment to be administered". (emphasis added)

[368] CDDH, *Official Records*, Vol. VI, CDDH/SR. 37, 24 May 1977, p. 69.
[369] CDDH, *Official Records*, Vol. VI, CDDH/SR. 37, 24 May 1977, p. 70.
[370] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.
[371] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

II. National Practice

Military Manuals

354. Argentina's Law of War Manual (1969) provides that "*only* urgent medical reasons will authorise priority in the order of treatment to be administered".[372] (emphasis added)

355. Argentina's Law of War Manual (1989) refers to Articles 10 AP I and 7 AP II and provides that "in all circumstances, the wounded, sick and shipwrecked, to whichever party they belong, must be respected and protected . . . There shall be *no distinction* based on any grounds other than medical ones."[373] (emphasis added)

356. Australia's Commanders' Guide provides that "if medical supplies, personnel or facilities are inadequate to treat all the sick and wounded then medical assistance is to be provided *strictly on the basis of medical triage*" and that "the most in need of medical treatment are to be given priority".[374] (emphasis added)

357. Australia's Defence Force Manual states that "priority in medical treatment can *only* be determined on the basis of medical need".[375] (emphasis added) The manual also states that "while there is no absolute obligation to accept civilian wounded and sick, once civilian patients have been accepted, discrimination against them, on any grounds other than medical, is not permissible".[376]

358. Belgium's Teaching Manual for Soldiers states that "during search and rescue operations, priority shall be given to a wounded enemy in the event that he/she is more seriously affected".[377]

359. Benin's Military Manual instructs soldiers to "care for the wounded and sick, *whether friend or foe*".[378] (emphasis added)

360. Canada's LOAC Manual provides that "*only* urgent medical requirements will justify any priority in treatment among those who are sick and wounded".[379] (emphasis added)

361. Canada's Code of Conduct provides that "there shall be no distinction among [the wounded, sick and shipwrecked] based on any grounds other than medical ones . . . *Only* medical reasons will determine the priority of treatment."[380] (emphasis added)

362. Colombia's Soldiers' Manual provides that "the most seriously wounded enemy combatants must be cared for first".[381]

[372] Argentina, *Law of War Manual* (1969), § 3.001.
[373] Argentina, *Law of War Manual* (1989), § 2.03.
[374] Australia, *Commanders' Guide* (1994), § 622.
[375] Australia, *Defence Force Manual* (1994), § 992.
[376] Australia, *Defence Force Manual* (1994) § 987.
[377] Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 32.
[378] Benin, *Military Manual* (1995), Fascicule II, p. 18.
[379] Canada, *LOAC Manual* (1999), p. 9-2, §§ 19–20.
[380] Canada, *Code of Conduct* (2001), Rule 7, §§ 1 and 4.
[381] Colombia, *Soldiers' Manual* (1999), p. 20.

363. Ecuador's Naval Manual provides that "priority in order of treatment may only be justified by urgent medical considerations".[382]

364. France's LOAC Manual provides with regard to the wounded and sick that "the law of armed conflicts does not allow any distinction other than that based on medical needs".[383]

365. Germany's Soldiers' Manual provides with regard to the treatment of the wounded, sick and shipwrecked that "there shall be no distinction other than on medical grounds".[384]

366. Hungary's Military Manual makes an explicit reference to GC I as being the regime applicable to the wounded and sick.[385]

367. Kenya's LOAC Manual instructs soldiers to "care for the wounded and sick, *be they friend or foe*".[386] (emphasis added)

368. Madagascar's Military Manual provides that the wounded and sick shall receive the medical care required by their state of health. It specifies that this obligation also applies in the case of wounded, sick and shipwrecked enemies.[387]

369. The Military Manual of the Netherlands provides that "*only* urgent medical reasons will determine priority of treatment among the wounded and sick".[388] (emphasis added) With respect to non-international armed conflicts, the manual states that the wounded, sick and shipwrecked shall receive medical care without discrimination".[389]

370. The Military Handbook of the Netherlands provides that "all wounded and sick must be cared for, also those from the enemies. Priority in treatment may only be based on medical grounds."[390]

371. New Zealand's Military Manual provides that "*only* urgent medical requirements will justify any priority in treatment among those who are sick and wounded".[391] (emphasis added) With regard to civilian sick and wounded, the manual provides that:

> There is no absolute obligation to accept civilian wounded and sick only so far as it is practicable to do so. For example, if military medical facilities are not being used but might be used in the immediate future because of an impending battle, there is no obligation to treat civilians. Once a civilian patient has been accepted, however, discrimination against him/her on other than medical grounds is not permissible.[392]

[382] Ecuador, *Naval Manual* (1989), § 11.4.
[383] France, *LOAC Manual* (2001), p. 32.
[384] Germany, *Soldiers' Manual* (1991), p. 5.
[385] Hungary, *Military Manual* (1992), p. 86.
[386] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.
[387] Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 16 and Fiche No. 2-T, § 2.
[388] Netherlands, *Military Manual* (1993), p. VI-1.
[389] Netherlands, *Military Manual* (1993), p. XI-5.
[390] Netherlands, *Military Handbook* (1995), p. 7-37.
[391] New Zealand, *Military Manual* (1992), § 1004(2).
[392] New Zealand, *Military Manual* (1992), § 1003(2).

372. Nigeria's Military Manual states that "*only* urgent medical reasons will authorise priority in the order of treatment to be administered".[393] (emphasis added)
373. Nigeria's Manual on the Laws of War provides that "priority in treatment should be granted to the most gravely wounded".[394]
374. The Soldier's Rules of the Philippines requires soldiers to "care for the wounded and sick, *be they friend or foe*".[395] (emphasis added)
375. Romania's Soldiers' Manual tells soldiers that "nobody will punish you for rendering first aid to a wounded, not even to an enemy one".[396]
376. Russia's Military Manual provides that:

> Military commanders may appeal to the charity of the local population to voluntarily collect and care for the wounded and sick. The military authorities must permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of *whatever nationality*.[397] [emphasis added]

377. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL and the 1948 UDHR is that no distinction other than that based on medical grounds shall be made in the treatment of the wounded and sick.[398]
378. Spain's LOAC Manual provides that medical personnel shall provide the wounded and sick with the medical care required by their condition. It states that *only* urgent medical reasons may justify priority in the order of medical treatment.[399]
379. Switzerland's Basic Military Manual provides that "at all times, and especially following an engagement, all means should be taken to search for and collect the wounded ... *whether friend or foe*".[400] (emphasis added) It further provides that "*only* emergency medical reasons shall establish the priority in the treatment of friendly or enemy wounded".[401] (emphasis added)
380. Togo's Military Manual instructs soldiers to "care for the wounded and sick, *whether friend or foe*".[402] (emphasis added)
381. The UK LOAC Manual provides that "priority in the order of medical treatment is decided *only* for urgent medical reasons".[403] (emphasis added)
382. The US Field Manual provides that "*only* urgent medical reasons will authorize priority in the order of treatment to be administered".[404] (emphasis added)

[393] Nigeria, *Military Manual* (1994), p. 13, § 4.
[394] Nigeria, *Manual on the Laws of War* (undated), § 35.
[395] Philippines, *Soldier's Rules* (1989), § 5.
[396] Romania, *Soldiers' Manual* (1991), p. 22, § 3.
[397] Russia, *Military Manual* (1990), § 15.
[398] Senegal, *IHL Manual* (1999), pp. 3 and 24.
[399] Spain, *LOAC Manual* (1996), Vol. I, § 9.2.(a).2.
[400] Switzerland, *Basic Military Manual* (1987), Article 71.
[401] Switzerland, *Basic Military Manual* (1987), Article 74.
[402] Togo, *Military Manual* (1995), Fascicule II, p. 18.
[403] UK, *LOAC Manual* (1981), Section 6, p. 22, § 2.
[404] US, *Field Manual* (1956), § 215.

383. The US Air Force Pamphlet states that "priority in order of treatment is justified *only* by urgent medical reasons".[405] (emphasis added)
384. The US Naval Handbook provides that "priority in order of treatment may *only* be justified by urgent medical considerations".[406] (emphasis added)
385. The YPA Military Manual of the SFRY (FRY) provides that "*only* urgent medical reasons shall determine priority of treatment among the wounded and sick".[407] (emphasis added)

National Legislation
386. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts:

> the Armed Forces of the Azerbaijan Republic and appropriate authorities and governmental bodies shall ensure [in all circumstances and with the least possible delay] medical assistance and care, needed for the wounded and sick *irrespective of their status*.[408] [emphasis added]

387. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[409]
388. Ethiopia's Red Cross Legal Notice refers to one of the objectives of the Red Cross, notably "caring for the sick and wounded among troops and civilians without national discretion".[410]
389. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 GC I and 12 GC II, and of AP I, including violations of Articles 10(2) and 15(3) AP I, as well as any "contravention" of AP II, including violations of Articles 7(2) and 9(2) AP II, are punishable offences.[411]
390. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[412]

National Case-law
391. No practice was found.

[405] US, *Air Force Pamphlet* (1976), § 12-2. [406] US, *Naval Handbook* (1995), § 11.4.
[407] SFRY (FRY), *YPA Military Manual* (1988), Article 162.
[408] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 25.
[409] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[410] Ethiopia, *Red Cross Legal Notice* (1947), Article 4(a).
[411] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[412] Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

392. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that when [the wounded, sick and shipwrecked] are given medical treatment, no distinction among them be based on any grounds other than medical ones".[413]

393. According to the Report on US Practice, it is the *opinio juris* of the US that there should be no distinction among the wounded and sick on any but medical grounds.[414]

III. Practice of International Organisations and Conferences

394. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

395. No practice was found.

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

396. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "there shall be no distinction among wounded, sick and shipwrecked founded on any grounds other than medical ones" and that "only urgent medical reasons shall authorize priority in the order of treatment to be administered. Criteria based on nationality or rank are excluded."[415]

397. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the wounded, the sick and the shipwrecked must be collected and cared for *regardless of the party to which they belong*".[416] (emphasis added)

398. In a press release in 1992, the ICRC urged all parties to the conflict in Nagorno-Karabakh "to ensure that the wounded and sick are cared of in all circumstances, regardless of the side to which they belong".[417]

[413] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

[414] Report on US Practice, 1997, Chapter 5.1.

[415] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 200 and 215.

[416] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

[417] ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

399. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all the wounded and sick, both civilian and military, must be collected and cared for, *without distinction*".[418] (emphasis added)

400. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised that "all the wounded and sick must be collected and cared for *without distinction*, in accordance with the provisions laid down primarily in the First and Fourth Geneva Conventions".[419] (emphasis added)

VI. Other Practice

401. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that "in every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, ... shall receive ... medical care ... There shall be no distinction among them on any grounds other than their medical condition."[420]

402. In 1993, in a communication on violations of IHL in Somalia during UNOSOM operations, MSF denounced "obstruction of civilian access to hospitals and medical care" in the following terms:

> The access of the only two civilian hospitals which have surgical units, Benadir and Digfer, was blocked on July 17, 1993 by the deployment of United Nations' tanks.
>
> The military hospitals were reserved exclusively for the treatment of United Nations' troops, thus setting up an unacceptable discrimination between the wounded.
>
> Only the Moroccan hospital remained open to the wounded Somalis. This building was inaccessible to the residents west of the K6/Digfer axis. Moreover, as the Moroccan troops were involved in front line military operations, the civilian population could expect little help from them.

MSF urged the UN military commander and the commanders of the various national contingents to respect humanitarian law, including "the right of the injured to treatment, anytime, anywhere, civilian and military alike (article 3 of the four Geneva Conventions)" and requested that "access to treatment be always guaranteed, with no discrimination".[421]

[418] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

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

[420] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 12 and 14, *IRRC*, No. 282, 1991, p. 335.

[421] MSF, Communication on the violations of humanitarian law in Somalia during UNOSOM operations, 20 July 1993, Part I, § 3(a), Part II and Part III, § 2(b).

C. Protection of the Wounded, Sick and Shipwrecked against Pillage and Ill-treatment

General

Note: *For practice concerning pillage in general, see Chapter 16, section D.*

I. Treaties and Other Instruments

Treaties

403. Article 28 of the 1906 GC provides that "in the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies".

404. Article 16 of the 1907 Hague Convention (X) provides that "after every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them . . . against pillage and ill-treatment".

405. Article 15, first paragraph, GC I provides that "at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to protect [the wounded and sick] against pillage and ill-treatment".

406. Article 18, first paragraph, GC II provides that "after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to protect [the shipwrecked, wounded and sick] against pillage and ill-treatment".

407. Article 16, second paragraph, GC IV provides that "as far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment".

408. Article 4(2)(g) AP II prohibits acts of pillage against "all persons who do not take a direct part or who have ceased to take part in hostilities". Article 4 AP II was adopted by consensus.[422]

409. Article 8 AP II provides that "whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, . . . to protect [the wounded, sick and shipwrecked] against pillage and ill-treatment". Article 8 AP II was adopted by consensus.[423]

Other Instruments

410. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including ill-treatment of wounded.

[422] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[423] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

411. Rule 4 of the 1950 UN Command Rules and Regulations gave Military Commissions of the UN Command in Korea jurisdiction over offences including acts of marauding.
412. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention".
413. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949".
414. Section 7.2 of the 1999 UN Secretary-General's Bulletin states that pillage of persons *hors de combat*is prohibited.

II. National Practice

Military Manuals

415. Argentina's Law of War Manual states that the sick and wounded on the battlefield must be protected against pillage.[424]
416. Australia's Defence Force Manual provides that all possible measures must be taken to protect the wounded and sick against pillage and ill-treatment.[425]
417. Burkina Faso's Disciplinary Regulations states that "it is prohibited the plunder the . . . wounded".[426]
418. Cameroon's Disciplinary Regulations states that "it is prohibited the plunder the wounded, sick and shipwrecked".[427]
419. Canada's LOAC Manual provides that "the parties to a conflict must protect the wounded, sick and shipwrecked against pillage and ill-treatment" in both international and non-international armed conflicts.[428]
420. Canada's Code of Conduct provides that following an engagement, there is an obligation to protect the sick, wounded and civilians against theft and ill-treatment. It further provides that "the personal property of sick and wounded . . . shall not be taken".[429]
421. Colombia's Circular on Fundamental Rules of IHL provides that the wounded and sick must be protected by the party which has them in its power.[430]

[424] Argentina, *Law of War Manual* (1969), § 3.003.
[425] Australia, *Defence Force Manual* (1994), § 986.
[426] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[427] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[428] Canada, *LOAC Manual* (1999), p. 9-1, § 9 and p. 17-4, § 32.
[429] Canada, *Code of Conduct* (2001), Rule 7, § 3 and Rule 8, § 2.
[430] Colombia, *Circular on Fundamental Rules of IHL* (1992), §§ 1 and 3.

422. Congo's Disciplinary Regulations states that "it is prohibited to plunder the . . . wounded".[431]
423. France's Disciplinary Regulations as amended states that "it is prohibited to plunder the . . . wounded".[432]
424. Germany's Military Manual states that the wounded, sick and shipwrecked "shall be protected against pillage and ill-treatment".[433]
425. Israel's Manual on the Laws of War states that the "Geneva Conventions contain provisions banning the looting of the wounded, sick [and] shipwrecked . . . Looting is regarded as a despicable act that tarnishes both the soldier and the IDF, leaving a serious moral blot."[434]
426. Italy's IHL Manual provides that the ill-treatment of the wounded, sick and shipwrecked is a war crime.[435]
427. Indonesia's Military Manual provides that the wounded and sick must be protected from robbery and ill-treatment.[436]
428. Lebanon's Army Regulations, Field Manual and Teaching Manual prohibit the pillage of the wounded.[437]
429. Mali's Army Regulations states that "it is prohibited to plunder the . . . wounded".[438]
430. Morocco's Disciplinary Regulations states that "it is prohibited to plunder the . . . wounded".[439]
431. The Military Manual of the Netherlands provides with regard non-international armed conflicts that "the wounded, sick and shipwrecked must be protected against pillage".[440]
432. New Zealand's Military Manual provides that the sick, wounded and shipwrecked are to be protected from pillage and ill-treatment in both international and non-international armed conflicts.[441]
433. Nigeria's Manual on the Laws of War provides that "the belligerents must immediately take all possible measures to protect the sick and wounded against pillage and ill-treatment".[442]
434. The Rules for Combatants of the Philippines provides that "it is forbidden to mistreat a wounded enemy combatant".[443]
435. Romania's Soldiers' Manual provides that "it is prohibited to despoil or pillage wounded and sick enemy combatants".[444]

[431] Congo, *Disciplinary Regulations* (1986), Article 32.2.
[432] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[433] Germany, *Military Manual* (1992), § 605.
[434] Israel, *Manual on the Laws of War* (1998), p. 62.
[435] Italy, *IHL Manual* (1991), Vol. I, § 84.
[436] Indonesia, *Military Manual* (1982), § 37.
[437] Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 8; *Teaching Manual* (1997), p. 77.
[438] Mali, *Army Regulations* (1979), Article 36.
[439] Morocco, *Disciplinary Regulations* (1974), Article 25.2.
[440] Netherlands, *Military Manual* (1993), p. XI-1.
[441] New Zealand, *Military Manual* (1992), §§ 1003(1) and 1817(1).
[442] Nigeria, *Manual on the Laws of War* (undated), § 34.
[443] Philippines, *Rules for Combatants* (1989), § 3.
[444] Romania, *Soldiers' Manual* (1991), p. 9.

436. Senegal's Disciplinary Regulations provides that "it is prohibited to plunder the . . . wounded".[445]

437. Switzerland's Basic Military Manual provides that "it is prohibited to despoil the wounded".[446]

438. The UK Military Manual states that the wounded and sick must be protected against pillage and ill-treatment.[447] The manual refers to:

> a special class of war crime that is sometimes known as "marauding". This consists of ranging over battlefields and following advancing or retreating armies in quest of loot, robbing, maltreating and killing stragglers and wounded and plundering the dead – all acts done not as a means of carrying on the war but for private gain. Nevertheless, such acts are treated as violations of the law of war. Those who commit them, whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerent.[448]

439. The UK LOAC Manual refers to Article 15 GC I and states that combatants shall prevent the wounded and sick from being despoiled.[449]

440. The US Field Manual states that the parties shall take all possible measures to protect the wounded and sick against pillage and ill-treatment and prevent their being despoiled.[450]

441. The US Air Force Pamphlet refers to Article 15 GC I and states the obligation to protect the sick and wounded from pillage and ill-treatment.[451]

442. The US Naval Handbook provides that "mistreating enemy forces, the shipwrecked disabled by sickness or wounds" is a war crime.[452]

National Legislation

443. Albania's Military Penal Code provides for the punishment of "stealing on the battlefield".[453]

444. Algeria's Code of Military Justice provides for the punishment of soldiers or civilians who, in an area of hostilities, steal from the wounded, sick or shipwrecked.[454]

445. Under Argentina's Draft Code of Military Justice, "despoliation of . . . the wounded, sick [and] shipwrecked" is an offence.[455]

446. Under Armenia's Penal Code, stealing objects from the wounded and sick on the battlefield is a punishable offence.[456]

[445] Senegal, *Disciplinary Regulations* (1990), Article 34.2.
[446] Switzerland, *Basic Military Manual* (1987), Article 72; see also *Teaching Manual* (1986), p. 19.
[447] UK, *Military Manual* (1958), § 342.
[448] UK, *Military Manual* (1958), § 636.
[449] UK, *LOAC Manual* (1981), Section 6, p. 22, § 3.
[450] US, *Field Manual* (1956), § 216.
[451] US, *Air Force Pamphlet* (1976), § 12-3(a).
[452] US, *Naval Handbook* (1995), § 6.2.5.
[453] Albania, *Military Penal Code* (1995), Articles 91–93.
[454] Algeria, *Code of Military Justice* (1971), Article 287.
[455] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(8) in the *Code of Military Justice as amended* (1951).
[456] Armenia, *Penal Code* (2003), Article 383.

447. Australia's Defence Force Discipline Act, in an article on looting, provides that:

> A person, being a defence member or a defence civilian, who, in the course of operations against the enemy, or in the course of operations undertaken by the Defence Force for the preservation of law and order or otherwise in aid of the civil authorities –
>
> ...
>
> (b) takes any property from the body of a person ... wounded [or] injured ... in those operations ...
>
> is guilty of [an] offence.[457]

448. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "in international and non-international armed conflicts, at any time and especially after an engagement, all possible measures must be taken to protect the wounded and sick from pillage and ill-treatment".[458]

449. Azerbaijan's Criminal Code provides for the punishment of "pillage of property of persons killed or wounded on the battlefield".[459]

450. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[460]

451. Bolivia's Military Penal Code provides that "the person who plunders the belongings of wounded in combat" commits a punishable offence.[461]

452. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "the unlawful appropriation of belongings from the ... wounded on the battlefield" is a war crime. It adds that ill-treatment of wounded, sick and shipwrecked is a war crime.[462] The Criminal Code of the Republika Srpska contains the same provisions.[463]

453. Bulgaria's Penal Code as amended provides that taking on the battlefield "objects from a wounded [person], ... with the intention to unlawfully appropriate them" is a crime.[464]

454. Under Burkina Faso's Code of Military Justice, "the despoliation of the wounded [and] sick ... in a unit's area of operations" is an offence.[465]

455. Canada's National Defence Act provides that "every person who ... steals from, or with intent to steal searches, the person of any person ... wounded, in the course of warlike operations, ... is guilty of [an] offence".[466]

[457] Australia, *Defence Force Discipline Act* (1982), Section 48(1).
[458] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 24.
[459] Azerbaijan, *Criminal Code* (1999), Article 118.
[460] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[461] Bolivia, *Military Penal Code* (1976), Article 156.
[462] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 159(1) and 173.
[463] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 439(1) and 441.
[464] Bulgaria, *Penal Code as amended* (1968), Article 405.
[465] Burkina Faso, *Code of Military Justice* (1994), Article 193.
[466] Canada, *National Defence Act* (1985), Section 77(*g*).

456. Under Chad's Code of Military Justice, the taking of property from the wounded is a criminal offence.[467]

457. Chile's Code of Military Justice provides that "anyone who plunders the clothing or other objects belonging to a wounded person . . . in order to appropriate them" commits a punishable offence against international law.[468]

458. Colombia's Penal Code imposes a sanction on "anyone who, during an armed conflict, despoils . . . a protected person".[469]

459. Côte d'Ivoire's Penal Code as amended provides for the punishment of "anyone who, in an area of military operations, plunders a wounded, sick [or] shipwrecked . . . person".[470]

460. Croatia's Criminal Code provides that the "unlawful taking of the personal belongings of the . . . wounded on the battlefield" is a war crime.[471]

461. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, plunders for personal gain money or other belongings from wounded persons".[472]

462. The Czech Republic's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations, . . . seizes another person's belongings, taking advantage of such person's distress".[473]

463. Under Egypt's Penal Code, stealing from enemy or friendly wounded on the battlefield is a punishable offence.[474]

464. Egypt's Military Criminal Code criminalises the theft in zones of military operations of property belonging to wounded or sick whether friend or foe.[475]

465. El Salvador's Code of Military Justice provides that "a soldier who plunders the clothes or other personal effects of a wounded person . . . in order to appropriate them" commits a punishable offence.[476]

466. Under Ethiopia's Penal Code, "whosoever . . . lays hands on or does violence to a wounded [or] sick . . . enemy on the field of battle, with intent to rob or plunder him" commits a crime. The Code also provides for the punishment of the ill-treatment of the wounded and sick.[477]

467. France's Code of Military Justice provides for the punishment of "any individual, military or not, who, in the area of operation of a force or a unit, . . . plunders a wounded, sick [or] shipwrecked . . . person".[478]

468. Gambia's Armed Forces Act provides that "every person subject to this Act who . . . steals from or with intent to steal searches, the person of any

[467] Chad, *Code of Military Justice* (1962), Article 62.
[468] Chile, *Code of Military Justice* (1925), Article 263.
[469] Colombia, *Penal Code* (2000), Article 151.
[470] Côte d'Ivoire, *Penal Code as amended* (1981), Article 465.
[471] Croatia, *Criminal Code* (1997), Articles 162 and 165.
[472] Cuba, *Military Criminal Code* (1979), Article 43(1).
[473] Czech Republic, *Criminal Code as amended* (1961), Article 264(a).
[474] Egypt, *Penal Code* (1937), Article 317(9).
[475] Egypt, *Military Criminal Code* (1966), Article 136, see also Article 123.
[476] El Salvador, *Code of Military Justice* (1934), Article 70.
[477] Ethiopia, *Penal Code* (1957), Articles 287(c) and 291.
[478] France, *Code of Military Justice* (1982), Article 428.

person . . . wounded, in the course of war-like operations" commits a punishable offence.[479]

469. Ghana's Armed Forces Act states that "every person subject to the Code of Service Discipline who . . . steals from or with the intent to steal searches, the person of any person . . . wounded, in the course of warlike operations" commits a punishable offence.[480]

470. Under Georgia's Criminal Code, "pillage, *i.e.* seizure in a combat situation of things which are on . . . wounded", is a crime.[481]

471. Guinea's Criminal Code provides that "whoever, in an area of military operation, plunders a wounded, sick [or] shipwrecked person" commits a punishable offence.[482]

472. Under Hungary's Criminal Code as amended, "the person who loots the fallen, injured or sick on the battlefield" is guilty, upon conviction, of a war crime.[483]

473. Under Indonesia's Military Penal Code, theft from sick or wounded members of the armed forces of parties to the conflict is a punishable offence.[484]

474. Iraq's Military Penal Code provides for the punishment of "every person who, with the intent to appropriate for himself or unjustifiably, takes money or other things . . . from the wounded while on the march or in hospital or during movements".[485]

475. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GC I, 18 GC II and 16 GC IV, as well as any "contravention" of AP II, including violations of Articles 4(2)(g) and 8 AP II, are punishable offences.[486]

476. Italy's Wartime Military Penal Code provides for the punishment of anyone who ill-treats the wounded, sick and shipwrecked. It also provides that anyone who plunders a wounded, sick or shipwrecked person is guilty of a punishable offence.[487]

477. Under Kazakhstan's Penal Code, "theft of objects belonging to the . . . wounded on the battlefield (marauding)" is a crime.[488]

478. Under Kenya's Armed Forces Act, anyone who steals from the wounded commits a punishable offence.[489]

[479] Gambia, *Armed Forces Act* (1985), Section 40(*g*).
[480] Ghana, *Armed Forces Act* (1962), Section 18(*g*).
[481] Georgia, *Criminal Code* (1999), Article 413(a).
[482] Guinea, *Criminal Code* (1998), Article 570.
[483] Hungary, *Criminal Code as amended* (1978), Section 161.
[484] Indonesia, *Military Penal Code* (1947), Articles 140–143.
[485] Iraq, *Military Penal Code* (1940), Article 115(a).
[486] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[487] Italy, *Wartime Military Penal Code* (1941), Articles 192 and 193.
[488] Kazakhstan, *Penal Code* (1997), Article 385.
[489] Kenya, *Armed Forces Act* (1968), Section 23.

479. Under South Korea's Military Criminal Code, "a person who takes the clothes and other property of the . . . wounded in the combat area" commits a punishable offence.[490]

480. Latvia's Criminal Code provides that the appropriation of property of the wounded on the battlefield is a war crime.[491]

481. Under Lebanon's Code of Military Justice, pillage of the sick or the wounded by non-military persons in an "area of military operations" is a punishable offence.[492]

482. Under Lithuania's Criminal Code as amended, "an order to plunder or seize things from . . . wounded victims on the battlefield" is a war crime.[493]

483. Malaysia's Armed Forces Act provides for the punishment of "every person subject to service law under this Act who . . . steals from, or with intent to steal searches, the person of anyone . . . wounded in the course of warlike operations".[494]

484. Under Mali's Code of Military Justice, "anyone who plunders a wounded, sick [or] shipwrecked . . . person" commits a punishable offence.[495]

485. Mexico's Code of Military Justice as amended provides penalties for persons who mistreat or otherwise cause physical or mental injuries to the wounded and sick.[496]

486. Mozambique's Military Criminal Law provides for the punishment of stealing valuables and objects from the wounded.[497]

487. The Definition of War Crimes Decree of the Netherlands includes "ill-treatment of wounded" in its list of war crimes.[498]

488. Under the Military Criminal Code as amended of the Netherlands, "theft from a . . . sick or wounded person, who belongs to one of the parties to the conflict," is a criminal offence.[499]

489. New Zealand's Armed Forces Discipline Act provides that:

> Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who –
>
> (a) Steals from, or with intent to steal searches, the person of anyone . . . wounded . . . in the course of any war or warlike operations in which New Zealand is engaged, or . . . injured . . . in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil power.[500]

[490] South Korea, *Military Criminal Code* (1962), Article 82.
[491] Latvia, *Criminal Code* (1998), Section 76.
[492] Lebanon, *Code of Military Justice* (1968), Article 132.
[493] Lithuania, *Criminal Code as amended* (1961), Article 341.
[494] Malaysia, *Armed Forces Act* (1972), Section 46(*a*).
[495] Mali, *Code of Military Justice* (1995), Article 134(1).
[496] Mexico, *Code of Military Justice as amended* (1933), Article 324.
[497] Mozambique, *Military Criminal Law* (1987), Articles 83(b) and 85(d).
[498] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.
[499] Netherlands, *Military Criminal Code as amended* (1964), Article 156.
[500] New Zealand, *Armed Forces Discipline Act* (1971), Section 31(a).

490. Nicaragua's Military Penal Law punishes "anyone who, in military operations, steals for personal gain money or other belongings of the wounded".[501]
491. Nicaragua's Military Penal Code provides for the punishment of the soldier who, in the zone of operations, "despoils a ... wounded, sick or shipwrecked person of their clothing or other personal effects".[502]
492. Nigeria's Armed Forces Decree 105 as amended punishes any person subject to service law who "steals from, or with intent to steal searches, the body of a person ... wounded ... in the course of a war-like operation".[503]
493. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[504]
494. Paraguay's Military Penal Code punishes "any soldier who has plundered another wounded soldier".[505]
495. Under Peru's Code of Military Justice, ill-treatment of a non-resisting wounded enemy constitutes a violation of the law of nations.[506]
496. Romania's Penal Code criminalises "robbing the ... wounded on the battlefield of objects they possess".[507]
497. Singapore's Armed Forces Act as amended provides for the punishment of every person subject to military law who:

> steals from or, with intent to steal, searches the person of anyone ... wounded ... in the course of warlike operations, or ... injured ... in the course of operations undertaken by the Singapore Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities.[508]

498. Slovakia's Criminal Code as amended punishes "whoever in a theatre of war, on [the] battlefield or in places affected by military operations, ... seizes another person's belongings, taking advantage of such person's distress".[509]
499. Under Slovenia's Penal Code, plundering or ordering the plunder of objects belonging to casualties on the battlefield constitutes a war crime.[510]
500. Under Spain's Military Criminal Code, the despoliation of wounded, sick or shipwrecked persons and appropriation of their personal belongings in a combat area is an offence against the laws and customs of war.[511]

[501] Nicaragua, *Military Penal Law* (1980), Article 81.
[502] Nicaragua, *Military Penal Code* (1996), Article 56(1).
[503] Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51.
[504] Norway, *Military Penal Code as amended* (1902), § 108.
[505] Paraguay, *Military Penal Code* (1980), Article 293.
[506] Peru, *Code of Military Justice* (1980), Article 94.
[507] Romania, *Penal Code* (1968), Article 350.
[508] Singapore, *Armed Forces Act as amended* (1972), Section 18(a).
[509] Slovakia, *Criminal Code as amended* (1961), Article 264(a).
[510] Slovenia, *Penal Code* (1994), Article 380(1).
[511] Spain, *Military Criminal Code* (1985), Article 77(2).

501. Spain's Penal Code provides for the punishment of anyone who during an armed conflict despoils the wounded, sick or shipwrecked and appropriates their personal belongings.[512]
502. Switzerland's Military Criminal Code as amended punishes anyone who, on the battlefield, despoils and pillages the wounded and sick. It also provides for the punishment of anyone who uses violence against the wounded and sick.[513]
503. Under Tajikistan's Criminal Code, pillage of wounded and sick in a combat zone is a crime in both international and non-international armed conflicts.[514]
504. Togo's Code of Military Justice punishes "any soldier who plunders a wounded, sick or shipwrecked person".[515]
505. Trinidad and Tobago's Defence Act as amended contains a section on "looting" which states that "any person subject to military law who . . . steals from, or with intent to steal searches, the person of anyone . . . wounded in the course of warlike operations . . . is guilty of looting".[516]
506. Uganda's National Resistance Army Statute provides that "a person subject to military law who . . . steals from or, with intent to steal, searches the person or any person . . . wounded in the course of war-like operations . . . commits an offence".[517]
507. Under Ukraine's Criminal Code, stealing the belongings of the wounded and sick on the battlefield or treating them cruelly constitutes a war crime.[518]
508. The UK Army Act as amended provides that:

> Any person subject to military law who –
>
> (a) steals from, or with intent to steal searches, the person of anyone . . . *wounded . . . in the course of warlike operations, or . . . injured . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities . . .*
>
> shall be guilty of looting.[519] [emphasis in original]

509. The UK Air Force Act as amended provides for the punishment of any person subject to air force law who:

> steals from, or with intent to steal searches, the person of anyone . . . wounded . . . in the course of warlike operations, or . . . injured . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities.[520]

[512] Spain, *Penal Code* (1995), Article 612(7).
[513] Switzerland, *Military Criminal Code as amended* (1927), Articles 139–140.
[514] Tajikistan, *Criminal Code* (1998), Article 405.
[515] Togo, *Code of Military Justice* (1981), Article 95.
[516] Trinidad and Tobago, *Defence Act as amended* (1962), Section 40(*a*).
[517] Uganda, *National Resistance Army Statute* (1992), Section 35(*f*).
[518] Ukraine, *Criminal Code* (2001), Articles 432 and 434.
[519] UK, *Army Act as amended* (1955), Section 30(*a*).
[520] UK, *Air Force Act as amended* (1955), Section 30(*a*).

510. Uruguay's Military Penal Code as amended punishes the "despoliation of the wounded . . . in combat".[521]
511. Under Venezuela's Code of Military Justice as amended, it is a crime against international law to "plunder . . . the wounded and sick".[522]
512. Vietnam's Penal Code provides for the punishment of "any person who steals personal belongings from a wounded soldier".[523]
513. Under Yemen's Military Criminal Code, despoliation of the wounded or sick is a war crime.[524]
514. Zambia's Defence Act as amended states that "any person subject to military law under this Act who . . . steals from or with intent to steal searches the person of anyone . . . wounded in the course of warlike operations . . . shall be guilty of looting".[525]
515. Zimbabwe's Defence Act as amended provides for the punishment of "any member [of the Defence Forces] who . . . steals from or with intent to steal searches the person of anyone . . . wounded in the course of warlike operations".[526]

National Case-law
516. No practice was found.

Other National Practice
517. According to German investigations following allegations of crimes committed against members of the armed forces in Crete in May 1941, it appeared that "wounded soldiers were robbed and deprived of parts of their clothing, primarily by the civilian population".[527]
518. According to the Report on US Practice, it is the *opinio juris* of the US that the wounded and sick in internal armed conflicts should be respected and protected in accordance with Article 8 AP II.[528]
519. Order No. 579 issued in 1991 by the Chief of Staff of the YPA provides that YPA units shall apply "all means to prevent any attempt of pillage [and] mistreatment of . . . the wounded and sick".[529]

III. Practice of International Organisations and Conferences

520. No practice was found.

[521] Uruguay, *Military Penal Code as amended* (1943), Article 58(10).
[522] Venezuela, *Code of Military Justice as amended* (1998), Article 474(11).
[523] Vietnam, *Penal Code* (1990), Article 271(2).
[524] Yemen, *Military Criminal Code* (1998), Article 20.
[525] Zambia, *Defence Act as amended* (1964), Section 35(*a*).
[526] Zimbabwe, *Defence Act as amended* (1972), First Schedule, Section 11(a).
[527] Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau*, 1939–1945, University of Nebraska Press, 1989, pp. 156–157.
[528] Report on US Practice, 1997, Chapter 5.1.
[529] SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

IV. Practice of International Judicial and Quasi-judicial Bodies

521. No practice was found.

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

522. No practice was found.

VI. Other Practice

523. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that "every possible measure shall be taken, without delay, . . . to protect [the wounded and sick] against pillage and ill-treatment".[530]

Respect by civilians for the wounded, sick and shipwrecked

I. Treaties and Other Instruments

Treaties
524. Article 18, second paragraph, GC I states that "the civilian population shall respect [the] wounded and sick, and in particular abstain from offering them violence".
525. Article 17(1) AP I provides that "the civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them". Article 17 AP I was adopted by consensus.[531]

Other Instruments
526. No practice was found.

II. National Practice

Military Manuals
527. Argentina's Law of War Manual provides that the civilian population shall respect the wounded, sick and shipwrecked and shall not commit any act of violence against them.[532]

[530] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, 1991, p. 335.
[531] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.
[532] Argentina, *Law of War Manual* (1989), § 2.03.

528. Australia's Defence Force Manual states that while personnel from a disabled aircraft may be captured by non-combatants, they may not be subjected to violent assault by them.[533]
529. Germany's Military Manual provides that "civilians must respect the wounded, the sick and the shipwrecked, even if they belong to the opposite party. They must not use violence against them."[534]
530. Spain's LOAC Manual refers to Article 17 AP I.[535]
531. Sweden's IHL Manual considers that Article 17 AP I on the role of aid organisations has the status of customary law.[536]
532. Switzerland's Basic Military Manual, although it refers to Article 18 GC I, does not provide explicitly for the duty of civilians to respect the wounded and sick. The commentary gives as an example, however, that if "a seriously injured parachutist lands near a farm, he shall be cared for until the arrival of the authorities".[537]
533. The UK Military Manual provides that "the civilian population must respect the wounded and sick, and refrain from offering them violence". The manual further provides that "nursing the wounded and sick should not be penalised, though this immunity does not extend to the concealment of enemy personnel or the activities of escape organisations".[538]
534. The US Field Manual provides that "the civilian population shall respect [the] wounded and sick, and in particular abstain from offering them violence".[539]
535. The US Health Service Manual reproduces Article 18 GC I and provides that "the civilian population must respect the wounded and the sick and refrain from offering them violence".[540]

National Legislation
536. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[541]
537. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 18 GC I, and of AP I, including violations of Article 17(1) AP I, are punishable offences.[542]
538. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

[533] Australia, *Defence Force Manual* (1994), § 848.
[534] Germany, *Military Manual* (1992), § 632.
[535] Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(4).
[536] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.
[537] Switzerland, *Basic Military Manual* (1987), Article 75.
[538] UK, *Military Manual* (1958), § 345.
[539] US, *Field Manual* (1956), § 219.
[540] US, *Health Service Manual* (1991), p. A-2.
[541] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[542] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[543]

National Case-law

539. No practice was found.

Other National Practice

540. According to the Report on the Practice of Chile, civilians also have a duty to respect persons *hors de combat*.[544]

541. According to the Report on Report on the Practice of Indonesia, although civilians do not have the legal duty to safeguard the enemy *hors de combat*, they would have a moral duty to do so under the principle of humanity stated in the State's fundamental philosophy (*Pancasila*).[545]

542. According to the Report on the Practice of Iran, during the Iran–Iraq War, in reply to allegations that "angry [Iranian] mobs had killed parachuting Iraqis", Iranian military authorities stated that pilots were under the control of the army and well treated.[546] The Iranian authorities repeatedly asked the Iranian population not to shoot at parachuting pilots and to capture them alive.[547]

543. The Report on the Practice of Israel states that:

> With respect to civilians, the Israeli Penal Law 1997 prohibits any assault on the person of another, except in situations where there exists a defence prescribed by law, such as self defence. Civilians are, therefore, also under the duty not to harm [the] enemy *hors de combat*.[548]

544. According to the Report on the Practice of Jordan, civilians also have a duty to respect persons *hors de combat*.[549]

III. Practice of International Organisations and Conferences

United Nations

545. In a resolution on Angola adopted in 1993, the UN Security Council condemned the "violations of international humanitarian law, in particular . . . the extensive killings carried out by armed civilians".[550]

Other International Organisations

546. No practice was found.

[543] Norway, *Military Penal Code as amended* (1902), § 108.
[544] Report on the Practice of Chile, 1997, Answers to additional questions on Chapter 2.1.
[545] Report on the Practice of Indonesia, 1997, Answers to additional questions on Chapter 2.1.
[546] Report on the Practice of Iran, 1997, Chapter 2.1.
[547] Report on the Practice of Iran, 1997, Chapters 2.1 and 5.3; see also Military Communiqué No. 66, 29 September 1980.
[548] Report on the Practice of Israel, 1998, Chapter 2.1, referring to Penal Law as amended (1977).
[549] Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 2.1.
[550] UN Security Council, Res. 804, 29 January 1993, § 10.

International Conferences

547. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

548. No practice was found.

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

549. The ICRC Commentary on Article 17 AP I states that its "provision was inspired by Article 18, paragraphs 2, 3 and 4, of the First Convention – the principle of which came from the original Convention of 22 August 1864 (Article 5) – and it was aimed at extending the scope of Article 18 to the civilian wounded and sick".[551]

VI. Other Practice

550. No practice was found.

[551] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 692.

CHAPTER 35

THE DEAD

A. Search for and Collection of the Dead

I. Treaties and Other Instruments

Treaties

1. Article 3 of the 1929 GC provides that "after each engagement the occupant of the field of battle shall take measures to search for . . . the dead".

2. Article 15, first paragraph, GC I provides that "at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to search for the dead".

3. Article 18, first paragraph, GC II provides that "after each engagement, Parties to the conflict shall, without delay, take all possible measures . . . to search for the dead".
4. Article 21, first paragraph, GC II states that "the Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft . . . to collect the dead".
5. Article 16, second paragraph, GC IV provides that "as far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed".
6. Article 17(2) AP I states that "the Parties to the conflict may appeal to the civilian population and the aid societies . . . to search for the dead and report their location". Article 17 AP I was adopted by consensus.[1]
7. Article 33(4) AP I provides that "the Parties to the conflict shall endeavour to agree on arrangements for teams to search for . . . and recover the dead from the battlefield areas". Article 33 AP I was adopted by consensus.[2]
8. Article 8 AP II provides that "whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay . . . to search for the dead". Article 8 AP II was adopted by consensus.[3]

Other Instruments
9. Article II(5) of the 1992 N'Sele Ceasefire Agreement provides that the ceasefire shall imply "the possibility of recovering the remains of the dead".
10. Article 4(9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "every possible measure shall be taken, without delay, . . . to search for the dead".

II. National Practice

Military Manuals
11. Argentina's Law of War Manual states that the parties shall, without delay, take all possible measures to search for and collect the dead.[4]
12. Australia's Defence Force Manual provides that "parties must search for the dead".[5] The manual further states that:

> All of the protagonists to a conflict shall attempt to agree to form special teams to undertake the search, identity and recovery of their dead from a belligerent's battlefield. This will include any arrangements for such teams to be accompanied by members of the belligerent force upon whose land they are searching. In the course of their duties search teams are deemed to be protected persons.[6]

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.
[2] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[3] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.
[4] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 2.06.
[5] Australia, *Defence Force Manual* (1994), § 986, see also § 994.
[6] Australia, *Defence Force Manual* (1994), § 9-104.

13. Belgium's Law of War Manual provides that "the belligerents must search for the dead and collect them".[7]

14. Benin's Military Manual provides that "combatants must search for the dead". The manual also states that "military commanders can make an appeal to the civilian population, to aid societies such as the National Red Cross or Red Crescent Societies . . . to collect . . . the dead".[8]

15. Cameroon's Instructors' Manual states that military commanders must take care of searching for the dead and that they must be evacuated.[9] It further provides that "in case of civilian losses, civil defence units and personnel shall participate in the search for the victims".[10] The manual also states that "an appeal to the charity of the population can be made to help National Societies such as the Red Cross or the Red Crescent in order to collect . . . the dead".[11]

16. Canada's LOAC Manual provides that the belligerents "must also search for the dead".[12] With respect to non-international armed conflicts in particular, the manual specifies that "steps must also be taken to search for the dead".[13] It also states that:

> Parties to the conflict shall endeavour to reach agreements to allow teams to search for . . . and recover the dead from battlefield areas. They may also attach to such teams representatives of the adverse party when the search is taking place in areas controlled by the adverse party. While carrying out these duties, members of the teams shall be respected and protected.[14]

17. Canada's Code of Conduct provides that "there is . . . an obligation to search for . . . the dead".[15]

18. Croatia's Commanders' Manual provides that "when the mission permits, the . . . dead in action shall be searched for and collected".[16] It further states that "bodies not buried or cremated on the spot shall be evacuated".[17]

19. France's LOAC Summary Note and LOAC Teaching Note provide that the dead must be collected.[18]

20. According to Germany's Military Manual, "the dead are to be collected".[19]

21. Under India's police regulations, Indian police are required to make arrangements for the collection of dead persons killed in police firing.[20]

[7] Belgium, *Law of War Manual* (1983), p. 49.
[8] Benin, *Military Manual* (1995), Fascicule II, p. 10.
[9] Cameroon, *Instructors' Manual* (1992), p. 67, § 241(1).
[10] Cameroon, *Instructors' Manual* (1992), pp. 95–96, DG 34.
[11] Cameroon, *Instructors' Manual* (1992), p. 96, DG 34.
[12] Canada, *LOAC Manual* (1999), p. 9-1, § 9, see also p. 11-2, § 16.
[13] Canada, *LOAC Manual* (1999), p. 17-4, § 32.
[14] Canada, *LOAC Manual* (1999), p. 9-5, § 53.
[15] Canada, *Code of Conduct* (2001), Rule 7, § 3.
[16] Croatia, *Commanders' Manual* (1992), § 71.
[17] Croatia, *Commanders' Manual* (1992), § 89.
[18] France, *LOAC Summary Note* (1992), § 2.1; *LOAC Teaching Note* (2000), p. 3.
[19] Germany, *Military Manual* (1992), § 611.
[20] India, *Police Manual* (1986), Article 13(xvii–xviii); *West Bengal Police Regulations* (1962), Article 156(a).

22. Italy's LOAC Elementary Rules Manual provides that "when the mission permits, the . . . dead in action shall be searched for and collected".[21]
23. Kenya's LOAC Manual provides that "at all times, and particularly after an engagement, Parties to the conflict must take measures to search for and collect the dead". It adds that "civil defence units and personnel shall participate in the search for victims, particularly when there are civilian casualties".[22] The manual also provides that "commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft . . . to collect and identify the dead".[23]
24. Madagascar's Military Manual provides that, "when the mission so permits . . . those killed in action shall be searched for and collected".[24]
25. The Military Manual of the Netherlands states that, with regard to non–international armed conflicts, "whenever circumstances permit, all measure shall be taken, without delay to search for and collect . . . the dead".[25]
26. According to the Military Handbook of the Netherlands, "the dead shall systematically, if possible, be searched for and collected".[26]
27. New Zealand's Military Manual provides that "the parties to a conflict are obliged to take all possible measures . . . to search for the dead".[27] The manual further states that:

> To facilitate the finding of the missing personnel Parties to the conflict endeavour to reach agreement to allow teams to search for . . . and recover the dead from battle-field areas and may attach to such teams representatives of the adverse Party when the search is taking place in areas controlled by the adverse Party. While carrying out these duties, members of the teams shall be respected and protected.[28]

With respect to non-international armed conflicts, the manual states that "steps must be taken to search for the dead".[29]
28. Nigeria's Military Manual provides that the dead must be searched for "may be, with the aid of the civilian population or the Red Cross/Crescent".[30]
29. Nigeria's Manual on the Laws of War provides that "at all times and particularly after a campaign, the belligerents must immediately take measures to . . . search for the dead".[31]

[21] Italy, *LOAC Elementary Rules Manual* (1991), § 71.
[22] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 3, pp. 11 and 13.
[23] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
[24] Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 16, see also Fiche No. 5-SO, § C, Fiche No. 8-SO, § C and Fiche 2-T, § 22.
[25] Netherlands, *Military Manual* (1993), p. XI–5.
[26] Netherlands, *Military Handbook* (1995), p. 7-40.
[27] New Zealand, *Military Manual* (1992), § 1003(1), see also § 1011(1).
[28] New Zealand, *Military Manual* (1992), § 1011(3).
[29] New Zealand, *Military Manual* (1992), § 1817.
[30] Nigeria, *Military Manual* (1994), p. 46, § 16(g).
[31] Nigeria, *Manual on the Laws of War* (undated), § 34(c).

30. The Military Instructions of the Philippines provides that "evacuation of the dead bodies must be done expeditiously and brought to the nearest morgue".[32]

31. According to Spain's LOAC Manual, "the belligerent parties must, at all times and particularly after an engagement, take all possible measures to search for and collect . . . the dead in action".[33] The manual also states that "the dead bodies not buried, cremated or buried at sea because of the circumstances, shall be evacuated".[34]

32. Switzerland's Basic Military Manual provides that "at all times, and particularly after an engagement, all measures shall be taken to search for and collect the dead, be they enemies or friends".[35]

33. Togo's Military Manual provides that "combatants must search for the dead". It also states that "military commanders can make an appeal to the civilian population, to aid societies such as the National Red Cross or Red Crescent Societies . . . to collect . . . the dead".[36]

34. The UK Military Manual provides that "belligerents must at all times, and particularly after an engagement, take all possible measures to search for the dead".[37]

35. The UK LOAC Manual provides that "combatants are required . . . to search for the dead".[38]

36. The US Field Manual reproduces Article 15 GC I.[39]

37. The US Air Force Pamphlet refers to Article 15 GC I.[40]

38. The US Operational Law Handbook states that "the LOW requires Parties to a conflict to search for the dead".[41]

39. The Annotated Supplement to the US Naval Handbook provides that the requirement for parties to the conflict, after each engagement and without delay, to take all possible measures to search for and collect the wounded and sick "also extends to the dead".[42]

40. The YPA Military Manual of the SFRY (FRY) provides that the civilian population or humanitarian societies may, of their own initiative, collect the dead, while military commanders assist and supervise these groups.[43]

[32] Philippines, *Military Instructions* (1989), p. 27, § 4; see also *Military Directive to Commanders* (1988), p. 30, guideline 4(h)(6).
[33] Spain, *LOAC Manual* (1996), Vol. I, § 7.5.a, see also § 5.2.d.(5).
[34] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[35] Switzerland, *Basic Military Manual* (1987), Article 71(1).
[36] Togo, *Military Manual* (1996), Fascicule II, p. 10.
[37] UK, *Military Manual* (1958), § 381.
[38] UK, *LOAC Manual* (1981), Section 6, p. 22, § 3.
[39] US, *Field Manual* (1956), § 216.
[40] US, *Air Force Pamphlet* (1976), § 12-2(a).
[41] US, *Operational Law Handbook* (1993), p. Q-185.
[42] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.
[43] SFRY (FRY), *YPA Military Manual* (1988), Article 166.

National Legislation

41. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[44]

42. Botswana's Geneva Conventions Act provides that "Parties to the conflict, shall, without delay take all possible measures . . . to search for the dead".[45]

43. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GC I, 18 GC II and 16 GC IV, and of AP I, including violations of Article 33(4) AP I, as well as any "contravention" of AP II, including violations of Article 8 AP II, are punishable offences.[46]

44. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[47]

45. Vietnam's Penal Code punishes "anyone who abandons . . . dead soldiers on the battlefield".[48]

National Case-law

46. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "teams would be selected, and include soldiers from the bomb disposal unit, medical and other professional representatives. These teams will locate the bodies."[49] It also stated that "locating . . . the bodies is a highly important humanitarian deed. It is derived from the respect to the dead. The respect of every dead."[50]

Other National Practice

47. According to the Report on the Practice of Indonesia, whenever circumstances permit, all possible measures should be taken to search for the dead.[51]

48. According to the Report on the Practice of the Philippines:

> In an armed conflict where guerilla warfare is the strategy used, distinguishing between civilians and combatants is very difficult. This is precisely the reason why the Philippines have adopted the same rules for both civilians and combatants with regard to the search for and care of the wounded, sick and dead.[52]

[44] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[45] Botswana, *Geneva Conventions Act* (1970), Article 15, Schedule 1.
[46] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[47] Norway, *Military Penal Code as amended* (1902), § 108.
[48] Vietnam, *Penal Code* (1990), Article 271(1).
[49] Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, §7.
[50] Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 9.
[51] Report on the Practice of Indonesia, 1997, Chapter 5.1.
[52] Report on the Practice of the Philippines, 1997, Chapter 5.1.

49. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that each party to a conflict permit teams to search for . . . and recover the dead from the battlefield".[53]
50. According to the Report on US Practice, it is the *opinio juris* of the US that all possible measures should be taken to search for the dead.[54]

III. Practice of International Organisations and Conferences

United Nations
51. In 1992, in a report concerning Bosnia and Herzegovina, the UN Secretary-General reported that ICRC delegates had recovered the war dead.[55]
52. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that "the Geneva Conventions require parties to a conflict to search for the dead".[56]

Other International Organisations
53. No practice was found.

International Conferences
54. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

55. No practice was found.

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

56. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "as soon as the tactical situation permits, necessary measures shall be taken . . . to search for the dead".[57] Delegates also teach that "commanders may appeal to the civilian population, to

[53] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.
[54] Report on US Practice, 1997, Chapter 5.1.
[55] UN Secretary-General, Report pursuant to Security Council resolution 752 (1992), UN Doc. S/24000, 26 May 1992, § 9.
[56] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).
[57] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 483.

aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft ...to collect... the dead".[58]

VI. Other Practice

57. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every possible measure shall be taken, without delay,... to search for the dead".[59]

B. Treatment of the Dead

Respect for the dead

I. Treaties and Other Instruments

Treaties

58. Under Article 16, second paragraph, GC IV, "as far as military considerations allow, each Party to the conflict shall facilitate the steps taken... to protect [the killed] against... ill-treatment".

59. Article 34(1) AP I provides that "the remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities... shall be respected". Article 34 AP I was adopted by consensus.[60]

60. Article 4 AP II states that:

> 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person [and] honour...
> 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
>
> ...
>
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment...

61. Pursuant to Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute, "committing outrages upon personal dignity" constitutes a war crime in both international and non-international armed conflicts.

Other Instruments

62. Article 19 of the 1880 Oxford Manual provides that "it is forbidden to... mutilate the dead lying on the field of battle".

[58] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 485.

[59] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

[60] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

63. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict . . . it is prohibited to mutilate dead bodies".
64. Article 3(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "desecration of the remains of those who have died in the course of the armed conflict or while under detention" shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*. Article 4(9) provides that "every possible measure shall be taken, without delay, . . . [to prevent] mutilation [the dead]".
65. With reference to the crime of outrages upon personal dignity, the 2000 ICC Elements of Crimes specifies that Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute also applies to dead persons.
66. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxi) and (c)(ii), "committing outrages upon personal dignity" constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

67. Australia's Defence Force Manual provides that:

> The remains of the dead, regardless of whether they are combatants, noncombatants, protected persons or civilians, are to be respected, in particular their honour, family rights, religious convictions and practices and manners and customs. At all times they shall be humanely treated.[61]

68. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 stated that:

> (c) Prisoners of war:
> . . . Islam likewise forbids the mutilation of enemy . . . dead . . . These are general rules which are binding for our soldiers. However, if the commanding officer assesses that the situation and the general interest demand a different course of action, then the soldiers are duty-bound to obey their commanding officer.[62]

69. Canada's LOAC Manual provides that "the remains of all persons who have died as a result of hostilities or while in occupation or detention in relation thereto shall be respected".[63] The manual considers that "mutilation or other maltreatment of dead bodies" is a war crime.[64]

[61] Australia, *Defence Force Manual* (1994), § 998.
[62] Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.
[63] Canada, *LOAC Manual* (1999), p. 9-6, § 54.
[64] Canada, *LOAC Manual* (1999), p. 16-4, § 21(a).

70. Canada's Code of Conduct provides that "there is ... an obligation to ... protect and pay proper respect for the dead".[65]
71. Ecuador's Naval Manual provides that "mutilation and other mistreatment of the dead" are representative war crimes.[66]
72. According to Israel's Manual on the Laws of War, "it is imperative to tend to the enemy's wounded and dead".[67] It further provides that a "[legal] combatant is entitled to the status of a prisoner of war, according him ... protection against the abuse of dead soldiers' bodies".[68] The manual also provides that it is absolutely forbidden to abuse the corpses of the enemy's dead.[69]
73. South Korea's Operational Law Manual provides that the mutilation of dead bodies is a war crime.[70]
74. Under South Korea's military regulations, "injuring dead bodies" is a war crime.[71]
75. The Military Manual of the Netherlands states that "remains must be protected".[72]
76. The Military Handbook of the Netherlands provides that "the dead must not be mutilated".[73]
77. New Zealand's Military Manual provides that "the remains of all persons who have died as a result of hostilities, or while in occupation or detention in relation to hostilities, shall be respected".[74] It also provides that "among other war crimes recognised by the customary law of armed conflict are mutilation or other maltreatment of dead bodies".[75] With respect to non-international armed conflicts, the manual states that "steps must be taken to prevent ... abuse" of the dead.[76]
78. According to Nigeria's Manual on the Laws of War, "maltreatment of dead bodies" is a war crime.[77]
79. The Military Instructions of the Philippines provides that "respect for the dead which includes our own troops, the enemy and particularly innocent civilians must be a paramount concern of all commanders and troops at all levels ... All dead bodies ... must be handled humanely and treated with care and respect."[78]

[65] Canada, *Code of Conduct* (2001), Rule 7, § 3.
[66] Ecuador, *Naval Manual* (1989), p. 6-5, § 6.2.5.
[67] Israel, *Manual on the Laws of War* (1998), p. 44.
[68] Israel, *Manual on the Laws of War* (1998), p. 46.
[69] Israel, *Manual on the Laws of War* (1998), p. 61.
[70] South Korea, *Operational Law Manual* (1996), Articles 1(4) and 2.
[71] South Korea, *Military Regulation 187* (1991), Article 4.2; *Military Operations Law of War Compliance Regulation* (1993).
[72] Netherlands, *Military Manual* (1993), p. VI-2
[73] Netherlands, *Military Handbook* (1995), p. 7-37.
[74] New Zealand, *Military Manual* (1992), § 1012(1).
[75] New Zealand, *Military Manual* (1992), § 1704(5).
[76] New Zealand, *Military Manual* (1992), § 1817(1).
[77] Nigeria, *Manual on the Laws of War* (undated), § 6.
[78] Philippines, *Military Instructions* (1989), §§ 2 and 4.

80. According to South Africa's LOAC Manual, "maltreatment of dead bodies" is a grave breach.[79]
81. Spain's LOAC Manual provides that "the dead shall be preserved from attack".[80] It also stipulates that "the dead shall be respected".[81]
82. Switzerland's Basic Military Manual states that anyone who "mutilates the dead" will be punished.[82]
83. The UK Military Manual provides that "the dead must be protected against . . . maltreatment".[83] It further states that "maltreatment of dead bodies" is a war crime.[84]
84. The UK LOAC Manual provides that "the dead must not be . . . mutilated".[85]
85. The US Field Manual provides that "maltreatment of dead bodies" is a war crime.[86]
86. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . mutilating or mistreating dead bodies".[87]
87. The US Naval Handbook provides that "mutilation and other mistreatment of the dead" are representative war crimes.[88]

National Legislation
88. Australia's War Crimes Act states that "the expression 'war crime' includes the following: . . . cannibalism . . . [and] mutilation of the dead".[89]
89. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "outrages upon personal dignity" of the bodies of dead persons in both international and non-international armed conflicts.[90]
90. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[91]
91. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[92]

[79] South Africa, *LOAC Manual* (1996), § 39(c).
[80] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[81] Spain, *LOAC Manual* (1996), Vol. I, § 7.5.a.
[82] Switzerland, *Basic Military Manual* (1987), Articles 194(2) and 200(f).
[83] UK, *Military Manual* (1958), § 380. [84] UK, *Military Manual* (1958), § 626(b).
[85] UK, *LOAC Manual* (1981), Annex A, p. 47, § 15. [86] US, *Field Manual* (1956), § 504(c).
[87] US, *Instructor's Guide* (1985), pp. 13 and 14. [88] US, *Naval Handbook* (1995), § 6.2.5.
[89] Australia, *War Crimes Act* (1945), Section 3(xxxiv) and (xxxv).
[90] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.58(2) and 268.74(2).
[91] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[92] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

92. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[93]
93. Under Ethiopia's Penal Code, it is a punishable offence to "mutilate a dead person".[94]
94. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 16 GC IV, and of AP I, including violations of Article 34(1) AP I, are punishable offences.[95]
95. Italy's Law of War Decree as amended provides that "commanders shall take all necessary measures to ensure respect for the bodies of enemy dead on the battlefield".[96]
96. Italy's Wartime Military Penal Code provides that anyone who mutilates or commits outrages upon the cadaver of a soldier fallen on the battlefield is guilty of a punishable offence.[97]
97. Lithuania's Criminal Code as amended punishes outrages upon the bodies of the killed out of revenge or for terror purposes.[98]
98. The Military Criminal Code as amended of the Netherlands provides for the punishment of persons committing violent acts against a dead person.[99]
99. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute.[100]
100. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[101]
101. Spain's Royal Ordinance for the Armed Forces states that "the dead shall be respected".[102]
102. Switzerland's Military Criminal Code as amended punishes anyone who mutilates a dead person.[103]
103. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute.[104]

[93] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[94] Ethiopia, *Penal Code* (1957), Article 287(b).
[95] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[96] Italy, *Law of War Decree as amended* (1938), Article 94.
[97] Italy, *Wartime Military Penal Code* (1941), Article 197.
[98] Lithuania, *Criminal Code as amended* (1961), Article 335.
[99] Netherlands, *Military Criminal Code as amended* (1964), Article 143.
[100] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[101] Norway, *Military Penal Code as amended* (1902), § 108.
[102] Spain, *Royal Ordinance for the Armed Forces* (1978), Article 140.
[103] Switzerland, *Military Criminal Code as amended* (1927), Article 140(2).
[104] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

104. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute.[105]
105. Under Venezuela's Code of Military Justice as amended, committing outrages against the dead is considered a crime against international law.[106]

National Case-law
106. In 1945, in the *Takehiko case*, an Australian Military Court sentenced the accused, a Japanese soldier, for "mutilating the dead body of a prisoner of war" and for "cannibalism".[107]
107. In 1946, in the *Tisato case*, an Australian Military Court found the accused, a Japanese soldier, guilty of "cannibalism". The prosecution in this case alleged that several prisoners had been killed and that their flesh had been eaten.[108]
108. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "needless to say, the burial will be made in an appropriate and respectful manner, maintaining the respect for the dead. In this matter, no distinction will be made between the bodies of armed combatants and the bodies of civilians."[109]
109. In 1946, in the *Kikuchi and Mahuchi case*, a US Military Commission sentenced the accused, who were Japanese soldiers, for "bayoneting and mutilating the dead body of a United States prisoner of war".[110]
110. In 1946, in the *Yochio and Others case*, a US Military Commission tried and convicted some of the accused Japanese soldiers for "preventing an honorable burial due to the consumption of parts of the bodies of prisoners of war by the accused during a special meal in the officers' mess". The accused were found guilty of these charges.[111]
111. In its judgement in the *Schmid case* in 1947, the US General Military Court at Dachau found the accused, a German medical officer, guilty of maltreating the body of a deceased US airman in violation of Article 3 of the 1929 Geneva Convention.The accused had severed the head from the body of the airman, had baked it and removed the skin and flesh and had bleached the skull.[112]

[105] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[106] Venezuela, *Code of Military Justice as amended* (1998), Article 474(12).
[107] Australia, Military Court at Wewak, *Takehiko case*, Judgement, 30 November 1945.
[108] Australia, Military Court at Rabaul, *Tisato case*, Judgement, 2 April 1946.
[109] Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 8.
[110] US, Military Commission at Yokohama, *Kikuchi and Mahuchi case*, Judgement, 20 April 1946.
[111] US, Military Commission at the Mariana Islands, *Yochio and Others case*, Judgement, 2–15 August 1946.
[112] US, General Military Court at Dachau, *Schmid case*, Judgement, 19 May 1947.

Other National Practice

112. In 1993, the Ministry of the Interior of Azerbaijan ordered that troops "in zones of combat, during military operations . . . must not desecrate the remains of enemies".[113]

113. In case before Colombia's Council of State in 1994, the Prosecutor stated that failure to treat the bodies of dead combatants and civilians with respect constituted a violation of common Article 3 of the 1949 Geneva Conventions.[114]

114. The Report on the Practice of Indonesia states that it is the practice of Indonesia to care for the dead.[115]

115. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that . . . the remains of the dead be respected and maintained".[116]

116. In 1991, the Ministry of Defence of the SFRY (FRY) issued a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia". This document included the following example: "the attitude towards dead YPA soldiers has been absolutely uncivilized and without any trace of humanity".[117]

III. Practice of International Organisations and Conferences

117. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

118. No practice was found.

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

119. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the dead may not be attacked".[118]

[113] Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 5.

[114] Colombia, Council of State, *Case No. 9276*, Concepto del Procurador Primero Delegado, 19 August 1994.

[115] Report on the Practice of Indonesia, 1997, Chapter 5.1.

[116] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

[117] SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 2(iv).

[118] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 230.

120. In 1993, the ICRC reminded officials of a State of their duty to prevent the abuse of remains of dead nationals of another State, even if such abuses were committed by the civilian population.[119] The following year, it again reminded the State of its obligation to respect the bodies of dead soldiers and protect them from mutilation and degrading treatment.[120]

121. In 1993, in a letter to the ICRC, a National Red Crescent Society denounced the inhumane treatment of bodies of dead combatants by troops of one of the parties to the conflict.[121]

122. In a press release issued in 1993 in the context of the conflict in Somalia, the ICRC condemned abuses committed on the remains of dead combatants of the UNOSOM II forces.[122]

VI. Other Practice

123. Investigations following allegations concerning crimes committed against members of the armed forces fighting in Crete during the Second World War found evidence that dead German soldiers had been mutilated:

> Some had their genitals mutilated, eyes put out, ears and noses cut off; others had knife wounds in the face, stomach, and back; throats were slit, and hands chopped off. The majority of these mutilations were probably defilement of dead bodies; only in a few cases does the evidence indicate that the victim was maltreated and tortured to death.[123]

124. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every possible measure shall be taken, without delay, . . . to prevent [the dead] being . . . mutilated".[124]

Protection of the dead against despoliation

I. Treaties and Other Instruments

Treaties

125. Article 16 of the 1907 Hague Convention (X) provides that, "after every engagement, the two belligerents, so far as military interests permit, shall take steps . . . to protect . . . the dead . . . against pillage".

[119] ICRC archive document. [120] ICRC archive document. [121] ICRC archive document.
[122] ICRC, Press Release No. 1759, Somalia: The ICRC appeals for respect for international humanitarian law, 7 October 1993, § 1.
[123] Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, 1989, pp. 156 and 157.
[124] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

126. Article 15, first paragraph, GC I provides that "at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to ... prevent [the dead from] being despoiled".
127. Article 18, first paragraph, GC II provides that "after each engagement, Parties to the conflict shall, without delay, take all possible measures to ... prevent [the dead from] being despoiled".
128. Article 16, second paragraph, GC IV provides that "as far as military considerations allow, each Party to the conflict shall facilitate the steps taken ... to protect [the killed] against pillage".
129. Article 4 AP II states that:

> 2. Without prejudice to the generality of the foregoing, the following acts against [all persons who do not take a direct part or who have ceased to take part in hostilities] are and shall remain prohibited at any time and in any place whatsoever:
>
> ...
>
> (g) pillage.

130. Article 8 AP II provides that "whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to ... prevent [the dead from] being despoiled". Article 8 AP II was adopted by consensus.[125]

Other Instruments
131. Article 19 of the 1880 Oxford Manual provides that "it is forbidden to rob ... the dead lying on the field of battle".
132. Rule 4 of the 1950 UN Command Rules and Regulations gave Military Commissions of the UN Command in Korea jurisdiction over offences including acts of marauding.
133. Article 4(9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "every possible measure shall be taken, without delay, to ... prevent despoliation [of the dead]".

II. National Practice

Military Manuals
134. Argentina's Law of War Manual provides that the dead shall be prevented from being despoiled.[126]
135. Australia's Defence Force Manual specifies that "parties must take measures to protect the bodies from being despoiled".[127] It adds that the remains of the dead "must be protected against pillage and despoilment".[128]

[125] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.
[126] Argentina, *Law of War Manual* (1969), § 3.005; *Law of War Manual* (1989), § 2.06.
[127] Australia, *Defence Force Manual* (1994), § 986.
[128] Australia, *Defence Force Manual* (1994), § 998.

136. Under Belgium's Field Regulations, "it is forbidden to despoil the dead".[129] The manual adds that "only weapons, ammunition, war material and personal documents may be removed from the body".[130]

137. Benin's Military Manual provides that "combatants must prevent the dead from being despoiled".[131]

138. Burkina Faso's Disciplinary Regulations states that it is prohibited "to despoil the dead".[132]

139. Cameroon's Disciplinary Regulations states that it is forbidden "to despoil the dead".[133]

140. Canada's LOAC Manual specifies that the belligerents "must ... prevent [the] remains [of the dead] from being despoiled".[134] With respect to non-international armed conflicts in particular, the manual states that "steps must also be taken to ... prevent despoliation [of the dead]".[135]

141. Canada's Code of Conduct provides that "the personal property of ... the dead shall not be taken".[136]

142. Congo's Disciplinary Regulations states that, under the laws and customs of war, it is forbidden to "despoil the dead".[137]

143. France's Disciplinary Regulations as amended provides that, under international conventions, "it is prohibited to despoil the dead".[138]

144. According to Germany's Military Manual, "the dead are to be ... prevented from being despoiled".[139]

145. Kenya's LOAC Manual states that "Parties to a conflict must ... prevent [the dead] being despoiled".[140]

146. Lebanon's Army Regulations and Field Manual prohibit pillage of the dead.[141]

147. Madagascar's Military Manual provides that "all possible measures must be taken ... to prevent [the dead] being despoiled".[142]

148. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited to plunder the dead.[143]

149. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to despoil the dead".[144]

[129] Belgium, *Field Regulations* (1964), Article 24; see also *Law of War Manual* (1983), p. 49.
[130] Belgium, *Field Regulations* (1964), Article 24.
[131] Benin, *Military Manual* (1995), Fascicule II, p. 10, see also Fascicule III, p. 5.
[132] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[133] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[134] Canada, *LOAC Manual* (1999), p. 9-1, § 9, see also p. 11-2, § 16.
[135] Canada, *LOAC Manual* (1999), p. 17-4, § 32.
[136] Canada, *Code of Conduct* (2001), Rule 8, § 2.
[137] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[138] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis*.
[139] Germany, *Military Manual* (1992), § 611.
[140] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 3, p. 11.
[141] Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 8.
[142] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 22.
[143] Mali, *Army Regulations* (1979), Article 36.
[144] Morocco, *Disciplinary Regulations* (1974), Article 25(2)(6).

150. The Military Handbook of the Netherlands provides that "the property [of the dead] must not be taken or destroyed".[145]
151. New Zealand's Military Manual provides that "the Parties to a conflict are obliged ... to prevent [the dead] ... being looted".[146]
152. Nigeria's Manual on the Laws of War provides that "at all times and particularly after a campaign, the belligerents must immediately take measures to ... prevent [the dead] being despoiled".[147]
153. Romania's Soldiers' Manual provides that it is prohibited to despoil or pillage dead enemy combatants.[148]
154. Senegal's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited for soldiers in combat "to despoil the dead".[149]
155. Spain's LOAC Manual provides that "the dead shall not be ... despoiled".[150]
156. Switzerland's Basic Military Manual provides that it is prohibited "to despoil the ... dead".[151]
157. Togo's Military Manual provides that "combatants must ... prevent the dead from being despoiled".[152]
158. The UK Military Manual provides that "the dead must be protected against pillage", specifying that "this is a well-established rule of customary international law".[153] It adds that "belligerents must at all times, and particularly after an engagement, take all possible measures ... to prevent [the dead] ... being despoiled".[154] The manual further states that:

> A special class of war crime is that sometimes known as "marauding". This consists of ranging over battlefields and following advancing or retreating armies in quest of loot, robbing ... and plundering the dead – all acts done not as a means of carrying on the war but for private gain. Nevertheless, such acts are treated as violations of the law of war. Those who commit them, whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerent.[155]

159. The UK LOAC Manual provides that "combatants are required to ... prevent [the dead] being despoiled".[156]

[145] Netherlands, *Military Handbook* (1995), p. 7-37.
[146] New Zealand, *Military Manual* (1992), § 1003(1).
[147] Nigeria, *Manual on the Laws of War* (undated), § 34(c).
[148] Romania, *Soldiers' Manual* (1991), p. 9.
[149] Senegal, *Disciplinary Regulations* (1990), Article 34(2).
[150] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6), see also § 7.5.a.
[151] Switzerland, *Basic Military Manual* (1987), Article 72; see also *Military Manual* (1984), p. 4 and *Teaching Manual* (1986), p. 38.
[152] Togo, *Military Manual* (1996), Fascicule II, p. 10, see also Fascicule III, p. 5.
[153] UK, *Military Manual* (1958), § 380.
[154] UK, *Military Manual* (1958), § 381.
[155] UK, *Military Manual* (1958), § 636.
[156] UK, *LOAC Manual* (1981), Section 6, p. 22, § 3, see also Annex A, p. 47, § 15.

160. The US Field Manual reproduces Article 15 GC I.[157]
161. The US Air Force Pamphlet refers to Article 15 GC I.[158]
162. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . taking and keeping . . . property from dead bodies".[159]
163. The US Operational Law Handbook states that "the LOW requires Parties to a conflict to prevent [the] despoilment [of the dead]".[160]
164. The Annotated Supplement to the US Naval Handbook provides that the "requirement [to protect from harm and ensure the care of wounded, sick and shipwrecked] also extends to the dead and includes a requirement to prevent despoiling of the dead".[161]

National Legislation
165. Under Albania's Military Penal Code, "stealing on the battlefield" is an offence.[162]
166. Under Algeria's Code of Military Justice, it is a punishable offence for a military or civilian person to steal from dead persons in the area of operation.[163]
167. Argentina's Draft Code of Military Justice punishes any soldier who "despoils a cadaver".[164]
168. Under Armenia's Penal Code, stealing objects from the dead on the battlefield is a punishable offence.[165]
169. Australia's Defence Force Discipline Act, in an article concerning looting, provides that:

> A person, being a defence member or a defence civilian, who, in the course of operations against the enemy, or in the course of operations undertaken by the Defence Force for the preservation of law and order or otherwise in aid of the civil authorities –
>
> . . .
>
> (b) takes any property from the body of a person killed . . . in those operations . . .
>
> is guilty of [a punishable] offence.[166]

170. Azerbaijan's Criminal Code provides that "pillage of property of persons killed . . . on the battlefield" constitutes a war crime in international and non-international armed conflicts.[167]

[157] US, *Field Manual* (1956), § 216.
[158] US, *Air Force Pamphlet* (1976), § 12-2(a).
[159] US, *Instructor's Guide* (1985), pp. 13 and 14.
[160] US, *Operational Law Handbook* (1993), p. Q-185.
[161] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.
[162] Albania, *Military Penal Code* (1995), Articles 91–93.
[163] Algeria, *Code of Military Justice* (1971), Article 287.
[164] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(8) in the *Code of Military Justice as amended* (1951).
[165] Armenia, *Penal Code* (2003), Article 383.
[166] Australia, *Defence Force Discipline Act* (1982), Section 48(1).
[167] Azerbaijan, *Criminal Code* (1999), Article 118.

171. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[168]
172. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "the unlawful appropriation of belongings from the killed . . . on the battlefield" is a war crime.[169] The Criminal Code of the Republika Srpska contains the same provision.[170]
173. Botswana's Geneva Conventions Act provides that "Parties to the conflict, shall, without delay take all possible measures . . . to protect [the dead] being despoiled".[171]
174. Bulgaria's Penal Code as amended provides that any "person who, on the battlefield, takes away objects from . . . a killed person, with the intention to unlawfully appropriate them" commits a punishable crime.[172]
175. Under Burkina Faso's Code of Military Justice, the despoliation of the dead in the area of operations of military units is a punishable offence.[173]
176. Canada's National Defence Act provides that "every person who . . . steals from, or with intent to steal searches, the person of any person killed . . . in the course of warlike operations . . . is guilty of [a punishable] offence".[174]
177. Under Chad's Code of Military Justice, taking the property of the dead on the battlefield is a criminal offence.[175]
178. Chile's Code of Military Justice provides that "military personnel who plunder soldiers or auxiliary personnel dead on the battlefield of their money, jewellery or other objects, in order to appropriate them," commits a punishable offence.[176]
179. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, despoils a dead person".[177]
180. Côte d'Ivoire's Penal Code as amended punishes "whoever, in an area of military operations, despoils . . . a dead person".[178]
181. Under Croatia's Criminal Code, "the unlawful taking of the personal belongings of those killed on the battlefield" is a war crime.[179]
182. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, for personal gain, despoils the money or other belongings of . . . the dead".[180]

[168] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[169] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 159(1).
[170] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 439(1).
[171] Botswana, *Geneva Conventions Act* (1970), Article 15, Schedule 1.
[172] Bulgaria, *Penal Code as amended* (1968), Article 405.
[173] Burkina Faso, *Code of Military Justice* (1994), Article 193.
[174] Canada, *National Defence Act* (1985), Section 77(g).
[175] Chad, *Code of Military Justice* (1962), Article 62.
[176] Chile, *Code of Military Justice* (1925), Article 365.
[177] Colombia, *Penal Code* (2000), Article 151.
[178] Côte d'Ivoire, *Penal Code as amended* (1981), Article 465.
[179] Croatia, *Criminal Code* (1997), Article 162(1).
[180] Cuba, *Military Criminal Code* (1979), Article 43(1).

183. The Czech Republic's Criminal Code as amended punishes "a person who, in the area of combat, on the battlefield, in places affected by war operations or in occupied territory, ... robs the war dead".[181]

184. Denmark's Military Criminal Code as amended provides that "any person who unlawfully takes an object from a person killed through an act of war shall be punishable for theft".[182]

185. Under Egypt's Penal Code, the theft of property belonging to a dead combatant ... in zones of military operations, "even if he is an enemy", is an offence.[183]

186. Egypt's Military Criminal Code punishes "any person who, in an area of military operations, steals from a dead ... soldier, even if he is an enemy".[184] The provision applies both to the military and to civilians.[185]

187. El Salvador's Code of Military Justice punishes "the soldier who despoils his comrade-in-arms, killed on the battlefield, of the money or jewellery carried with him, and appropriates it for himself".[186]

188. Under Ethiopia's Penal Code, "whoever, in time of war and contrary to public international law and humanitarian conventions, ... lays hands on or does violence to a ... dead enemy on the field of battle, with intent to rob or plunder him" commits a punishable offence against the law of nations.[187]

189. Under France's Code of Military Justice, "any individual, military or not, who, in the area of operation of a force or a unit, ... plunders a ... dead person" commits a punishable offence.[188]

190. Gambia's Armed Forces Act provides that "every person subject to this Act who ... steals from or with intent to steal searches, the person of any person killed ... in the course of war-like operations" commits a punishable offence.[189]

191. Under Georgia's Criminal Code, "pillage, *i.e.* seizure in a combat situation of things which are on a dead person," is a crime.[190]

192. Ghana's Armed Forces Act states that "every person subject to the Code of Service Discipline who ... steals from or with the intent to steal searches, the person of any person killed ... in the course of warlike operations" commits a punishable offence.[191]

193. Guinea's Criminal Code provides that "whoever, in an area of military operation, plunders a ... dead person" commits a punishable offence.[192]

[181] Czech Republic, *Criminal Code as amended* (1961), Article 264(c).
[182] Denmark, *Military Criminal Code as amended* (1978), Article 24(2).
[183] Egypt, *Penal Code* (1937), Article 317(9).
[184] Egypt, *Military Criminal Code* (1966), Article 136.
[185] Egypt, *Military Criminal Code* (1966), Articles 123 and 136.
[186] El Salvador, *Code of Military Justice* (1934), Article 71.
[187] Ethiopia, *Penal Code* (1957), Article 287(c).
[188] France, *Code of Military Justice* (1982), Article 428.
[189] Gambia, *Armed Forces Act* (1985), Section 40(g).
[190] Georgia, *Criminal Code* (1999), Article 413(a).
[191] Ghana, *Armed Forces Act* (1962), Section 18(g).
[192] Guinea, *Criminal Code* (1998), Article 570.

194. Under Hungary's Criminal Code as amended, "the person who loots the dead . . . on the battlefield" is guilty, upon conviction, of a war crime.[193]
195. Indonesia's Military Penal Code provides that "those who commit theft from dead bodies" commit a punishable offence.[194]
196. Iraq's Military Penal Code states that "every person who, with the intent to appropriate for himself or unjustifiably, takes money or other things from the killed in the field of battle . . . shall be punished".[195]
197. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GC I, 18 GC II and 16 GC IV, as well as any "contravention" of AP II, including violations of Article 8 AP II, are punishable offences.[196]
198. Italy's Wartime Military Penal Code provides that anyone who despoils a cadaver on the battlefield for private purposes is guilty of a punishable offence.[197]
199. Under Kazakhstan's Penal Code, "theft of objects belonging to the dead . . . on the battlefield" is a punishable offence.[198]
200. Under Kenya's Armed Forces Act, anyone who steals from the person of the dead commits a punishable offence.[199]
201. Under South Korea's Military Criminal Code, "a person who takes the clothes and other property of the dead . . . in the combat area" commits a punishable offence.[200]
202. Under Latvia's Criminal Code, the pillage of persons killed on the battlefield is a punishable offence.[201]
203. Lebanon's Code of Military Justice stipulates that "any person, military or not, who, in an area of military operations, despoils a . . . dead person" commits a punishable offence.[202]
204. Under Lithuania's Criminal Code as amended, "an order to plunder or seize things from fallen . . . victims on the battlefield" is a war crime.[203]
205. Malaysia's Armed Forces Act provides that:

Every person subject to service law under this Act who –

(a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations . . .

[193] Hungary, *Criminal Code as amended* (1978), Section 161.
[194] Indonesia, *Military Penal Code* (1947), Article 143.
[195] Iraq, *Military Penal Code* (1940), Article 115(a).
[196] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[197] Italy, *Wartime Military Penal Code* (1941), Article 197.
[198] Kazakhstan, *Penal Code* (1997), Article 385.
[199] Kenya, *Armed Forces Act* (1968), Section 23.
[200] South Korea, *Military Criminal Code* (1962), Article 82.
[201] Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (deliver children on a compulsory basis from one group of people into another as a part of a genocide campaign).
[202] Lebanon, *Code of Military Justice* (1968), Article 132.
[203] Lithuania, *Criminal Code as amended* (1961), Article 341.

shall be guilty of looting and liable on conviction by court-martial to imprisonment or any less punishment provided by this Act.[204]

206. Under Mali's Code of Military Justice, "anyone who despoils a . . . dead person" commits a punishable offence.[205]
207. Under Moldova's Penal Code, "pillage of the dead on the battlefield" is a punishable offence.[206]
208. Under the Military Criminal Code as amended of the Netherlands "theft from a dead . . . person, who belongs to one of the parties to the conflict" is a criminal offence.[207]
209. New Zealand's Armed Forces Discipline Act provides that:

Every person subject to this Act commits the offence of looting, and is liable to imprisonment . . . who –

(a) Steals from, or with intent to steal searches, the person of anyone killed . . . in the course of any war or warlike operations in which New Zealand is engaged, or killed . . . in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil power.[208]

210. Nicaragua's Military Penal Law punishes "anyone who, in military operations, steals, for personal gain, the money or other belongings of . . . the dead".[209]
211. Nicaragua's Military Penal Code provides for the punishment of the soldier who, in the zone of operations, "despoils a dead person . . . of his or her clothes or other personal effects".[210]
212. Under Nigeria's Armed Forces Decree 105 as amended, looting is a punishable offence. A person is guilty of looting who "steals from, or with intent to steal, searches the body of a person killed . . . in the course of war-like operations, or killed . . . in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities".[211]
213. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[212]

[204] Malaysia, *Armed Forces Act* (1972), Section 46(a).
[205] Mali, *Code of Military Justice* (1995), Article 134(1).
[206] Moldova, *Penal Code* (2002), Article 389.
[207] Netherlands, *Military Criminal Code as amended* (1965), Article 156.
[208] New Zealand, *Armed Forces Discipline Act* (1971), Section 31(a).
[209] Nicaragua, *Military Penal Law* (1980), Article 81.
[210] Nicaragua, *Military Penal Code* (1996), Article 56(1).
[211] Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51(a).
[212] Norway, *Military Penal Code as amended* (1902), § 108.

214. Romania's Penal Code criminalises "robbing the dead . . . on the battlefield of objects they possess".[213]

215. Singapore's Armed Forces Act as amended provides that:

> Every person subject to military law who –
>
> (a) steals from or, with intent to steal, searches the person of anyone killed . . . in the course of warlike operations, or killed . . . in the course of operations undertaken by the Singapore Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities . . .
>
> shall be guilty of looting and shall be liable on conviction by a subordinate military court to imprisonment.[214]

216. Slovakia's Criminal Code as amended punishes "a person who in the area of combat, on the battlefield, in places affected by war operations or in the occupied territory . . . rob the war dead".[215]

217. Under Slovenia's Penal Code, plundering or ordering the plunder of the belongings of casualties on the battlefield is a war crime.[216]

218. Under Spain's Military Criminal Code, "the military personnel who . . . strip a cadaver . . . of his personal effects in the area of operations, with the intent to appropriate them," commit punishable offences against the laws and customs of war.[217]

219. Under Spain's Penal Code, "anyone who, on the occasion of an armed conflict . . . strips a cadaver . . . of his personal effects" commits a punishable "offence against protected persons and objects in the event of armed conflict".[218]

220. Switzerland's Military Criminal Code as amended punishes anyone who, on the battlefield, despoils dead persons.[219]

221. Tajikistan's Criminal Code punishes "pillage, i.e. seizure in a combat situation of things which are on the dead".[220]

222. Under Togo's Code of Military Justice, taking the property from the dead on the battlefield is a criminal offence.[221]

223. Trinidad and Tobago's Defence Act as amended contains a section on "looting" which states that:

> Any person subject to military law who –
>
> (a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations . . .

[213] Romania, *Penal Code* (1968), Article 350.
[214] Singapore, *Armed Forces Act as amended* (1972), Section 18(a).
[215] Slovakia, *Criminal Code as amended* (1961), Article 264(c).
[216] Slovenia, *Penal Code* (1994), Article 380(1).
[217] Spain, *Military Criminal Code* (1985), Article 77(2).
[218] Spain, *Penal Code* (1995), Article 612(7).
[219] Switzerland, *Military Criminal Code as amended* (1927), Article 140(1).
[220] Tajikistan, *Criminal Code* (1998), Article 405.
[221] Togo, *Code of Military Justice* (1981), Article 95.

is guilty of looting and, on conviction by court-martial, liable to imprisonment or less punishment.[222]

224. Uganda's National Resistance Army Statute stipulates that "a person subject to military law who . . . steals from or with intent to steal, searches the person or any person killed . . . in the course of war-like operations . . . commits an offence and shall on conviction, be liable to . . . imprisonment".[223]

225. Pursuant to Ukraine's Criminal Code, "stealing belongings of the dead . . . on a battlefield" is a war crime.[224]

226. The UK Army Act as amended provides that:

> Any person subject to military law who –
> (a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations, or killed . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities . . .
> shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.[225]

227. The UK Air Force Act as amended provides that:

> Any person subject to air-force law who –
> (a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations, or killed . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities . . .
> shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.[226]

228. Uruguay's Military Penal Code as amended punishes "the spoliation of . . . the dead in combat".[227]

229. Under Venezuela's Code of Military Justice as amended, it is a crime against international law to plunder a dead person.[228]

230. Vietnam's Penal Code punishes "anyone who steals things from . . . remains of soldiers dead on the battlefield".[229]

231. Under Yemen's Military Criminal Code, "any person who . . . despoils . . . a dead person" commits a war crime.[230]

[222] Trinidad and Tobago, *Defence Act as amended* (1962), Section 40(a).
[223] Uganda, *National Resistance Army Statute* (1992), Section 35(f).
[224] Ukraine, *Criminal Code* (2001), Article 432.
[225] UK, *Army Act as amended* (1955), Section 30(a).
[226] UK, *Air Force Act as amended* (1955), Section 30(a).
[227] Uruguay, *Military Penal Code as amended* (1943), Article 58(10).
[228] Venezuela, *Code of Military Justice as amended* (1998), Article 474(12).
[229] Vietnam, *Penal Code* (1990), Article 271(2).
[230] Yemen, *Military Criminal Code* (1998), Article 20.

232. Under the Penal Code as amended of the SFRY (FRY), ordering or executing the unlawful seizure of belongings from the killed on the battlefield is a war crime.[231]

233. Zambia's Defence Act as amended states that:

> Any person subject to military law under this Act who –
> (a) steals from or with intent to steal searches the person of anyone killed . . . in the course of warlike operations . . .
> shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.[232]

234. Zimbabwe's Defence Act as amended provides that:

> Any member [of the Defence Forces] who –
> (a) steals from or with intent to steal searches the person of anyone killed . . . in the course of warlike operations . . .
> shall be guilty of the offence of looting and liable to imprisonment or any less punishment.[233]

National Case-law

235. In its judgement in the *Pohl case* in 1947, the US Military Tribunal at Nuremberg stated that "robbing the dead, even without the added offence of killing, is and always has been a crime. And when it is organized and planned and carried out on a hundred-million mark scale, it becomes an aggravated crime, and anyone who takes part in it is a criminal".[234]

Other National Practice

236. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that "stealing from a dead soldier is illegal and also a court martial offence".[235]

III. Practice of International Organisations and Conferences

United Nations

237. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780

[231] SFRY (FRY), *Penal Code as amended* (1976), Article 147(1).
[232] Zambia, *Defence Act as amended* (1964), Section 35(a).
[233] Zimbabwe, *Defence Act as amended* (1972), First Schedule, Section 11(a).
[234] US, Military Tribunal at Nuremberg, *Pohl case*, Judgement, 3 November 1947.
[235] UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.3.

(1992) stated that "the Geneva Conventions require parties to a conflict . . . to prevent [the] bodies and remains [of the dead] from being despoiled".[236]

Other International Organisations
238. No practice was found.

International Conferences
239. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

240. No practice was found.

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

241. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the dead may not be . . . despoiled".[237]

VI. Other Practice

242. According to German investigations following allegations of crimes committed against members of armed forces in Crete in May 1941, it appeared that:

> Dead . . . soldiers were robbed and deprived of parts of their clothing, primarily by the civilian population . . .
> From these investigations it appears that . . . the maltreatment of soldiers [was] committed almost exclusively by Cretan civilians. In some cases survivors observed that civilians fell upon dead soldiers [and] robbed them.[238]

243. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every possible measure shall be taken, without delay . . . to prevent [the dead] being despoiled".[239]

[236] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).
[237] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 230.
[238] Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, 1989, pp. 156–157.
[239] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

C. Return of the Remains and Personal Effects of the Dead

Return of the remains of the dead

I. Treaties and Other Instruments

Treaties

244. Article 17, third paragraph, GC I provides that an "Official Graves Registration Service [shall be established] to allow . . . the possible transportation of the remains to the home country. These provisions shall likewise apply to the ashes."

245. Article 120, sixth paragraph, GC III provides, with regard to the possibility of return of the remains to the home country, that:

> Responsibility . . . for records of any subsequent moves of the bodies shall rest on the Power controlling the territory . . . These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

246. Article 130, second paragraph, GC IV provides that "the ashes [of deceased internees] shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request".

247. Article II(13)(f) of the 1953 Panmunjon Armistice Agreement provides that:

> the Commanders of the opposing sides shall:
> . . .
> f. In those cases where places of burial are a matter of record and graves are actually found to exist, permit graves registration personnel of the other side to enter, within a definite time limit after this Armistice Agreement becomes effective, the territory of Korea under their military control, for the purpose of proceeding to such graves to recover and evacuate the bodies of the deceased military personnel of that side, including deceased prisoners of war.

248. Article 8(b) of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam contains provisions designed "to facilitate . . . repatriation of remains".

249. Article 34 AP I provides that:

> 2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
> . . .
> (b) to protect and maintain such gravesites permanently;
> (c) to facilitate the return of the remains of the deceased . . . to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

Article 34 AP I was adopted by consensus.[240]

250. The 1992 Finnish–Russian Agreement on War Dead provides for cooperation in relation to the identification and return of the remains of soldiers dating from the Second World War.

251. The 1997 Estonian–Finnish Agreement on War Dead provides for cooperation in relation to the identification and return of the remains of soldiers dating from the Second World War.

Other Instruments

252. Proposal 1.2 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains in the context of the former Yugoslavia provided that, "at the request of the party on which the deceased depended, the parties to the conflict shall organize the handover of the mortal remains".

253. Article 3(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "breach of [the] duty to tender immediately [the remains of those who have died in the course of the armed conflict or while under detention] to their families" shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

II. National Practice

Military Manuals

254. Argentina's Law of War Manual provides that ashes "shall be kept by the Graves Registration Service until the home country makes known what arrangements it wants made".[241]

255. Australia's Defence Force Manual provides that "the ashes of the deceased shall be forwarded to the Graves Registration and the ashes exchanged as soon as practical following the conclusion of hostilities".[242]

256. Croatia's LOAC Compendium provides that one of the measures required after a conflict is to return ashes and remains.[243]

[240] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[241] Argentina, *Law of War Manual* (1969), § 3.005.
[242] Australia, *Defence Force Manual* (1994), § 9-100.
[243] Croatia, *LOAC Compendium* (1991), p. 21.

257. France's LOAC Teaching Note provides that "at the end of an engagement, the dead of both sides ... should be buried in order to facilitate the possible repatriation of mortal remains".[244]
258. Hungary's Military Manual provides that one of the measures required after a conflict is to return ashes and remains of the dead.[245]
259. The Military Manual of the Netherlands states that the parties "shall conclude agreements in order to facilitate the return of the remains of the deceased".[246]
260. Spain's LOAC Manual provides that when bodies have been cremated, the ashes of the deceased shall be forwarded to the Graves Registration Authority and handed over to relatives as soon as practicable.[247]
261. Switzerland's Basic Military Manual provides that "if possible, the remains of the deceased shall be repatriated to the country of origin, according to special agreements".[248]
262. The UK Military Manual provides that "the ashes must be respectfully treated, and kept by the Graves Registration Service until properly disposed of according to the wishes of the home country".[249]
263. The US Field Manual provides that an Official Graves Registration Service "shall allow ... the possible transportation to the home country" of the bodies exhumed. The manual adds that the ashes "shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country".[250]
264. The Annotated Supplement to the US Naval Handbook provides that "as soon as circumstances permit, arrangement be made to ... facilitate the return of the remains when requested".[251]

National Legislation
265. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that: ... the places where dead bodies ... were buried should be marked ... and recorded ... with the aim to return back these dead bodies ... following a request from the parties and close relatives of the dead persons.[252]

[244] France, *LOAC Teaching Note* (2000), p. 3.
[245] Hungary, *Military Manual* (1992), p. 38.
[246] Netherlands, *Military Manual* (1993), p. VI-3.
[247] Spain, *LOAC Manual* (1996), Vol. I, Article 5.2.d.(6).
[248] Switzerland, *Basic Military Manual* (1987), Article 71(2).
[249] UK, *Military Manual* (1958), § 384.
[250] US, *Field Manual* (1956), § 218.
[251] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.
[252] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(5).

266. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[253]
267. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, and of AP I, including violations of Article 34 AP I, are punishable offences.[254]
268. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[255]

National Case-law
269. In a case before Colombia's Administrative Court in Cundinamarca in 1985, it was stated that families must not be denied their legitimate right to claim the bodies of their relatives, transfer them to wherever they see fit, and bury them.[256]
270. According the Report on the Practice of Israel, in the *Abu-Rijwa case* in 2000, the IDF carried out DNA identification tests when asked by family members to repatriate remains, implying that when these remains are identified correctly, they will be returned.[257]

Other National Practice
271. According to the Report on the Practice of Egypt, it is the well-established practice of Egypt to exchange and repatriate mortal remains, in order to enable burial in accordance with the wishes of the deceased and their families.[258] In 1975 and 1976, the exchange and repatriation of mortal remains of both civilians and combatants were carried out between Egypt and Israel in the presence of ICRC delegates.[259]
272. In 1996, the Greek observer to the UN Commission on Human Rights stressed that if the deaths of persons missing in Cyprus were confirmed, their remains would be returned to their families.[260]

[253] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[254] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[255] Norway, *Military Penal Code as amended* (1902), § 108.
[256] Colombia, Administrative Tribunal of Cundinamarca, *Case No. 4010*, Informe del Tribunal Especial de Instrucción, 6–7 November 1985, cuaderno de pruebas.
[257] Report on the Practice of Israel, 1997, Chapter 5.1, referring to High Court, *Abu-Rijwa case*, Judgement, 15 November 2000.
[258] Report on the Practice of Egypt, 1997, Chapter 5.1.
[259] ICRC, *Annual Report 1975*, Geneva, 1976, p. 21; *Annual Report 1976*, Geneva, 1977, p. 13.
[260] Greece, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.46, 22 May 1996, § 24.

273. In 1975 and 1976, the exchange and repatriation of mortal remains of both civilians and combatants were carried out between Egypt and Israel in the presence of ICRC delegates.[261]
274. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran, based on practice in the Iran–Iraq War, that attempts should be made to return the bodies of dead combatants to the relevant party.[262]
275. In 1991, the *Asian Yearbook of International Law* reported that the "ashes of 3,500 Japanese soldiers killed during World War II in Irian Jaya were handed over by Indonesia to the Japanese Ambassador at Jakarta".[263]
276. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that each party to a conflict permit teams to . . . facilitate the return of the remains when requested".[264]
277. In 1983, a faction of a State agreed to repatriate the remains of combatants, although the State had not at the time ratified the Geneva Conventions.[265]
278. In 1999, the exchange committees of the parties to a non-international armed conflict signed an agreement concerning the treatment of prisoners, which provided that "bodies of the prisoners died in jails must be handed over to the concerned sides without any conditions".[266]

III. Practice of International Organisations and Conferences

United Nations

279. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, "regardless of their character and location, during and after the end of hostilities and in accordance with the Geneva Conventions, to take such action as may be within their power . . . to facilitate the disinterment and the return of remains, if requested by their families".[267]
280. In 1996, in a report concerning Liberia, the UN Secretary-General reported that UNOMIL had facilitated discussions on the release of the bodies of soldiers killed in the fighting, which ULIMO-J had accepted on the understanding that concerns about its own combatants would be considered.[268]

[261] ICRC, *Annual Report 1975*, Geneva, 1976, p. 21; *Annual Report 1976*, Geneva, 1977, p. 13.
[262] Report on the Practice of Iran, 1997, Chapter 5.1, referring to Statement by the Iranian Minister of Foreign Affairs, 15 November 1980 and Military Communiqué No. 2176, 27 July 1985.
[263] *Asian Yearbook of International Law*, Vol. 1, 1991, p. 354.
[264] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.
[265] ICRC archive document.
[266] ICRC archive document.
[267] UN General Assembly, Res. 3220 (XXIX), 6 November 1974, §§ 2 and 4.
[268] UN Secretary-General, Fifteenth progress report on the UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 26.

Other International Organisations
281. No practice was found.

International Conferences
282. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts "during hostilities and after cessation of hostilities . . . to facilitate the disinterment and return of remains".[269]
283. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "every effort is made to identify dead persons, inform their families and return their bodies to them".[270]

IV. Practice of International Judicial and Quasi-judicial Bodies

284. In a case concerning Suriname before the IACiHR in 1989, it was reported that, in 1987, the military did not allow family members to collect the remains of a large number of dead following an attack by the National Army.[271]
285. In a case concerning Colombia before the IACiHR in 1995, testimony was given to the effect that, in 1990, the witness was permitted by a Colombian brigade commander to collect the body of her husband for burial, following his death in an indiscriminate attack on a house suspected of harbouring guerrillas.[272]

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

286. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the return of remains and ashes of the deceased . . . to the home State shall be facilitated".[273]
287. The ICRC often acts as a neutral intermediary between the parties to the conflict regarding servicemen missing in action so that the mortal remains of combatants may be returned to the respective parties. For instance, in 1998, in the context of the conflict in Sri Lanka, the ICRC transported the mortal remains of 1,014 soldiers and LTTE combatants.[274] The same year, it "repatriated

[269] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.
[270] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).
[271] IACiHR, *Case 10.124 (Suriname)*, Resolution, 27 September 1989, § 6(iv).
[272] IACiHR, *Case 11.010 (Colombia)*, Report, 13 September 1995, Section 11A(a).
[273] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 262.
[274] ICRC, *Annual Report 1998*, Geneva, 1999, p. 175.

the mortal remains of an Israeli soldier and of 40 Lebanese fighters to their respective countries".[275]

288. In 1995, the ICRC asked the parties to an international conflict to return the remains of dead combatants to their families.[276]

VI. Other Practice

289. No practice was found.

Return of the personal effects of the dead

I. Treaties and Other Instruments

Treaties

290. Article 4, third paragraph, of the 1929 GC provides that belligerents shall "collect and transmit to each other all articles of a personal nature found on the field of battle or on the dead".

291. Article 16, fourth paragraph, GC I provides that parties to the conflict shall "collect and forward through the [Information Bureau] ... money and in general all articles of an intrinsic or sentimental value, which are found on the dead". Article 19, third paragraph, GC II contains the same provision.

292. Article 122, ninth paragraph, GC III provides that:

> The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have ... died, and shall forward the said valuables to the Powers concerned.

Article 139 GC IV contains a similar provision with respect to civilian internees.

293. Article 34(2)(c) AP I provides that as soon "as the circumstances and the relations between the adverse Parties permit, ... [they] shall conclude agreements in order ... to facilitate the return of the personal effects of the deceased". Article 34 AP I was adopted by consensus.[277]

294. The 1999 NATO STANAG 2070 provides that:

> 18. With the exception of deceased United States personnel, all personal effects (including all personal and official papers) are removed from the remains and placed in a suitable receptacle. One identification tag/disc must be buried with the corpse. The second identification tag/disc, or the removable part, is placed in the receptacle with the personal effects. In the case of United States personnel, all personal effects and one identification tag are buried with the remains ...

[275] ICRC, *Annual Report 1998*, Geneva, 1999, p. 279.
[276] ICRC archive document.
[277] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

19. An inventory is to be made of the personal effects, checked and signed by an officer, and dispatched with the receptacle containing the personal effects.

Other Instruments

295. Article 20 of the 1880 Oxford Manual provides that "the articles... collected from the dead of the enemy are transmitted to its army or government".

II. National Practice

Military Manuals

296. Argentina's Law of War Manual provides that "last wills or other documents of importance to the family of the dead, money and in general all objects of an intrinsic or sentimental value which are found on the dead" shall be transmitted to the other party through its national Information Bureau.[278]

297. Benin's Military Manual provides that "personal effects [of the dead] shall be collected and evacuated".[279] It further specifies that "identity cards and personal effects of the deceased shall be sent to superiors".[280]

298. Cameroon's Instructors' Manual provides that "personal effects of the dead shall be evacuated".[281]

299. Croatia's LOAC Compendium provides that one of the measures required after a conflict is to return personal effects of the dead.[282]

300. Croatia's Commanders' Manual states that "personal effects of the dead shall be collected and evacuated to the rear".[283]

301. France's LOAC Summary Note provides that "the belongings of the dead must be collected and evacuated to the rear".[284]

302. France's LOAC Teaching Note provides that the personal effects of the dead "shall be collected and transferred to the rear. They shall be returned to the family if it claims them."[285]

303. Hungary's Military Manual provides that one of the requirements after a conflict is the return of the personal effects of the dead.[286]

304. According to Israel's Manual on the Laws of War, "it is incumbent on each party to... hand over to the other side half of the dog-tag worn by the fallen soldier as well as his personal effects".[287]

[278] Argentina, *Law of War Manual* (1989), § 6.03.
[279] Benin, *Military Manual* (1995), Fascicule II, p. 13.
[280] Benin, *Military Manual* (1995), Fascicule III, p. 6.
[281] Cameroon, *Instructors' Manual* (1992), p. 44, § 163(2).
[282] Croatia, *LOAC Compendium* (1991), p. 21.
[283] Croatia, *Commanders' Manual* (1992), § 76; see also *LOAC Compendium* (1991), p. 21.
[284] France, *LOAC Summary Note* (1992), § 2.1.
[285] France, *LOAC Teaching Note* (2000), p. 3.
[286] Hungary, *Military Manual* (1992), p. 38.
[287] Israel, *Manual on the Laws of War* (1998), p. 61.

305. Kenya's LOAC Manual states that "personal effects [of the dead] shall be collected and evacuated".[288]
306. Madagascar's Military Manual provides that "the personal effects of the deceased shall be collected and evacuated to the rear".[289]
307. The Military Manual of the Netherlands provides that the parties to the conflict shall conclude agreements in order to "facilitate the return of the personal effects of the deceased to the home country".[290]
308. The Military Handbook of the Netherlands provides that "the property of the dead may not be confiscated or destroyed".[291]
309. Nigeria's Manual on the Laws of War provides that "money and articles of personal or sentimental value found on the dead must be forwarded to the enemy".[292]
310. Senegal's IHL Manual provides that, in situations of internal troubles, the personal effects of the dead shall be collected and evacuated with the dead body.[293]
311. Spain's LOAC Manual stipulates that personal belongings, identity tags and any last will left by the deceased must be sent to the national Information Bureau.[294]
312. Togo's Military Manual provides that "personal effects [of the dead] shall be collected and evacuated".[295] It further specifies that "identity cards shall be evacuated. One half of the identity card shall remain on the corpse, the other half shall be evacuated."[296]
313. The UK Military Manual provides that "the belligerents must also forward to each other through . . . [the information] bureau . . . last wills or other documents of importance to the next of kin; money and all articles of an intrinsic or sentimental value which are found on the dead".[297]
314. The US Field Manual provides that parties to the conflict shall "collect and forward through the . . . [information] bureau one half of the double identity disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead".[298]

National Legislation
315. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the appropriate authorities and

[288] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.
[289] Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23.
[290] Netherlands, *Military Manual* (1993), p. VI-3.
[291] Netherlands, *Military Handbook* (1995), p. 7-37.
[292] Nigeria, *Manual on the Laws of War* (undated), § 35.
[293] Senegal, *IHL Manual* (1999), p. 18, § 6.
[294] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[295] Togo, *Military Manual* (1996), Fascicule II, p. 13.
[296] Togo, *Military Manual* (1996), Fascicule II, p. 12.
[297] UK, *Military Manual* (1958), § 382. [298] US, *Field Manual* (1956), § 217.

governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken . . . to return back . . . personal property [of the dead] following a request from the parties and close relatives of the dead persons".[299]

316. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[300]

317. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 16 GC I, 19 GC II, 122 GC III and 139 GC IV, and of AP I, including violations of Article 34(2)(c) AP I, are punishable offences.[301]

318. Italy's Law of War Decree as amended provides that "the objects of personal use belonging to enemy dead on the battlefield shall be collected and kept safely".[302]

319. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[303]

National Case-law

320. No practice was found.

Other National Practice

321. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

322. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that "for every deceased person who falls into the hands of the adverse party, the adverse party must . . . forward . . . personal effects to the appropriate parties".[304]

Other International Organisations

323. No practice was found.

[299] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(5).
[300] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[301] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[302] Italy, *Law of War Decree as amended* (1938), Article 94.
[303] Norway, *Military Penal Code as amended* (1902), § 108.
[304] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

International Conferences
324. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

325. No practice was found.

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

326. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the "return of . . . [the] personal effects [of the deceased] to the home State shall be facilitated".[305]

VI. Other Practice

327. No practice was found.

D. Disposal of the Dead

General

I. Treaties and Other Instruments

Treaties
328. Article 4, fifth paragraph, of the 1929 GC provides that belligerents shall ensure that "the dead are honourably interred".
329. Article 76, third paragraph, of the 1929 Geneva POW Convention provides that "the belligerents shall ensure that prisoners of war who have died in captivity are honourably buried".
330. Articles 17 GC I, 20 GC II, 120 GC III and 130 GC IV contain provisions pertaining to the disposal of the dead in order to ensure that it takes place in a respectful manner.
331. Article 8 AP II provides that, whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to dispose decently of the dead. Article 8 AP II was adopted by consensus.[306]

Other International Instruments
332. Article 3(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "breach of the duty . . . to give [those who have died in the course of the armed conflict or while under detention] decent burial" shall remain prohibited at any time and in any

[305] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 262 and 739.
[306] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

place whatsoever with respect to persons *hors de combat*. Article 4(9) provides that "every possible measure shall be taken, without delay . . . to dispose of [the dead] with respect".

II. National Practice

Military Manuals

333. Argentina's Law of War Manual provides that the remains of deceased persons shall be honourably buried.[307]

334. Australia's Defence Force Manual provides that "the minimum respect for the remains of the dead is a decent burial or cremation".[308] The manual further states that "the deceased should be honourably interred".[309]

335. Belgium's Law of War Manual provides that "the necessary measures shall be taken to bury the dead".[310]

336. Canada's LOAC Manual provides that "parties to the conflict shall ensure that the dead are honourably interred".[311] It also states that "regulations with regard to burial at sea are adjusted to meet the requirements of the situation".[312] With respect to non-international armed conflicts in particular, the manual provides that "steps must also be taken to . . . provide for decent disposition [of the dead]".[313]

337. Canada's Code of Conduct provides that "the dead shall be honourably interred".[314]

338. Croatia's Commanders' Manual provides that "as a rule, the dead shall be identified and buried, cremated or buried at sea individually".[315]

339. France's LOAC Summary Note provides that the dead must be and buried, cremated or buried at sea.[316]

340. France's LOAC Manual reproduces Article 17 GC I.[317]

341. Hungary's Military Manual states that "the dead may be buried, buried at sea, cremated".[318]

342. According to Israel's Manual on the Laws of War, a "[legal] combatant is entitled to the status of a prisoner of war, according him . . . the right to a proper burial".[319]

[307] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 2.06.
[308] Australia, *Defence Force Manual* (1994), § 998.
[309] Australia, *Defence Force Manual* (1994), § 999.
[310] Belgium, *Law of War Manual* (1983), p. 49.
[311] Canada, *LOAC Manual* (1999), p. 9-6, § 58.
[312] Canada, *LOAC Manual* (1999), p. 9-2, § 11.
[313] Canada, *LOAC Manual* (1999), p. 17-4, § 32.
[314] Canada, *Code of Conduct* (2001), Rule 7, § 5.
[315] Croatia, *Commanders' Manual* (1992), § 76, see also § 89 and *LOAC Compendium* (1991), p. 47.
[316] France, *LOAC Summary Note* (1992), § 2.1; see also *LOAC Teaching Note* (2000), p. 3.
[317] France, *LOAC Manual* (2001), p. 121.
[318] Hungary, *Military Manual* (1992), p. 77.
[319] Israel, *Manual on the Laws of War* (1998), p. 46.

343. Italy's LOAC Elementary Rules Manual provides that "as a general rule, the dead shall be . . . buried, cremated or buried at sea individually".[320]
344. Kenya's LOAC Manual states that "the dead shall be buried, cremated or buried at sea individually, when the tactical situation and other circumstances (e.g. hygiene) permit".[321]
345. Madagascar's Military Manual provides that "generally, the dead shall be . . . buried, incinerated or buried at sea individually".[322]
346. New Zealand's Military Manual provides that "the remains [of the dead] . . . shall be respected".[323] It also states that "the regulations with regard to burial at sea are adjusted to meet the requirements of the situation".[324] With respect to non-international armed conflicts, the manual states that the parties to a conflict must take steps to "provide for [the] decent disposal [of the dead]".[325]
347. The Military Instructions of the Philippines provides that "evacuation of all dead bodies must be done . . . and arrangements for a decent burial made".[326]
348. Russia's Military Manual states that the emergency disposal of the dead is one of the activities of civil defence that helps eliminate the immediate effects of hostilities or disaster.[327]
349. Spain's LOAC Manual stipulates that "the dead shall be buried, cremated or buried at sea as soon as the tactical situation and other circumstances permit".[328]
350. Switzerland's Basic Military Manual provides that "burial shall be honourable".[329]
351. Togo's Military Manual provides that the dead "shall be buried, incinerated or disposed of at sea individually when the tactical situation or other circumstances (hygiene) so permit".[330]
352. The UK Military Manual provides that "the belligerents must make provision for honourable interment" of the dead.[331]
353. The US Field Manual states that parties to the conflict "shall further ensure that the dead are honourably interred".[332]

[320] Italy, *LOAC Elementary Rules Manual* (1991), § 76.
[321] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
[322] Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23, see also Fiche No. 8-O, § 25 and Fiche No. 6-SO, § B.
[323] New Zealand, *Military Manual* (1992), § 1012(1).
[324] New Zealand, *Military Manual* (1992), § 1003(3).
[325] New Zealand, *Military Manual* (1992), § 1817.
[326] Philippines, *Military Instructions* (1989), p. 27, § 4; see also *Military Directive to Commanders* (1988), p. 30, Guideline 4(h)(6).
[327] Russia, *Military Manual* (1990), § 9(l).
[328] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[329] Switzerland, *Basic Military Manual* (1987), Article 76(2).
[330] Togo, *Military Manual* (1996), Fascicule II, p. 12, see also p. 9 and Fascicule III, p. 5.
[331] UK, *Military Manual* (1958), § 383.
[332] US, *Field Manual* (1956), § 218.

354. The US Operational Law Handbook provides that "the Parties must ensure proper burial".[333]

National Legislation

355. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that: . . . the dead bodies of persons who are not citizens of the State concerned and died of wounds or in prison, and whose death is connected with the military operations or occupation, should be buried with the necessary respect.[334]

356. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[335]

357. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 20 GC II, 120 GC III and 130 GC IV, as well as any "contravention" of AP II, including violations of Article 8 AP II, are punishable offences.[336]

358. Italy's Law of War Decree as amended provides that commanders shall take all the necessary measures "to give [the dead] an honourable burial".[337]

359. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[338]

360. Venezuela's Code of Military Justice as amended punishes "those who do not take care of the burial, cremation or burial at sea of the dead".[339]

National Case-law

361. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "needless to say, the burial will be made in an appropriate and respectful manner, maintaining the respect for the

[333] US, *Operational Law Handbook* (1993), p. Q-185.
[334] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(3).
[335] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[336] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[337] Italy, *Law of War Decree as amended* (1938), Article 94.
[338] Norway, *Military Penal Code as amended* (1902), § 108.
[339] Venezuela, *Code of Military Justice as amended* (1998), Article 474(12).

dead . . . [T]he burial will be conducted in a respectful manner, conforming to religious laws, and as soon as possible."[340]

Other National Practice

362. The Report on the Practice of Algeria notes that during the Algerian war of independence, "Algerian soldiers on occasion buried enemy personnel who died in combat".[341]

363. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran, based on practice during the Iran–Iraq War, that, where dead combatants cannot be returned to the relevant party, they should be buried.[342]

364. According to the Report on the Practice of Israel, the IDF is sensitive to the correct and proper treatment of remains, and has established detailed internal regulations and procedures concerning their burial.[343]

III. Practice of International Organisations and Conferences

United Nations

365. In 1996, the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions identified as a particular concern a report that the bodies of six civilians who had been beaten and summarily executed by the Papua New Guinea Defence Forces were dumped at sea from helicopters.[344]

366. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that "interment should be carried out in an honourable fashion".[345]

Other International Organisations

367. In February 1995, in a statement before the Permanent Council of the OSCE on the situation in Chechnya, the EU stated that the proposal to establish a "humanitarian truce" appeared essential in order to provide the victims with a decent burial.[346]

[340] Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, §§ 8 and 9.
[341] Report on the Practice of Algeria (1997), Chapter 5.1, referring to *El Moudjahid*, Vol. 2, p. 641.
[342] Report on the Practice of Iran, 1997, Chapter 5.1, referring to Statement by the Iranian Minister of Foreign Affairs, 15 November 1980 and Military Communiqué No. 2176, 27 July 1985.
[343] Report on the Practice of Israel, 1997, Chapter 5.1.
[344] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1996/4/Add.2, 27 February 1996, § 73.
[345] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).
[346] EU, Statement by France on behalf of the EU before the Permanent Council of the OSCE, Vienna, 2 February 1995, *Politique étrangère de la France*, February 1995, p. 155.

International Conferences
368. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

369. No practice was found.

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

370. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the dead shall be buried, cremated or buried at sea individually, when the tactical situation and other circumstances (e.g. hygiene) permit".[347]

VI. Other Practice

371. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every possible measure shall be taken, without delay, . . . to dispose of [the dead] with respect".[348]

Respect for the religious beliefs of the dead

Note: *For practice concerning convictions and religious practices in general, see Chapter 32, section P.*

I. Treaties and Other Instruments

Treaties
372. Article 17, third paragraph, GC I, Article 120, fourth paragraph, GC III and Article 130, first paragraph, GC IV provide that the dead shall be "buried, if possible according to the rites of the religion to which they belonged".
373. The 1999 NATO STANAG 2070 provides that:

10. Whenever practicable, a brief burial service of the appropriate religion is to be held . . .
11. An appropriate (religious) marker high enough to be seen readily is to be erected.

[347] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 512.
[348] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

Other Instruments

374. No practice was found.

II. National Practice

Military Manuals

375. Argentina's Law of War Manual provides that the dead "shall be buried . . . if possible according to their religious rites".[349]

376. According to Australia's Defence Force Manual, the dead should be given a decent burial in accordance with their religious rights and practices.[350]

377. Benin's Military Manual provides that "the dead shall be . . . buried . . . according to their religious rites".[351]

378. Cameroon's Instructors' Manual states that the burial shall take place according to the religion of the deceased.[352]

379. Canada's LOAC Manual provides that "parties to the conflict shall ensure that the dead are . . . interred and if possible according to the rites of the religion to which they belong".[353]

380. Canada's Code of Conduct provides that "the dead shall be . . . interred, and if possible accorded the rites of the religion to which the deceased belonged".[354]

381. According to Israel's Manual on the Laws of War, "generally speaking, the enemy fallen are to be interred (in accordance with their religion's customs insofar as possible)".[355]

382. The Military Instructions of the Philippines stipulates that "religious services must be provided if required".[356]

383. Switzerland's Basic Military Manual provides that "inhumation shall . . . [take place] if possible according to the religious rites of the deceased".[357]

384. Togo's Military Manual provides that "the dead shall be . . . buried . . . according to their religious rites".[358]

385. The UK Military Manual provides that "the belligerents must make provision for . . . interment . . . if possible according to the rites of the religion to which the dead belong".[359]

[349] Argentina, *Law of War Manual* (1969), § 3.005.
[350] Australia, *Defence Force Manual* (1994), §§ 998 and 999.
[351] Benin, *Military Manual* (1995), Fascicule III, p. 5, see also Fascicule II, p. 12.
[352] Cameroon, *Instructors' Manual* (1992), p. 118, § 431(2).
[353] Canada, *LOAC Manual* (1999), p. 9-6, § 58.
[354] Canada, *Code of Conduct* (2001), Rule 7, § 5.
[355] Israel, *Manual on the Laws of War* (1998), p. 61.
[356] Philippines, *Military Instructions* (1989), p. 27, § 4.
[357] Switzerland, *Basic Military Manual* (1987), Article 76(2).
[358] Togo, *Military Manual* (1996), Fascicule III, p. 5, see also Fascicule II, p. 12.
[359] UK, *Military Manual* (1958), § 383.

386. The US Field Manual states that parties to the conflict "shall further ensure that the dead are . . . interred, if possible according to the rites of the religion to which they belonged".[360]

National Legislation

387. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[361]

388. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, is a punishable offence.[362]

389. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[363]

National Case-law

390. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "the burial will be conducted . . . conforming to religious laws".[364]

Other National Practice

391. According to the Report on the Practice of Malaysia, the bodies of members of enemy forces and civilians that remain unclaimed, but whose religious persuasions are identified, are buried according to their religious rites.[365]

III. Practice of International Organisations and Conferences

United Nations

392. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council 780 (1992) stated that "interment should be carried out . . . according to the religious rites of the deceased".[366]

[360] US, *Field Manual* (1956), § 218; see also *Operational Law Handbook* (1993), p. Q-185.
[361] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[362] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[363] Norway, *Military Penal Code as amended* (1902), § 108(a).
[364] Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 8.
[365] Report on the Practice of Malaysia, 1997, Chapter 5.1.
[366] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

Other International Organisations
393. No practice was found.

International Conferences
394. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

395. No practice was found.

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

396. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "burial or cremation shall, as far as circumstances permit, be carried out . . . according to the rites of the religion to which the dead belonged".[367]

VI. Other Practice

397. No practice was found.

Cremation of bodies

I. Treaties and Other Instruments

Treaties
398. Article 17, second paragraph, GC I provides that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead."
399. Article 120, fifth paragraph, GC III provides that "bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased."
400. Article 130, second paragraph, GC IV provides that "bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased."

[367] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.

Other Instruments

401. No practice was found.

II. National Practice

Military Manuals

402. Argentina's Law of War Manual provides that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the reasons must be stated in detail on the death certificate or on the authenticated list of the dead."[368]

403. Australia's Defence Force Manual stipulates that "the cremation of the dead shall be carried out individually in accordance with the religious rights and practices of the deceased".[369] It then specifies that "bodies shall only be cremated for imperative reasons of hygiene and health, or for the requirements of the deceased".[370]

404. Benin's Military Manual provides that "cremation shall only take place for imperative hygiene reasons and according to the deceased's religion".[371]

405. Canada's LOAC Manual provides that "bodies shall not be cremated except for imperative reasons of hygiene or for religious motives".[372]

406. Canada's Code of Conduct provides that "bodies must not be cremated except for imperative reasons of hygiene or because of the religion of the deceased. Reasons for cremation must be recorded."[373]

407. France's LOAC Manual states that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased".[374]

408. According to Israel's Manual on the Laws of War, "generally speaking, the enemy fallen are to be interred (in accordance with their religion's customs insofar as possible), with cremation allowed only in cases where this is necessary hygienically or for religious reasons".[375]

409. Kenya's LOAC Manual provides that "cremation shall take place only for imperative reasons of hygiene or for motives based on the religion of the deceased".[376]

410. The Military Manual of the Netherlands states that "the cremation of a body shall be granted for imperative reasons of hygiene or for motives based on the religion" of the deceased.[377]

368 Argentina, *Law of War Manual* (1969), § 3.005.
369 Australia, *Defence Force Manual* (1994), § 999.
370 Australia, *Defence Force Manual* (1994), § 9-100.
371 Benin, *Military Manual* (1995), Fascicule II, p. 12.
372 Canada, *LOAC Manual* (1999), p. 9-6, § 59.
373 Canada, *Code of Conduct* (2001), Rule 7, § 5.
374 France, *LOAC Manual* (2001), p. 121.
375 Israel, *Manual on the Laws of War* (1998), p. 61.
376 Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
377 Netherlands, *Military Manual* (1993), p. VI-2.

411. Spain's LOAC Manual stipulates that cremation is permitted only if required on religious grounds or for reasons of hygiene in cases where there is a risk of disease.[378]
412. Switzerland's Basic Military Manual states that "cremation is only permitted for imperative hygiene reasons or for religious motives".[379]
413. Togo's Military Manual provides that "cremation shall only take place for imperative hygiene reasons and according to the deceased's religion".[380]
414. The UK Military Manual stipulates that "bodies must not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. When cremation is carried out the circumstances and reasons for it must be stated in detail on the death certificate."[381]
415. The UK LOAC Manual provides that "cremation is allowed only on religious grounds or for imperative reasons of hygiene".[382]
416. The US Field Manual provides that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead."[383]
417. The US Air Force Pamphlet provides that "cremation is permitted only for imperative reasons of hygiene or for motives based on the deceased's religion".[384]
418. The US Operational Law Handbook provides that "Parties may cremate the dead only for hygienic or religious reasons".[385]

National Legislation
419. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[386]
420. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, is a punishable offence.[387]
421. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[388]

[378] Spain, *LOAC Manual* (1996), Vol. I, Article 5.2.d.(6).
[379] Switzerland, *Basic Military Manual* (1987), Article 76, commentary.
[380] Togo, *Military Manual* (1995), Fascicule II, p. 12.
[381] UK, *Military Manual* (1958), § 384.
[382] UK, *LOAC Manual* (1981), Section 6, p. 22, § 5.
[383] US, *Field Manual* (1956), § 218.
[384] US, *Air Force Pamphlet* (1976), § 12-2(a).
[385] US, *Operational Law Handbook* (1993), p. Q-185.
[386] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[387] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[388] Norway, *Military Penal Code as amended* (1902), § 108(a).

National Case-law
422. No practice was found.

Other National Practice
423. No practice was found.

III. Practice of International Organisations and Conferences

United Nations
424. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that:

> A mass gravesite is a potential repository of evidence of mass killing of civilians and POWs . . .
>
> The manner and method by which a mass grave is created may itself be a breach of the Geneva Conventions, as well as a violation of the customary regulations of armed conflict . . . Bodies should not be cremated except for hygiene reasons or for the religious reasons of the deceased.[389]

Other International Organisations
425. No practice was found.

International Conferences
426. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

427. No practice was found.

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

428. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "burial or cremation shall, as far as circumstances permit, be carried out individually".[390]

VI. Other Practice

429. No practice was found.

[389] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(a) and (b).
[390] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.

Burial in individual or collective graves

I. Treaties and Other Instruments

Treaties

430. Article 17, first paragraph, GC I provides that parties to the conflict shall ensure that burial or cremation of the dead is "carried out individually as far as circumstances permit".

431. Article 20, first paragraph, GC II provides that parties to the conflict shall ensure that burial at sea of the dead be "carried out individually as far as circumstances permit".

432. Article 120, fifth paragraph, GC III provides that "deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves".

433. Article 130, second paragraph, GC IV provides that "deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves".

434. The 1999 NATO STANAG 2070 provides that:

> 3. Whenever practicable, separate burial should be given to the remains, or even part remains, of each deceased person.
> . . .
> 6. The following definitions are taken from the NATO Glossary of Terms and Definitions for military use in English and French . . .:
> a. Emergency Burial. A burial, usually on the battlefield, when conditions do not permit evacuation for burial in a cemetery.
> b. Group Burial. A burial in a common grave of two or more individually unidentified remains.
> c. Trench Burial. A method of burial resorted to when casualties are heavy whereby a trench is prepared and the individual remains are laid in it side by side, thus obviating the necessity of digging and filling individual graves.
> . . .
> 12. In the case of trench and group burials a marker and list in a suitable container endorsed accordingly is to be placed at each end of the grave and the distance of the remains from the marker is to be shown against the relevant entry in the list. In group burials, the number of bodies buried must be recorded, with the names of the known but unidentifiable dead listed.

Other Instruments

435. No practice was found.

II. National Practice

Military Manuals

436. Argentina's Law of War Manual provides that the deceased must "be buried individually, so far as the circumstances so permit".[391]

[391] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.04.

437. According to Australia's Defence Force Manual, "the burial or cremation of the dead shall be carried out individually".[392]
438. Benin's Military Manual provides that the dead "shall be buried, cremated or buried at sea individually".[393]
439. Canada's LOAC Manual provides that "parties to the conflict shall ensure that burial or cremation of the dead is carried out individually as far as circumstances permit".[394]
440. Canada's Code of Conduct provides that "the burial or cremation of the dead should be carried out individually as far as circumstances permit".[395]
441. Croatia's Commanders' Manual provides that "as a rule, the dead shall be . . . buried, cremated or buried at sea individually".[396]
442. France's LOAC Manual reproduces Article 17 GC I.[397]
443. Italy's LOAC Elementary Rules Manual provides that "as a general rule, the dead shall be . . . buried, cremated or buried at sea individually".[398]
444. Kenya's LOAC Manual states that "after identification, the dead shall be buried, cremated or buried at sea individually, when the tactical situation and other circumstances (e.g. hygiene) permit".[399]
445. Madagascar's Military Manual provides that "generally, the dead shall be . . . buried, cremated or buried at sea individually".[400]
446. The Military Manual of the Netherlands states that "parties to the conflict are obliged to ensure that burial or cremation of the dead shall be carried out individually".[401]
447. Spain's LOAC Manual stipulates that "the dead shall be buried, cremated or buried at sea individually".[402]
448. Switzerland's Basic Military Manual states that "if possible, corpses shall be buried separately".[403]
449. Togo's Military Manual provides that the dead "shall be buried, incinerated or buried at sea individually".[404]
450. The UK Military Manual provides that "the belligerents must make provision for . . . interment, in individual graves so far as possible".[405]
451. The US Field Manual provides that "Parties to the conflict shall ensure burial or cremation of the dead, carried out individually as far as circumstances permit".[406]

[392] Australia, *Defence Force Manual* (1994), § 999.
[393] Benin, *Military Manual* (1995), Fascicule II, p. 12, see also Fascicule III, p. 5.
[394] Canada, *LOAC Manual* (1999), p. 9-6, § 55.
[395] Canada, *Code of Conduct* (2001), Rule 7, § 5.
[396] Croatia, *Commanders' Manual* (1992), § 76.
[397] France, *LOAC Manual* (2001), p. 121.
[398] Italy, *LOAC Elementary Rules Manual* (1991), § 76.
[399] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
[400] Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23, see also Fiche No. 6-SO, § B.
[401] Netherlands, *Military Manual* (1993), p. VI-2.
[402] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[403] Switzerland, *Basic Military Manual* (1987), Article 76, commentary.
[404] Togo, *Military Manual* (1996), Fascicule II, p. 12, see also Fascicule III, p. 5.
[405] UK, *Military Manual* (1958), § 383.
[406] US, *Field Manual* (1956), § 218; see also *Air Force Pamphlet* (1976), § 12-2(a).

452. The YPA Military Manual of the SFRY (FRY) stipulates that bodies should be buried individually.[407]

National Legislation

453. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[408]

454. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 20 GC II, 120 GC III and 130 GC IV, is a punishable offence.[409]

455. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... is liable to imprisonment".[410]

National Case-law

456. In 1995, Colombia's Council of State held that the deceased must be buried individually, subject to all the requirements of the law, and not in mass graves.[411]

Other National Practice

457. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

458. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that:

> A mass gravesite is a potential repository of evidence of mass killings of civilians and POWs ...
>
> The manner and method by which a mass grave is created may itself be a breach of the Geneva Conventions, as well as a violation of the customary regulations of armed conflict ... Parties to a conflict must also ensure that deceased persons are ... buried in individual graves, as far apart as circumstances permit.[412]

[407] SFRY (FRY), *YPA Military Manual* (1988), Article 167.
[408] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[409] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[410] Norway, *Military Penal Code as amended* (1902), § 108(a).
[411] Colombia, Council of State, *Administrative Case No. 10941*, Judgement, 6 September 1995.
[412] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(a) and (b).

Other International Organisations
459. No practice was found.

International Conferences
460. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

461. No practice was found.

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

462. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that "burial or cremation shall, as far as circumstances permit, be carried out individually".[413]

VI. Other Practice

463. No practice was found.

Grouping of graves according to nationality

I. Treaties and Other Instruments

Treaties
464. Article 17, third paragraph, GC I provides that graves shall be "grouped if possible according to the nationality of the deceased".
465. Article 120, fourth paragraph, GC III provides that "whenever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place".
466. Paragraph 9 of the 1999 NATO STANAG 2070 states that "burials are to be grouped by nationalities. Different areas for separate graves, trench or group burials are to be allotted to each nationality."

Other Instruments
467. No practice was found.

II. National Practice

Military Manuals
468. Argentina's Law of War Manual provides that graves "shall be grouped if possible according to the nationality of the dead".[414]

[413] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.
[414] Argentina, *Law of War Manual* (1969), § 3.005.

469. Australia's Defence Force Manual provides that the graves of the deceased shall "be grouped by nationality".[415]
470. Cameroon's Instructors' Manual provides that the deceased shall be buried by nationality.[416]
471. The Military Manual of the Netherlands provides that "graves shall be grouped if possible according to the nationality of the deceased".[417]
472. The US Field Manual provides that the "graves [of the dead] are . . . grouped if possible according to the nationality of the deceased".[418]
473. The YPA Military Manual of the SFRY (FRY) provides that military graves should, if possible, be grouped by nationality.[419]

National Legislation
474. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[420]
475. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I and 120 GC III, is a punishable offence.[421]
476. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[422]

National Case-law
477. No practice was found.

Other National Practice
478. No practice was found.

III. Practice of International Organisations and Conferences

United Nations
479. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780

[415] Australia, *Defence Force Manual* (1994), § 999.
[416] Cameroon, *Instructors' Manual* (1992), p. 119, § 431(2).
[417] Netherlands, *Military Manual* (1993), p. VI-2.
[418] US, *Field Manual* (1956), § 218.
[419] SFRY (FRY), *YPA Military Manual* (1988), Article 168.
[420] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[421] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[422] Norway, *Military Penal Code as amended* (1902), § 108(a).

(1992) stated, with respect to its investigation into mass graves, that "victims should be grouped by nationality".[423]

Other International Organisations
480. No practice was found.

International Conferences
481. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

482. No practice was found.

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

483. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "wherever possible, the dead of the same nationality shall be buried at the same place".[424]

VI. Other Practice

484. No practice was found.

Respect for and maintenance of graves

I. Treaties and Other Instruments

Treaties
485. Article 4, fifth paragraph, of the 1929 GC provides that belligerents shall ensure that graves are respected.
486. Article 76, third paragraph, of the 1929 Geneva POW Convention provides that belligerents shall ensure that the graves of POWs are "treated with respect and suitably maintained".
487. Article 17, third paragraph, GC I, Article 120, fourth paragraph, GC III and Article 130, first paragraph, GC IV provide that graves shall be respected and properly maintained.

[423] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).
[424] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.

488. Article 34 AP I provides that:

> 1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected [and] maintained . . . as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.
> 2. As soon as circumstances and the relation between the adverse Parties permit, . . . [they] shall conclude agreements in order:
>
> . . .
>
> (b) to protect and maintain such gravesites permanently;
>
> . . .
>
> 3. In the absence of [such] agreements . . . and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

Article 34 AP I was adopted by consensus.[425]

489. Article 8(b) of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam contained provisions requiring the parties to take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains.

Other Instruments

490. No practice was found.

II. National Practice

Military Manuals

491. Argentina's Law of War Manual provides that graves shall be "respected . . . and properly maintained".[426]

492. Australia's Defence Force Manual provides that the graves of the deceased "shall be respected".[427]

493. Canada's LOAC Manual states that the grave sites of all persons who have died as a result of hostilities or while in occupation or detention in relation thereto shall be "properly respected [and] maintained".[428]

494. Croatia's LOAC Compendium provides that one of the requirements after a conflict is to "respect . . . and maintain gravesites".[429]

[425] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[426] Argentina, *Law of War Manual* (1969), § 3.005.
[427] Australia, *Defence Force Manual* (1994), § 999.
[428] Canada, *LOAC Manual* (1999), p. 9-6, § 54.
[429] Croatia, *LOAC Compendium* (1991), p. 21.

495. France's LOAC Manual reproduces Article 17 GC I.[430]
496. Hungary's Military Manual provides that one of the requirements after a conflict is to "respect . . . and maintain gravesites".[431]
497. Israel's Manual on the Laws of War states that "the IDF maintains a cemetery in the north for the interment of the bodies of terrorists killed in clashes with the IDF".[432]
498. The Military Manual of the Netherlands provides that "graves must be properly maintained".[433]
499. New Zealand's Military Manual provides that the grave sites of the dead shall be "properly respected, maintained and marked".[434]
500. Spain's LOAC Manual provides that "the graves of the dead shall be respected and properly maintained, wherever they are located".[435]
501. Switzerland's Basic Military Manual provides that "graves shall be respected" and "properly maintained".[436]
502. The UK Military Manual provides that "graves must be respected and properly maintained".[437]
503. The US Field Manual provides that the graves of the dead "are respected [and] properly maintained".[438]
504. The Annotated Supplement to the US Naval Handbook requires that "as soon as circumstances permit, arrangement be made to . . . protect and maintain such sites permanently".[439]
505. The YPA Military Manual of the SFRY (FRY) provides that the graves of the deceased shall be respected.[440]

National Legislation
506. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the places of burial of [the dead] are respected".[441]
507. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[442]
508. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I,

[430] France, *LOAC Manual* (2001), p. 121.
[431] Hungary, *Military Manual* (1992), p. 38.
[432] Israel, *Manual on the Laws of War* (1998), p. 61.
[433] Netherlands, *Military Manual* (1993), p. VI-3.
[434] New Zealand, *Military Manual* (1992), § 1012(1).
[435] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[436] Switzerland, *Basic Military Manual* (1987), Article 71(2) and Article 76, commentary.
[437] UK, *Military Manual* (1958), § 383. [438] US, *Field Manual* (1956), § 218.
[439] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.
[440] SFRY (FRY), *YPA Military Manual* (1988), Article 168.
[441] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 13(3).
[442] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

120 GC III and 130 GC IV, and of AP I, including violations of Article 34 AP I, are punishable offences.[443]

509. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[444]

National Case-law

510. No practice was found.

Other National Practice

511. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support ... the principle ... to maintain [grave] sites permanently".[445]

III. Practice of International Organisations and Conferences

United Nations

512. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that the graves of victims should be maintained.[446]

Other International Organisations

513. No practice was found.

International Conferences

514. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts "during hostilities and after cessation of hostilities, to help locate and care for the graves of the dead".[447]

[443] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[444] Norway, *Military Penal Code as amended* (1902), § 108.
[445] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.
[446] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).
[447] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

IV. Practice of International Judicial and Quasi-judicial Bodies

515. In the *Neira Alegría and Others case* in 1995, the government of Peru informed the IACtHR that a certain cemetery under discussion was official and permanent in nature, and that the bodies of persons who died as a result of disproportionate use of force in putting down a prison mutiny would not therefore be moved except in accordance with regulations on the subject and at the request of an interested party.[448]

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

516. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "gravesites of deceased persons shall be respected and maintained, wherever located".[449]

VI. Other Practice

517. In 1996, in the context of the conflict in Bosnia and Herzegovina, Amnesty International called for IFOR to protect mass grave sites.[450]

E. Accounting for the Dead

Note: *For practice concerning respect for family rights, see Chapter 32, section Q. For practice concerning the right of the families to know the fate of their relatives, see Chapter 36.*

Identification of the dead prior to disposal

I. Treaties and Other Instruments

Treaties

518. Article 4 of the 1929 GC provides that the belligerents "shall ensure that the burial or cremation of the dead is preceded by a careful, and if possible medical, examination of the bodies, with a view to confirming death, establishing identity and enabling a report to be made".

519. Article 16, first paragraph, GC I and Article 19, first paragraph, GC II provide that:

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

[448] IACtHR, *Neira Alegría and Others case*, Judgement, 19 January 1995, § 36.
[449] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 261, see also § 230.
[450] Amnesty International, Bosnia and Herzegovina: Amnesty International renews calls for IFOR to comply with international law, AI Index: EUR 63/11/96, 18 April 1996, p. 4.

These records should if possible include:

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

520. Article 17, first paragraph, GC I and Article 20, first paragraph, GC II provide that "Parties to the conflict shall ensure that burial or cremation of the dead . . . is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made".

521. Articles 120 and 121 GC III contain detailed provisions relating to identification, death certificates and investigation in the case of death of POWs.

522. Article 129, second paragraph, GC IV provides that "deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred".

523. Article 131, first paragraph, GC IV provides that any suspect death shall be followed by an official enquiry.

524. Article III(58)(a) of the 1953 Panmunjon Armistice Agreement provides that:

> The Commander of each side shall furnish to the Commander of the other side as soon as practicable, but not later than ten (10) days after this Armistice Agreement becomes effective, the following information concerning prisoners of war:
> . . .
> (2) Insofar as practicable, information regarding name, nationality, rank, and other identification data, date and cause of death, and place of burial, of those prisoners of war who died while in custody.

525. The 1974 NATO STANAG 2132 describes the procedures to be followed with respect to documentation relative to medical evacuation, treatment and cause of death of patients.

526. Article 33 AP I provides that:

2. . . . each Party to the conflict shall . . .
   (a) record the information . . . [on those] who have died during any period of detention;
   (b) . . . facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.
   . . .

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to . . . identify . . . the dead from battlefield areas.

Article 33 AP I was adopted by consensus.[451]

527. The 1999 NATO STANAG 2070 provides that:

11. An appropriate (religious) marker high enough to be seen is to be erected. At its base, a bottle, can, or other suitable container is to be half buried, open end downwards, containing a paper on which is recorded such information listed below as is available:
    a. Name (surname, prefix and forename or initials).
    b. Rank or Grade.
    c. Gender.
    d. Service Number.
    e. National Force, Unit, and Place of Birth, if desired.
    f. Date and cause of death, if known.
    g. Date buried.
    h. By whom buried.
    i. Religious faith.
    j. Nature of contamination.
12. In the case of trench and group burials a marker and list in a suitable container endorsed accordingly is to be placed at each end of the grave and the distance of the remains from the marker is to be shown against the relevant entry in the list. In group burials the number of bodies buried must be recorded, with the names of the known but unidentifiable dead listed.
    . . .
15. Unidentifiable dead should be buried and reported as others except that the word "unknown" is to be used in place of the name. Particular care must be taken to list all information which may assist identification later. The fullest possible physical, especially dental, description is to be recorded and fingerprints taken if possible. Details of numbers and markings on uniforms, equipment, vehicles or aircraft, and particulars of IDENTIFIABLE DEAD in the vicinity should be noted.
16. In all cases an emergency burial report must be completed by the unit responsible. The type of report form to be used is given at Annex A. This is not a prescribed format, but shows generally the information most nations consider essential to have, provided it is available.
    . . .
18. . . . One identification tag/disc must be buried with the corpse. The second identification tag/disc, or the removable part, is placed in the receptacle with the personal effects. In the case of United States personnel, all personal effects and one identification tag are buried with the remains and the second identification tag affixed to the grave marker.

Other Instruments

528. Article 20 of the 1880 Oxford Manual provides that "the dead should never be buried until all articles on them which may serve to fix their identity, such as pocket-books, numbers, etc., shall have been collected".

[451] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

II. National Practice

Military Manuals

529. Argentina's Law of War Manual provides that the dead shall be identified prior to their disposal.[452]

530. Australia's Defence Force Manual provides that:

> As soon as is practical following the death of a combatant, a belligerent shall record the following information to aid identification . . .
> a) nationality;
> b) regimental or serial number and rank;
> c) surname and all first names;
> d) date of birth, religion and any other particulars shown on the body's identity card or identity discs; and
> e) the date, cause and place of death and if the body is given a field burial, the exact location of the remains to enable future exhumation of the body, or remains if necessary.[453]

531. Belgium's Law of War Manual states that "the belligerents must . . . identify the dead".[454]

532. Benin's Military Manual provides that "the dead must be identified".[455]

533. Cameroon's Instructors' Manual states that, when the tactical situation permits, the dead should be buried after identification and medical examination. It also states that "all the dead must be listed".[456]

534. Canada's LOAC Manual provides that "Parties to the conflict shall endeavour to reach agreements to allow teams to . . . identify . . . the dead from battlefield areas".[457] It further states that "burial or cremation must be preceded by a careful examination of the bodies (if possible by a medical examination), with a view to confirming death, establishing identity and enabling a report to be made".[458]

535. Canada's Code of Conduct provides that "burial must be preceded by a careful examination, and if possible, by a medical examination of the bodies in order to confirm death, establish identity and make appropriate reports".[459]

536. Croatia's LOAC Compendium states that "the dead shall be identified according to the circumstances".[460]

537. Croatia's Commanders' Manual provides that "as a rule, the dead shall be identified".[461]

[452] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), §§ 2.06, 6.01 and 6.04.
[453] Australia, *Defence Force Manual* (1994), § 9-101.
[454] Belgium, *Law of War Manual* (1983), p. 49.
[455] Benin, *Military Manual* (1995), Fascicule II, pp. 9 and 12.
[456] Cameroon, *Instructors' Manual* (1992), p. 44, § 163(2) and p. 118, § 431(2).
[457] Canada, *LOAC Manual* (1999), p. 9-5, § 53.
[458] Canada, *LOAC Manual* (1999), p. 9-6, § 56.
[459] Canada, *Code of Conduct* (2001), Rule 7, § 5.
[460] Croatia, *LOAC Compendium* (1991), p. 47.
[461] Croatia, *Commanders' Manual* (1992), § 76, see also § 89.

538. France's LOAC Summary Note and LOAC Teaching Note provide that the dead must be identified.[462]
539. France's LOAC Manual reproduces Article 17 GC I.[463]
540. Germany's Military Manual provides that "burial or cremation of the dead shall be preceded by an examination of the bodies with documentation".[464]
541. Hungary's Military Manual states that "the dead shall be identified according to the circumstances".[465]
542. India's Police Manual provides that, in cases of death resulting from a clash, the police are required to hold an inquest and to send the body for post-mortem examination.[466]
543. According to Israel's Manual on the Laws of War, "it is incumbent on each party to keep a record of a fallen soldier's personal details and particulars of death, and hand over to the other side half of the dog-tag worn by the fallen soldier, as well as a death certificate".[467]
544. Italy's LOAC Elementary Rules Manual provides that "as a general rule, the dead shall be identified".[468]
545. Kenya's LOAC Manual provides that "the dead shall be identified. After identification, the dead shall be buried . . . Identity cards shall be evacuated."[469]
546. Madagascar's Military Manual provides that "generally, the dead shall be identified".[470]
547. The Military Manual of the Netherlands provides that:

> Parties to the conflict are obliged to ensure that burial or cremation of the dead . . . is preceded for each dead by a careful examination, if possible by a medical examination, of the body, with a view to confirming death and establishing identity. One half of the double identity disc or the identity disc itself if it is a single disc, should remain on the body.[471]

548. The Military Handbook of the Netherlands provides that "the identification of the dead must be done".[472]
549. New Zealand's Military Manual states that "to facilitate the finding of the missing personnel, Parties to the conflict endeavour to reach agreement to allow teams to . . . identify . . . the dead from battlefield areas".[473]

[462] France, *LOAC Summary Note* (1992), § 2.1; *LOAC Teaching Note* (2000), p. 3.
[463] France, *LOAC Manual* (2001), p. 121.
[464] Germany, *Military Manual* (1992), § 611.
[465] Hungary, *Military Manual* (1992), p. 77.
[466] India, *Police Manual* (1986), Article 13(xviii), p. 39.
[467] Israel, *Manual on the Laws of War* (1998), p. 61.
[468] Italy, *LOAC Elementary Rules Manual* (1991), § 76.
[469] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.
[470] Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23, see also Fiche No. 8-O, § 25, Fiche No. 6-SO, § B and Fiche No. 2-T, § 22.
[471] Netherlands, *Military Manual* (1993), p. VI-2.
[472] Netherlands, *Military Handbook* (1995), p. 7-37.
[473] New Zealand, *Military Manual* (1992), § 1011(3).

550. Nigeria's Manual on the Laws of War provides that "the belligerents have to register as soon as possible all the particulars that can help to identify an enemy soldier who is wounded, sick or dead".[474]
551. Senegal's IHL Manual provides that, in situations of internal troubles, "the dead shall be identified".[475]
552. Spain's LOAC Manual states that "the dead must be identified".[476]
553. Switzerland's Basic Military Manual provides that "no corpse shall be buried or cremated without an examination, if possible medical, to certify the death and establish the identity of the deceased".[477]
554. Togo's Military Manual provides that "the dead must be identified".[478]
555. The UK Military Manual provides that "belligerents must record as soon as possible any particulars which may assist in the identification of dead persons belonging to the opposing belligerent who fall into their hands".[479] The manual adds that "before being buried or cremated, the bodies must be carefully examined to ensure that life is extinct, and also to establish identity and enable a report to be made".[480]
556. The US Field Manual provides that:

> Parties to the conflict shall record as soon as possible, in respect of each . . . dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.
>
> These records should if possible include:
>
> (a) designation of the Power on which he depends;
> (b) army, regimental, personal or serial number;
> (c) surname;
> (d) first name or names;
> (e) date of birth;
> (f) any other particulars shown on his identity card or disc;
> (g) date and place of capture or death;
> (h) particulars concerning wounds or illness, or cause of death.[481]

The manual also provides that "Parties to the conflict shall ensure that burial or cremation of the dead . . . is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made".[482]
557. The US Air Force Pamphlet refers to Article 16 GC I.[483]

[474] Nigeria, *Manual on the Laws of War* (undated), § 35.
[475] Senegal, *IHL Manual* (1999), p. 18, § 6.
[476] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[477] Switzerland, *Basic Military Manual* (1987), Article 76(1).
[478] Togo, *Military Manual* (1996), Fascicule II, pp. 9 and 12.
[479] UK, *Military Manual* (1958), § 382.
[480] UK, *Military Manual* (1958), § 383.
[481] US, *Field Manual* (1956), § 217; see also *Operational Law Handbook* (1993), p. Q-185.
[482] US, *Field Manual* (1956), § 218.
[483] US, *Air Force Pamphlet* (1976), § 12-2(a).

National Legislation

558. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "each party buries [the dead] after they take all the measures for their identification".[484]

559. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[485]

560. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 16 and 17 GC I, 19 and 20 GC II, 120 and 121 GC III, 129 and 131 GC IV, and of AP I, including violations of Article 33 AP I, are punishable offences.[486]

561. Italy's Law of War Decree as amended provides that "commanders shall take all necessary measures to . . . ascertain [the] identity [of the dead]".[487]

562. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[488]

National Case-law

563. In its judgement in the *Military Juntas case* in 1985, Argentina's Court of Appeal referred to the rule that prior to burial or cremation, the dead should be examined, if possible by a doctor.[489]

564. In 1995, Colombia's Council of State held that a report must be made concerning the circumstances of death: in the aftermath of a battle, the bodies of all those killed, whether combatants or non-combatants, must be treated in accordance with forensic requirements in order to "permit complete identification and establishment of the circumstances of death".[490]

565. According to the Report on the Practice of Israel, in the *Abu-Rijwa case* in 2000, the IDF carried out DNA identification tests when asked by family members to repatriate remains.[491]

566. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "once the identification process is over, the

[484] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 13(3).
[485] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[486] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[487] Italy, *Law of War Decree as amended* (1938), Article 94.
[488] Norway, *Military Penal Code as amended* (1902), § 108.
[489] Argentina, Court of Appeal, *Military Juntas case*, Judgement, 9 December 1985.
[490] Colombia, Council of State, *Case No. 10941*, Judgement, 6 September 1995, pp. 37–42.
[491] Report on the Practice of Israel, 1997, Chapter 5.1, referring to High Court, *Abu-Rijwa case*, Judgement, 15 November 2000.

burial shall begin" and that "identifying . . . the bodies is a highly important humanitarian need".[492]

Other National Practice

567. According to the Report on the Practice of Malaysia, the "bodies of enemies and civilians are identified, sent to a morgue and subsequently buried".[493]

568. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that each party to a conflict permit teams to identify . . . the dead".[494]

III. Practice of International Organisations and Conferences

United Nations

569. In Resolution 3320 (XXIX), adopted in 1974, the UN General Assembly:

> 2. Calls upon parties to armed conflicts, regardless of their character or location, during and after the end of hostilities and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power to help locate and mark the graves of the dead [and] to facilitate the disinternment and the return of the remains, if requested by the families . . .
> . . .
> 4. Calls upon all parties to armed conflicts to cooperate, in accordance with the Geneva Conventions of 1949, with Protecting Powers or their substitutes and with the International Committee of the Red Cross in providing information on the . . . dead in armed conflicts, including persons belonging to other countries not parties to the armed conflict.[495]

570. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights recommended that the Croatian authorities identify all those killed.[496]

571. In 1991, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL recommended that:

> The immediate disposal of bodies should be avoided in cases of violent death or death in questionable circumstances and an adequate autopsy should be conducted in accordance with the conditions recommended in the Principles [on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions].[497]

[492] Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, §§ 8 and 9.
[493] Report on the Practice of Malaysia, 1997, Chapter 5.1.
[494] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.
[495] UN General Assembly, Res. 3220 (XXIX), 6 November 1974, §§ 2 and 4.
[496] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, § 59.
[497] ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/658-S/23222, 15 November 1991, Annex, § 151.

572. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated, with respect to its investigation into mass graves, that "for every deceased person who falls into the hands of the adverse party, the adverse party must record, prepare, and forward all identification information, death certificates . . . to the appropriate parties. Parties to a conflict must also ensure that deceased persons are autopsied."[498]

573. In its report in 1993, the UN Commission on the Truth for El Salvador noted that, following a reported clash between FMLN troops and a military patrol, a member of the Salvadoran Armed Service Press Committee (COPREFA) photographed the bodies of the dead, and members of the National Police performed paraffin tests to see whether the persons had fired weapons.[499]

Other International Organisations

574. In 1999, the Committee of Ministers of the Council of Europe adopted a recommendation on the harmonisation of medico-legal autopsy rules, without making any exception for situations of armed conflict. In particular, it stated that autopsies should be carried out "in all cases of obvious or suspected unnatural death, in particular arising out of violations of human rights such as suspicion of torture or any other form of ill-treatment and deaths in custody or death associated with police or military activities".[500]

575. In a resolution adopted in 1997, the Council of the League of Arab States decided "to call for the implementation of the investigations provided for by the international conventions to be applied to the death of Lebanese detainees in Israeli detention camps and prisons".[501]

576. In February 1995, in a statement before the Permanent Council of the OSCE on the situation in Chechnya, the EU stated that the proposal to establish a "humanitarian truce" appeared essential in order to permit the identification of the victims.[502]

International Conferences

577. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the wearing of identity discs in which it recalled that Articles 16 and 17 GC I "provide for identity discs to be worn by members of the armed forces to facilitate their identification in case they are killed". The Conference further stated that it:

[498] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).
[499] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 90.
[500] Council of Europe, Committee of Ministers, Rec. (99)3, Harmonisation of medico-legal autopsy rules, 2 February 1999, §§ 2(c) and (i).
[501] League of Arab States, Council, Res. 5635, 31 March 1997, § 5.
[502] EU, Statement by France on behalf of the EU before the Permanent Council of the OSCE, Vienna, 2 February 1995, *Politique étrangère de la France*, February 1995, p. 155.

1. *urges* the Parties to an armed conflict to take all necessary steps to provide the members of their armed forces with identity discs and to ensure that the discs are worn during service,
2. *recommends* that the Parties to an armed conflict should see that these discs give all the indications required for a precise identification of members of the armed forces such as full name, date and place of birth, religion, serial number and blood group; that every disc be double and composed of two separable parts, each bearing the same indications; and that the inscriptions be engraved on a substance as resistant as possible to the destructive action of chemical and physical agents, especially to fire and heat.[503]

578. The 25th International Conference of the Red Cross in 1986 urged the parties to every international armed conflict "to implement the provisions of Articles 16 and 17 of the First Geneva Convention, prescribing the wearing of identity discs by members of the armed forces, in order to facilitate the identification of the . . . dead".[504]

579. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "every effort is made . . . to identify dead persons".[505]

IV. Practice of International Judicial and Quasi-judicial Bodies

580. In its judgement in *Kaya v. Turkey* in 1998, the ECtHR found that an autopsy on a man shot by Turkish security forces, who reportedly believed him to be a terrorist, was inadequate on the basis that the number of bullets in the body was not recorded, no tests for fingerprints or gunpowder traces were made and no attempt was made to identify the body. While acknowledging the difficult security conditions under which the examination was carried out, the ECtHR expressed surprise that the body had not been evacuated to a safer location for further examination.[506]

581. In its judgement in *Ergi v. Turkey* in 1998, the ECtHR recalled the obligation pointed out in its previous judgements that "neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation . . . to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces, more so in cases . . . where the circumstances are in many respects unclear".[507]

[503] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. I, §§ 1 and 2.
[504] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 1.
[505] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).
[506] ECtHR, *Kaya v. Turkey*, Judgement, 19 February 1998, § 89.
[507] ECtHR, *Ergi v. Turkey*, Judgement, 28 July 1998, § 85.

582. In its judgement in *Yasa v. Turkey* in 1998, the ECtHR recalled the obligation pointed out in its judgement in *Kaya v. Turkey* "to carry out an investigation" into the circumstances surrounding the death of individuals killed as a result of the use of force by the State authorities, even when arising in a climate marked by violent action.[508]

583. In 1997, in a case concerning Argentina, in the context of a clash which the IACiHR qualified as being of sufficient intensity to trigger the application of IHL, the IACiHR found that the autopsies were, according to expert evidence, superficial and did not make any serious attempt to examine the injuries, invoking instead the degree of putrefaction of the corpses as a bar to further examination. The Commission recognised that in certain situations of conflict, the collection of evidence may be difficult, but that this justification may not be used where, immediately following the incident, the State had absolute control over the evidence.[509]

584. In its judgement in the *Neira Alegría and Others case* in 1995, involving the disappearance of three prisoners following a riot in which control and jurisdiction of the prison was handed over to the army, the IACtHR stated that:

> The Court likewise considers it proven that the identification of the bodies was not undertaken with the required diligence, since only a few of those bodies recovered during the days immediately following the end of the conflict were identified. Of the rest, which were recovered over a span of nine months, certainly a long period, this was not done either although, according to the statement of the experts, identification could have been possible by applying certain techniques. This conduct on the part of the Government constitutes a serious act of negligence.[510]

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

585. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the dead shall be identified".[511]

586. In 1995, the ICRC asked the military leaders of a separatist entity to establish death certificates of deceased captured combatants.[512]

VI. Other Practice

587. No practice was found.

[508] ECtHR, *Yasa v. Turkey*, Judgement, 2 September 1998, § 104.
[509] IACiHR, *Case 11.137* (*Argentina*), Report, 18 November 1997, §§ 238–242 and 423.
[510] IACtHR, *Neira Alegría and Others case*, Judgement, 19 January 1995, § 71.
[511] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 511 and 734.
[512] ICRC archive document.

Recording of the location of graves

I. Treaties and Other Instruments

Treaties

588. Article 4, sixth and seventh paragraphs, of the 1929 GC provides that:

> At the commencement of hostilities, [the belligerents] shall organize officially a graves registration service, to render eventual exhumations possible, and to ensure the identification of bodies whatever may be the subsequent site of the grave. After the cessation of hostilities they shall exchange the list of graves and of dead interred in their cemeteries and elsewhere.

589. Article 17, fourth paragraph, GC I, Article 120, sixth paragraph, GC III and Article 130, third paragraph, GC IV provide that lists showing the exact location and markings of the graves together with the particulars of the dead interred therein shall be made by the Graves Registration Service in order to allow subsequent exhumations, to ensure the identification of the bodies and the possible transportation to the home country. These lists are also meant to be forwarded to the Power on whom the deceased depended.

590. Article 8(b) of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam contains provisions requiring the parties to determine the location of the graves of the dead so as to facilitate the exhumation and repatriation of the remains.

Other Instruments

591. No practice was found.

II. National Practice

Military Manuals

592. Argentina's Law of War Manual provides that "when circumstances so permit and at latest at the end of the hostilities [the obituary] services shall communicate to each other, through the Information Office . . . the lists indicating the location and designation of the graves".[513]

593. Australia's Defence Force Manual provides that "as soon as is practical following the death of a combatant, a belligerent shall record the following information to aid identification . . . [including] the exact location of the remains to enable future exhumation of the body or remains if necessary".[514]

594. Canada's LOAC Manual provides that "AP I also imposes obligations . . . to report upon the disposal of the remains of the dead".[515]

[513] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.05.
[514] Australia, *Defence Force Manual* (1994), § 9-101.
[515] Canada, *LOAC Manual* (1999), p. 9-5, § 51.

595. Kenya's LOAC Manual provides that "as soon as the tactical situation permits, a report on the death and the subsequent measures taken shall be established".[516]
596. The Military Manual of the Netherlands provides that "as soon as circumstances and the relation between the parties to the conflict permit, the parties, in whose territories graves of the persons who have died as a result of hostilities are located, shall conclude agreements in order . . . to facilitate access to the gravesites".[517]
597. Spain's LOAC Manual stipulates that "the Graves Registration Service shall be responsible for recording all particulars concerning the deceased and their graves, as well as for the conservation of ashes".[518]
598. The UK Military Manual provides that "as soon as possible, and at latest at the end of the hostilities, these services must exchange lists showing the location and marking of the graves and giving particulars of the dead interred therein".[519]
599. The US Field Manual reproduces Article 17 GC I.[520]
600. The US Operational Law Handbook provides that "the Parties must . . . register grave sites, and, as soon as circumstances permit, relay to the affected Party, the exact location of burial and details of death".[521]

National Legislation
601. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that: . . . all the information regarding the burial and graves should be registered by the funeral parlour.[522]

602. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[523]
603. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, is a punishable offence.[524]
604. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

[516] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.
[517] Netherlands, *Military Manual* (1993), p. VI-3.
[518] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[519] UK, *Military Manual* (1958), § 383. [520] US, *Field Manual* (1956), § 218.
[521] US, *Operational Law Handbook* (1993), p. Q-185.
[522] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(3).
[523] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[524] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[525]

National Case-law

605. In 1995, the Colombian Council of State stated that the bodies of enemy dead must be placed at the disposal of the competent authority and may not be concealed. Commanders are bound to report the death of detainees and their place of burial.[526]

Other National Practice

606. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

607. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, "regardless of their character or location, during and after the end of hostilities and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power to help locate . . . the graves of the dead".[527]

Other International Organisations

608. No practice was found.

International Conferences

609. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the tracing of burial places of persons killed during armed conflict in which it recommended "the exchange among National Societies in agreement with their respective Governments and in co-operation with the International Committee of the Red Cross, of all available data concerning these places of burial" and "the tracing, by any appropriate means, of places of burial which have not so far been registered".[528]

610. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts "during hostilities and after cessation of hostilities, to help . . . care for the graves of the dead".[529]

[525] Norway, *Military Penal Code as amended* (1902), § 108(a).
[526] Colombia, Council of State, *Case No. 11369*, Judgement, 6 February 1997, pp. 20–25.
[527] UN General Assembly, Res. 3220 (XXIX), 6 November 1974, §§ 2 and 4.
[528] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIII, §§ 1 and 2 .
[529] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

IV. Practice of International Judicial and Quasi-judicial Bodies

611. No practice was found.

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

612. No practice was found.

VI. Other Practice

613. No practice was found.

Marking of graves and access to gravesites

I. Treaties and Other Instruments

Treaties

614. Article 4, fifth paragraph, of the 1929 GC, Article 76, third paragraph, of the 1929 Geneva POW Convention, Article 17, third paragraph, GC I, Article 120, fourth paragraph, GC III and Article 130, first paragraph, GC IV provide that graves must be marked so that they can easily be found.

615. Article 34 AP I provides that:

> 1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be . . . marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.
> 2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
>   (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access.

Article 34 AP I was adopted by consensus.[530]

616. The 1999 NATO STANAG 2070 provides that:

> 7. Graves are normally located as near as convenient to the scene of death. Sites should be selected as much as possible with reference to ease of subsequent relocation and identification. Graves should not be dispersed. Easy recovery is essential and protection from water is desirable.
> . . .

[530] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

11. An appropriate (religious) marker high enough to be seen readily is to be erected . . .
12. In the case of trench or group burials a marker and list in a suitable container endorsed accordingly is to be placed at each end of the grave.

Other Instruments

617. No practice was found.

II. National Practice

Military Manuals

618. Argentina's Law of War Manual provides that graves shall be "marked so that they can always be found".[531]

619. Australia's Defence Force Manual provides that the graves of the deceased "are to be correctly marked to allow future exhumation".[532]

620. Benin's Military Manual provides that "the graves shall be marked so that they can be easily found".[533]

621. Cameroon's Instructors' Manual states that "the graves shall be marked so that they can be easily found".[534]

622. Canada's LOAC Manual provides that the grave sites of the dead shall be marked.[535]

623. Croatia's LOAC Compendium provides that one of the requirements after a conflict is to "mark . . . gravesites".[536]

624. Kenya's LOAC Manual provides that "the graves shall be marked so that they can be easily found (e.g. improvised wooden cross or similar)".[537]

625. The Military Manual of the Netherlands provides that "graves must be properly . . . marked".[538] It also provides that:

> As soon as circumstances and the relations between the parties to the conflict permit, the parties, in whose territories graves of the persons who have died as a result of hostilities are located, shall conclude agreements in order: to facilitate access to the gravesites by relatives of the deceased and by representatives of official Graves Registration Services.[539]

626. New Zealand's Military Manual provides that grave sites shall be properly marked.[540]

[531] Argentina, *Law of War Manual* (1969), § 3.005.
[532] Australia, *Defence Force Manual* (1994), § 999.
[533] Benin, *Military Manual* (1995), Fascicule II, p. 12.
[534] Cameroon, *Instructors' Manual* (1992), p. 44, § 163(2).
[535] Canada, *LOAC Manual* (1999), p. 9-6, § 54.
[536] Croatia, *LOAC Compendium* (1991), p. 21.
[537] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.
[538] Netherlands, *Military Manual* (1993), pp. VI-2 and VI-3.
[539] Netherlands, *Military Manual* (1993), p. VI-3.
[540] New Zealand, *Military Manual* (1992), § 1012(1).

627. Spain's LOAC Manual provides that "graves shall be marked so that they can always be found".[541]
628. Switzerland's Basic Military Manual provides that graves shall be "respected and marked with a distinctive sign" and "properly maintained and marked".[542]
629. Togo's Military Manual provides that "the graves shall be marked so that they can be easily found".[543]
630. The UK Military Manual provides that graves "must be marked so that they may always be found".[544]
631. The US Field Manual provides that the graves of the dead are "marked so that they may always be found".[545]
632. The Annotated Supplement to the US Naval Handbook requires that "as soon as circumstances permit, arrangement be made to facilitate access to grave sites by relatives".[546]

National Legislation
633. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the places of burial of [the dead] . . . are signed with the purpose to find them any time".[547]
634. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[548]
635. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, and of AP I, including violations of Article 34 AP I, are punishable offences.[549]
636. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[550]

National Case-law
637. No practice was found.

[541] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[542] Switzerland, *Basic Military Manual* (1987), Article 71(2) and Article 76, commentary.
[543] Togo, *Military Manual* (1996), Fascicule II, p. 12.
[544] UK, *Military Manual* (1958), § 383. [545] US, *Field Manual* (1956), § 218.
[546] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.
[547] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 13(3).
[548] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[549] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[550] Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

638. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support ... the principle that ... the remains of the dead be ... marked ... [and] as soon as circumstances permit, arrangements be made to facilitate access to grave sites by relatives".[551]

III. Practice of International Organisations and Conferences

United Nations

639. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, "regardless of their character or location, during and after the end of hostilities and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power to help ... mark the graves of the dead".[552]

640. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated, with respect to its investigation into mass graves, that the "graves [of victims should] ... be marked so that they can be easily found".[553]

Other International Organisations

641. No practice was found.

International Conferences

642. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

643. No practice was found.

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

644. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "graves shall be ... marked so that they can be easily found".[554]

[551] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

[552] UN General Assembly, Res. 3220 (XXIX), 6 November 1974, § 2.

[553] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

[554] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 736.

VI. Other Practice

645. No practice was found.

Identification of the dead after disposal

I. Treaties and Other Instruments

Treaties
646. Article 4, sixth paragraph, of the 1929 GC provides that "at the commencement of hostilities, [the belligerents] shall organize officially a graves registration service, to render eventual exhumations possible, and to ensure the identification of bodies whatever may be the subsequent site of the grave.
647. Article 17, third paragraph, GC I provides that parties to the conflict "shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumation and to ensure the identification of bodies, whatever the site of the graves".
648. According to Article 34(4) AP I, exhumation is allowed only where it is "a matter of overriding public necessity, including cases of investigative necessity". Article 34 AP I was adopted by consensus.[555]

Other Instruments
649. Proposal 1.2 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains in the context of the former Yugoslavia provides that, "at the request of the party on which the deceased depend, the parties to the conflict shall . . . allow the identification of the [mortal remains of the] deceased by the adverse party". Proposal 1.3 provides that "by mutual agreement, the parties may decide on the participation of foreign medical experts in identifying the deceased".

II. National Practice

Military Manuals
650. Argentina's Law of War Manual provides that "an official Graves Registration Service must be established from the commencement of hostilities in order to allow possible exhumations, to ensure the identity of the bodies".[556]
651. Australia's Defence Force Manual states that the graves "are to be correctly marked to allow future exhumation".[557]
652. The UK Military Manual provides that "Graves Registration Services must be officially established at the outbreak of hostilities, to allow of

[555] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71, § 36.
[556] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.05.
[557] Australia, *Defence Force Manual* (1994), § 999.

exhumations and to ensure the identification of the bodies and their possible transportation to the home country".[558]

653. The US Field Manual provides that the belligerents "shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country".[559]

National Legislation

654. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[560]

655. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 17 GC I, and of AP I, including violations of Article 34(4) AP I, are punishable offences.[561]

656. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[562]

National Case-law

657. According the Report on the Practice of Israel, in the *Abu-Rijwa case*, the IDF carried out DNA identification tests on the remains of two "terrorists" buried in Israel at the request of a Jordanian family who petitioned the Israeli High Court in 1992 for the purpose of repatriating the remains of their son.[563]

Other National Practice

658. The Report on the Practice of Bosnia and Herzegovina states that:

During the aggression on Bosnia and Herzegovina, a large number of persons were registered as missing and the tracing process is still ongoing. It is assumed that the majority of the missing persons were killed by the aggressor and thrown into mass graves in different locations ... The State Commission for the Exchange of Prisoners of War has undertaken huge efforts to locate mass graves, to exhume and identify bodies of innocent victims. Allegations of mass graves are received from eyewitnesses of the committed massacres.[564]

[558] UK, *Military Manual* (1958), § 383.
[559] US, *Field Manual* (1956), § 218.
[560] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[561] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[562] Norway, *Military Penal Code as amended* (1902), § 108.
[563] Report on the Practice of Israel, 1997, Chapter 5.1, referring to High Court, *Abu-Rijwa case*, Judgement, 15 November 2000.
[564] Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.2.

III. Practice of International Organisations and Conferences

United Nations

659. In a resolution adopted in 1996 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights welcomed the establishment of the Expert Group on Exhumation and Missing Persons chaired by the Office of the High Representative.[565]

660. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights recommended that the Croatian authorities identify all those killed, including by exhumation, which, whenever necessary, should be carried out under the supervision of international experts.[566]

661. In 1996, the Office of the UN High Commissioner for Human Rights, in a briefing on the investigation of violations of international law,noted that a project was arranged by the Special Rapporteur on the Situation of Human Rights in the former Yugoslavia, in coordination with the Expert on Missing Persons, the Office of the High Commissioner for Human Rights and the governments of Finland and the Netherlands, to recover and identify remains of the dead in a particular area, with the humanitarian aim of identifying persons for the sake of their relatives. The Expert emphasised the problem of mass graves and called upon the parties and the international community to intensify efforts to clarify the fate of missing persons using every possible means, including exhumation of mortal remains where necessary.[567]

662. In 1997, the Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia drew the attention of the UN Commission on Human Rights to the fact that "governments were apparently growing less hostile to the use of forensic methods to elucidate the fate of disappeared persons".[568] The UN Observer for Croatia further commented that "the exhumation of [certain] mass graves . . . which had resulted in the exhumation and identification of the remains of some 200 disappeared persons [was] a step in the right direction".[569]

663. In 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina reported that national authorities and international mechanisms and organisations dealing with the issue of mass

[565] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, preamble.

[566] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, § 59.

[567] Office of the UN High Commissioner for Human Rights, Briefing on Progress Reached in Investigation of Violations of International Law in the Areas of Srebrenica, Žepa, Banja Luka and Sanski Most pursuant to Security Council Resolution 1034 (1995), 22 August 1996, §§ 9–12.

[568] Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia, Statement before the UN Commission on Human Rights, 26 March 1997, UN Doc. E/CN.4/1997/SR.25, 13 May 1997, § 9.

[569] UN Observer for Croatia, Statement before the UN Commission on Human Rights, 26 March 1997, UN Doc. E/CN.4/1997/SR.25, 13 May 1997, § 17.

graves had undertaken considerable efforts towards establishing the fate of the dead bodies found in mass grave sites.[570]

Other International Organisations
664. No practice was found.

International Conferences
665. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the tracing of burial places of persons killed during armed conflict in which it recommended "recourse, in the event of exhumation, to all possible identification procedures with the help of specialist services".[571]

IV. Practice of International Judicial and Quasi-judicial Bodies

666. No practice was found.

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

667. No practice was found.

VI. Other Practice

668. No practice was found.

Information concerning the dead

I. Treaties and Other Instruments

Treaties
669. Article 4, second paragraph, of the 1929 GC provides that belligerents "shall establish and transmit to each other the certificates of death".
670. Article 16 GC I provides for the communication, exchange and mutual forwarding of certificates of death, cause of death, identity discs, lists showing the exact location and markings of the graves and other important documents through the Information Bureau described in Article 122 GC III. In this respect, Article 17 GC I provides for the establishment of an Official Graves Registration Service. Articles 19 GC II, 120 GC III and 130 GC IV contain similar provisions.
671. Article 33 AP I provides that:

> 2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

[570] High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/542, 10 July 1996, Annex, § 41.
[571] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIII, § 3.

(a) record the information specified in Article 138 of the Fourth Convention in respect of . . . persons who have . . . died during any period of detention;
(b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

Article 33 AP I was adopted by consensus.[572]

672. Paragraph 9 of the 1974 NATO STANAG 2132 describes the "procedure for reporting on allied patients to parent nations". Paragraph 10 states that "in the case of death of a member of NATO forces if examined by a medical officer, the medical officer should determine the cause of death and report . . . to the deceased's parent nation".

Other Instruments

673. In proposal 1.1 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains, the parties to the conflict in the former Yugoslavia agreed that they "shall provide to the adverse party/parties, through the intermediary of the ICRC and National Information Bureaux and, as rapidly as possible, all available information regarding: the identification of deceased persons [and] the gravesites of deceased persons belonging to the adverse parties".

II. National Practice

Military Manuals

674. Argentina's Law of War Manual provides that "one half of a double identity disc or the whole disc if it is a single disc, shall remain on the body".[573] It also states that "when circumstances so permit and at latest at the end of the hostilities, [the obituary] services shall communicate to each other, through the Information Office . . . the lists indicating . . . the details relative to the dead".[574]

675. Australia's Defence Force Manual states that "each of the protagonists shall record the following information for each person detained, imprisoned or otherwise held in captivity for a period of two weeks, or who has died".[575] The manual further states that "bodies shall be buried with one half of a double identity disc placed in the mouth of the deceased. The other half is to be kept for records by Graves Registration".[576]

[572] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[573] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), §§ 6.03 and 6.04.
[574] Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.05.
[575] Australia, *Defence Force Manual* (1994), § 997.
[576] Australia, *Defence Force Manual* (1994), § 999.

676. Belgium's Law of War Manual provides that "the belligerents are obliged to exchange the information collected about the dead of the adverse party under their power".[577]

677. Benin's Military Manual states that "one half of a double identity disc should remain on the body; the other half should be evacuated".[578]

678. Canada's LOAC Manual provides that "the Geneva Conventions impose certain obligations on Detaining Powers with regard to burial and reporting of dead personnel belonging to the adverse party".[579] It further states that "one half of a double disc, or the identity disc itself if it is a single disc, should remain on the body".[580]

679. Canada's Code of Conduct provides that "one half of the double identity disc, or the identity disc itself if it is a single disc, should remain with the body".[581]

680. Croatia's LOAC Compendium provides that, with respect to the dead on land with a single identity disc, the disc shall remain on the body or with the urn containing the ashes. The single identity disc of dead at sea shall be evacuated. With respect to the dead bearing a double identity disc (on land and at sea), one half shall remain on the body or with the urn containing the ashes and the other half evacuated.[582]

681. France's LOAC Manual reproduces Article 17 GC I.[583] The manual also provides for the creation of a national information bureau, which would be in liaison with the Central Information Agency.[584]

682. Hungary's Military Manual provides that with respect to the dead on land with a single identity disc, the disc shall remain on the body or with the urn containing the ashes. The single identity disc of dead at sea shall be evacuated. With respect to the dead bearing a double identity disc (on land and at sea), one half shall remain on the body or with the urn containing the ashes and the other half evacuated.[585]

683. According to Israel's Manual on the Laws of War, "it is incumbent on each party to keep a record of a fallen soldier's personal details and particulars of death, and hand over to the other side half of the dog-tag worn by the fallen soldier . . . as well as a death certificate".[586]

684. Kenya's LOAC Manual states that:

Identity cards shall be evacuated. With respect to the dead bearing a double identity disc, one half shall remain on the body (or with the urn containing the ashes) and

[577] Belgium, *Law of War Manual* (1983), p. 49.
[578] Benin, *Military Manual* (1995), Fascicule II, p. 12.
[579] Canada, *LOAC Manual* (1999), p. 9-5, § 51.
[580] Canada, *LOAC Manual* (1999), p. 9-6, § 57.
[581] Canada, *Code of Conduct* (2001), Rule 7, § 5.
[582] Croatia, *LOAC Compendium* (1991), p. 47.
[583] France, *LOAC Manual* (2001), p. 121.
[584] France, *LOAC Manual* (2001), p. 34.
[585] Hungary, *Military Manual* (1992), p. 77.
[586] Israel, *Manual on the Laws of War* (1998), p. 61.

the other half evacuated. With respect to the dead with a single identity disc, the whole disc shall remain on the body (or with the urn containing the ashes)... As soon as the tactical situation permits, a report on the death and the subsequent measures taken shall be established.[587]

685. Madagascar's Military Manual provides that "information concerning the identification of the... dead must be recorded".[588]

686. Nigeria's Manual on the Laws of War provides that "the belligerents have to register as soon as possible all the particulars that can help to identify an enemy soldier who is... dead. These registration records together with identification tags, documents... must be forwarded to the enemy."[589]

687. The Military Instructions of the Philippines provides that, upon evacuation of the deceased to the nearest morgue, "the next of kin if at all possible" should be informed.[590]

688. Senegal's IHL Manual provides that, in situations of internal troubles, "the dead shall be identified. This information shall be sent to civil authorities. Red Cross or Red Crescent organisations are entitled to collect such information."[591]

689. Switzerland's Basic Military Manual provides that "half of the double identity disc, or the whole disc if single, shall remain on the body".[592] It further states that "all elements helping to identify the... dead enemy... shall be recorded and communicated without delay to the Official Information Office".[593] The information to be collected includes, for instance, the date and place of death, indications concerning the death and all other information on the identity card or the half of a double identity disc.[594]

690. Togo's Military Manual states that "one half of a double identity disc should remain on the body; the other half should be evacuated".[595]

691. The UK Military Manual provides that:

> Belligerents must record as soon as possible any particulars which may assist in the identification of dead persons belonging to the opposing belligerent who fall into their hands. This information must be forwarded to the information bureau described in the P.O.W. Convention, Article 122. The belligerents must also forward to each other through that bureau certificates of death or duly authenticated lists of the dead; one half of the identity discs found on the bodies (the other half to be left on the body)...[596]

[587] Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 11 and 12.
[588] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 23.
[589] Nigeria, *Manual on the Laws of War* (undated), § 35.
[590] Philippines, *Military Instructions* (1989), p. 27, § 4.
[591] Senegal, *IHL Manual* (1999), p. 18, § 6.
[592] Switzerland, *Basic Military Manual* (1987), Article 76, commentary.
[593] Switzerland, *Basic Military Manual* (1987), Article 77.
[594] Switzerland, *Basic Military Manual* (1987), Article 77, commentary.
[595] Togo, *Military Manual* (1996), Fascicule II, p. 12.
[596] UK, *Military Manual* (1958), § 382; see also *LOAC Manual* (1981), Section 6, p. 22, § 4.

692. The US Field Manual provides that:

As soon as possible the . . . information [recorded by the parties to the conflict on the dead person of the adverse party] shall be forwarded to the Information Bureau described in Article 122 GC I, which shall transmit this information to the Power on which these persons depend . . . Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead.[597]

National Legislation

693. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that:

. . .

3) . . . all the information regarding the burial and graves should be registered by the funeral parlour;
4) the list of the graves and all information concerning the prisoners of war buried in the cemeteries and other places should be given to the party the prisoners of war belong to.[598]

694. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[599]

695. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 16 and 17 GC I, 19 GC II, 120 GC III and 130 GC IV, and of AP I, including violations of Article 33(2) AP I, are punishable offences.[600]

696. Italy's Law of War Decree as amended provides that "the Government of the King, in the way it considers appropriate, will make available to the enemy State news of the death of people belonging to the latter's armed forces as well as the objects mentioned above".[601]

697. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[602]

[597] US, *Field Manual* (1956), § 217; see also *Operational Law Handbook* (1993), p. Q-185.
[598] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(3)–(4).
[599] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[600] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[601] Italy, *Law of War Decree as amended* (1938), Article 94.
[602] Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law
698. No practice was found.

Other National Practice
699. According to the Report on the Practice of Malaysia, "unidentified bodies are briefly described (e.g. by age, sex, any distinguishing feature) and buried. Lists are made available to interested parties indicating burial sites of the unidentified dead."[603]
700. The Report on the Practice of the Philippines notes that it is the practice in the Philippines during clashes between government troops and insurgent forces for the military to account for the number of dead insurgents and of those taken prisoner. The information collected is then passed on to the authorities with a view to transmitting the names of the missing to the rebel side. This notification is, however, frequently subject to delay.[604]

III. Practice of International Organisations and Conferences

United Nations
701. In a resolution adopted in 1974, the UN General Assembly stated that:

> Recognizing that one of the tragic results of armed conflicts is the lack of information on persons – civilians as well as combatants – who are missing or dead in armed conflicts.
>
> Noting with satisfaction the resolution V, adopted by the twenty-second International Conference of the Red Cross held at Teheran from 28 October to 15 November 1973, calling on parties to armed conflicts to accomplish the humanitarian task of accounting for the dead . . .
>
> Considering that . . . the provision of information on those who are missing . . . should not be delayed . . .
>
> Calls upon all parties to armed conflicts to cooperate, in accordance with the Geneva Conventions of 1949, with protecting Powers or their substitutes, and with the ICRC, in providing information on the missing and dead in armed conflicts, including persons belonging to other countries not parties to the armed conflict.[605]

702. In a resolution adopted in 1992, the UN Sub-Commission on Human Rights urged the Indonesian authorities, on humanitarian grounds to cooperate with the families of victims of the fighting in East Timor by providing information about the dead and the whereabouts of their remains.[606]
703. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights recommended that the Croatian authorities identify all those killed and

[603] Report on the Practice of Malaysia, 1997, Chapter 5.1.
[604] Report on the Practice of the Philippines, 1997, Chapter 5.4, referring to Human Rights Update, *Soldiers detain, torture 5 civilians*, Vol. 10(8), November–December 1996.
[605] UN General Assembly, Res. 3220 (XXIX), 6 November 1974, preamble and § 4.
[606] UN Sub-Commission on Human Rights, Res. 1992/20, 27 August 1992, § 7.

provide information to the families about the causes of death and the place of burial.[607]

704. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that "for every deceased person who falls into the hands of the adverse party, the adverse party must record, prepare, and forward all identification information, death certificates . . . to the appropriate parties".[608]

Other International Organisations

705. No practice was found.

International Conferences

706. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it recognised that "one of the tragic consequences of armed conflicts is a lack of information on persons missing, killed or deceased in captivity". The Conference further called on parties to conflicts to:

> co-operate with Protecting Powers, with the ICRC and its Central Tracing Agency, and with such other appropriate bodies as may be established for this purpose, and in particular National Red Cross Societies, to accomplish the humanitarian mission of accounting for the dead and missing, including those belonging to third countries not parties to the armed conflict.[609]

707. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the wearing of identity discs in which it recalled that Articles 16 and 17 GC I "provide for identity discs to be worn by members of the armed forces to facilitate . . . the communication of their deaths to the Power on which they depend". The Conference further stated that it "*reminds* the Parties to an armed conflict that one half of each disc must, in case of death, be detached and sent back to the Power on which the member of the armed forces depended, the other half remaining on the body".[610]

708. The 25th International Conference of the Red Cross in 1986 urged the parties to every international armed conflict "to implement the provisions of Articles 16 and 17 of the First Geneva Convention, prescribing the wearing of identity discs by members of the armed forces, in order to facilitate the

[607] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, § 59.
[608] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).
[609] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.
[610] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. I, § 3.

forwarding of information concerning [the dead] to the Power on which they depend".[611]

IV. Practice of International Judicial and Quasi-judicial Bodies

709. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that the State was obliged to use the means at its disposal to inform the relatives of the location of the remains of the dead.[612]
710. In its judgement in the *Godínez Cruz case* in 1989, the IACtHR stated that, where a person has been killed as a result of a disappearance, the State had an obligation to inform the relatives of the location of the remains.[613]

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

711. No practice was found.

VI. Other Practice

712. No practice was found.

[611] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 1.
[612] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.
[613] IACtHR, *Godínez Cruz case*, Judgement, 20 January 1989, § 191.

CHAPTER 36

MISSING PERSONS

Note: *For practice concerning enforced disappearance, see Chapter 32, section K. For practice concerning accounting for the dead, see Chapter 35, section E. For practice concerning the recording and notification of personal details of persons deprived of their liberty, see Chapter 37, section F.*

Accounting for Missing Persons

Search for missing persons

I. Treaties and Other Instruments

Treaties

1. Paragraph 5 of the 1956 Joint Declaration on Soviet-Japanese Relations states that "with regard to those Japanese whose fate is unknown, the USSR, at the request of Japan, will continue its effort to discover what has happened to them".

2. Article 33 AP I provides that:

> 1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by the adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
> 2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

Article 33 AP I was adopted by consensus.[1]

Other Instruments

3. In Article XIX of the 1994 Agreement on the Gaza Strip, the government of Israel and the PLO agreed that:

> The Palestinian Authority shall cooperate with Israel by providing all necessary assistance in the conduct of searches by Israel within the Gaza Strip and the Jericho Area for missing Israelis ... Israel shall cooperate with the Palestinian Authority in searching for ... missing Palestinians.

4. Article 4(9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "every possible measure shall be taken, without delay, to search for ... missing persons".

II. National Practice

Military Manuals

5. Argentina's Law of War Manual provides that "at all times, particularly after an engagement, the parties to the conflict shall, without delay, take all possible measures to search for ... missing persons".[2]

6. Australia's Defence Force Manual provides that "as soon as possible each party to an armed conflict must search for those reported missing by the enemy". It adds that "in order to facilitate the search for missing combatants ... each protagonist shall record ... information for each person detained, imprisoned or otherwise held in captivity for a period of two weeks, or who has died".[3]

7. Canada's LOAC Manual provides that "as soon as possible, and certainly immediately upon the end of hostilities, each party to the conflict must search for those reported missing by the adverse party".[4] The manual further states that "to facilitate the finding of missing personnel, parties to the conflict shall endeavour to reach agreements to allow teams to search for ... the dead from the battlefield areas".[5]

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[2] Argentina, *Law of War Manual* (1989), § 2.05, see also § 6.01.
[3] Australia, *Defence Force Manual* (1994), §§ 994, 996 and 997.
[4] Canada, *LOAC Manual* (1999), p. 9-5, § 52.
[5] Canada, *LOAC Manual* (1999), p. 9-5, § 53.

8. Croatia's LOAC Compendium instructs local commanders to offer their assistance to the civil authorities in the search for missing persons.[6]
9. Hungary's Military Manual provides that one of the requirements after a conflict is to "search for missing persons".[7]
10. Indonesia's Military Manual provides that "the parties to the conflict should search for missing persons, who are reported by the adverse party, soon after the hostilities cease".[8]
11. Israel's Manual on the Laws of War provides that according to the Additional Protocols, "each party must ... search for missing persons of the enemy and try to reach arrangements for the dispatch of search teams".[9]
12. Kenya's LOAC Manual provides that "as soon as circumstances permit or, at least, at the end of active hostilities, each Party to the conflict must search for persons who have been reported missing by the adverse Party".[10]
13. Madagascar's Military Manual states that missing persons must be searched for.[11]
14. The Military Manual of the Netherlands provides that "as soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party".[12]
15. New Zealand's Military Manual provides that "as soon as possible, and certainly immediately upon the end of hostilities, each party to the conflict must search for those reported missing by the adverse Party".[13]
16. Spain's LOAC Manual states that the relevant provisions relating to the dead apply also to the missing. It also states that "the belligerents shall search for the persons whose disappearance has been notified by the adverse party, who shall communicate all the relevant information concerning them".[14]

National Legislation
17. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The appropriate authorities and governmental bodies of the Azerbaijan Republic shall begin the tracing of the persons considered to be missing by the adverse party to the conflict at the first opportunity and at the latest as soon as active military operations are over ...
>
> The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that:

[6] Croatia, *LOAC Compendium* (1991), p. 50, see also p. 21.
[7] Hungary, *Military Manual* (1992), p. 38.
[8] Indonesia, *Military Manual* (1982), § 98.
[9] Israel, *Manual on the Laws of War* (1998), p. 61.
[10] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 3, p. 13.
[11] Madagascar, *Military Manual* (1994), Fiche No. 8-SO, § C, see also Fiche No. 1-T, § 22(3).
[12] Netherlands, *Military Manual* (1993), p. VI-3.
[13] New Zealand, *Military Manual* (1992), § 1011(2).
[14] Spain, *LOAC Manual* (1996), Vol. I, § 5.d.2.(6).

1) information is collected and registered concerning the missing person in all cases irrespective of whether they are detained, in prison or dead.[15]

18. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 33 AP I, are punishable offences.[16]

19. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[17]

20. In Zimbabwe, domestic legislation on missing persons outside armed conflict empowers judicial officers to compel police officers to search for a missing person. The Report on the Practice of Zimbabwe states that this demonstrates that the authorities in Zimbabwe believe that missing persons, even in armed conflict, should be searched for.[18]

National Case-law

21. No practice was found.

Other National Practice

22. The Report on the Practice of Botswana states that there is a duty on all parties to armed conflicts to search for persons reported missing.[19]

23. The main task of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, established by the Croatian government in 1991, was to collect and process the information about civil and other persons missing from the territory of Croatia during the war. In 1993, a new Commission, the Commission for Detained and Missing Persons, replaced the one established in 1991, yet with the same task.[20]

24. At the CDDH, the FRG stated that the draft rule that each party to the conflict should try to obtain information on missing persons would meet a "fundamental humanitarian need, which was not yet fully and explicitly covered by existing treaty obligations".[21]

[15] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 28 and 29(1).
[16] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(4).
[17] Norway, *Military Penal Code as amended* (1902), § 108.
[18] Report on the Practice of Zimbabwe, 1998, Chapter 5.2, referring to *Missing Persons Act as amended* (1978),Section 4.
[19] Report on the Practice of Botswana, 1998, Chapter 5.2.
[20] Croatia, Directive on the Establishment and Functioning of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, 1991; Regulations establishing the Commission for Detained and Missing Persons in Croatia, *Official Gazette*, No. 46, 17 May 1993.
[21] FRG, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.19, 13 February 1975, p. 186, § 79–80.

25. In 1995, during a debate in the UN Security Council concerning Bosnia and Herzegovina, the German representative noted that his delegation had taken the initiative in the Security Council to push for measures to be taken to establish the whereabouts of missing Bosnian men.[22]

26. According to the Report on the Practice of Israel, it is the policy of the Israeli authorities to conduct ongoing searches for members of the IDF who are missing in action.[23]

27. The Report on the Practice of Jordan states that Jordan recognises that it has a special duty to search for persons reported missing.[24]

28. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that missing persons must be searched for in order to establish their fate and enable their return.[25]

29. According to the Report on the Practice of Malaysia, search operations for missing persons are initiated upon receipt of information on the missing person and continue for seven years.[26]

30. In 1988, in a report on Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, the Ministry of Foreign Affairs of the Netherlands stated that "the National Information Bureau has a plan for the organization of searches" with regard to missing persons.[27]

31. According to the Report on the Practice of Peru, during the international armed conflict between Peru and Ecuador in 1995, Peru carried out search and rescue operations to recover missing Peruvian aircraft crews.[28]

32. According to the Report on the Practice of Russia, a great effort has been made to determine the fate of Japanese persons who were reported missing in the USSR, but only during the period of *perestroika*. The Joint Soviet-Japanese Commission and the Japanese Union of ex-Prisoners have made some progress in this field.[29] According to the report, there are no specific rules in Russia or in other CIS countries to regulate the search for missing persons. In practice, private organisations have assumed State functions. Representatives of the Soldiers' Mothers Committee, for example, have gone to Chechnya with the mothers of missing soldiers to find out what happened to their sons.[30]

33. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . each party to a conflict should search

[22] Germany, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, pp. 2–3.
[23] Report on the Practice of Israel, 1997, Chapter 5.2.
[24] Report on the Practice of Jordan, 1997, Chapter 5.2.
[25] Report on the Practice of Kuwait, 1997, Chapter 5.2.
[26] Report on the Practice of Malaysia, 1997, Chapter 5.2.
[27] Netherlands, Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, annexed to Letter dated 20 December 1988 from the Minister of Foreign Affairs to the Permanent Mission of the Netherlands in Geneva for submission to the ICRC, Comments on Article 33 AP I.
[28] Report on the Practice of Peru, 1999, Chapter 5.2.
[29] Report on the Practice of Russia, 1997, General Notes.
[30] Report on the Practice of Russia, 1997, Chapter 5.2.

areas under its control for persons reported missing, when circumstances permit, and at the latest from the end of active hostilities".[31]

34. In 1995, during a debate in the UN Security Council concerning Bosnia and Herzegovina, the US stated, with respect to the civilians missing and unaccounted for, that "we have a responsibility to investigate, to find out what we can".[32]

III. Practice of International Organisations and Conferences

United Nations

35. In 1996, in a statement by its President, the UN Security Council expressed concern that endeavours by the relevant international authorities to identify the fate of the missing by, *inter alia*, carrying out exhumations had met with limited success "largely due to obstruction by Republika Srpska". It also noted with concern that the fate of only a few hundred missing persons had so far been established.[33]

36. In a resolution adopted in 1987 on the question of human rights in Cyprus, the UN Commission on Human Rights called for the tracing of missing persons without further delay.[34]

37. In a resolution on missing persons adopted in 2002, the UN Commission on Human Rights reaffirmed that "each party to an armed conflict, as soon as circumstances permit and at the latest from the end of active hostilities, shall search for the persons who have been reported missing by an adverse party". The Commission further called upon "States which are parties to an armed conflict to take immediate steps to determine the identity and fate of persons reported missing in connection with the armed conflict". It also requested that States "pay the utmost attention to cases of children reported missing in connection with armed conflicts and to take appropriate measures to search for and identify those children".[35]

38. In 1995, the chairman of the UN Commission on Human Rights called upon the government of Indonesia to continue its investigation into those persons missing as a result of incidents in Dili.[36]

[31] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

[32] US, Statement before the UN Security Council, UN Doc. S/PV.3564, 10 August 1995, p. 6.

[33] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/41, 10 October 1996, p. 1.

[34] UN Commission on Human Rights, Res. 1987/50, 11 March 1987, p. 113, § 3.

[35] UN Commission on Human Rights, Res. 2002/60, 25 April 2002, §§ 3–5.

[36] UN Commission on Human Rights, Chairman's statement on the situation of human rights in East Timor, UN Doc. E/CN.4/1995/SR.49, 1 March 1995, § 27(4).

39. In resolutions adopted in 1984 and 1985, the UN Sub-Commission on Human Rights urged that the fate of disappeared persons in the context of the conflict in Guatemala be clarified.[37]
40. In a resolution adopted in 1987, the UN Sub-Commission on Human Rights expressed concern at the fate of the missing in Cyprus and urged the immediate tracing of these persons.[38]
41. In 1996, the Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia called upon the parties and the international community to intensify their efforts to clarify the fate of missing persons using every possible means, including exhumation of mortal remains where necessary.[39]

Other International Organisations
42. In a recommendation adopted in 1983 on the situation in Cyprus, the Parliamentary Assembly of the Council of Europe asked the Committee of Ministers to instruct the Secretary-General of the Council of Europe to undertake all necessary steps to gather information on the events in Cyprus and to investigate the cases of those persons who had disappeared following the invasion by armed forces in 1974.[40]
43. In a recommendation adopted in 1987 on national refugees and missing persons in Cyprus, the Parliamentary Assembly of the Council of Europe urged the Committee of Ministers to support every effort made to investigate the fate of missing persons.[41]
44. In a recommendation adopted in 1998 on the humanitarian situation of the Kurdish refugees and displaced persons in south-eastern Turkey and northern Iraq, the Parliamentary Assembly of the Council of Europe invited Turkey to bring to light the fate of missing persons.[42]

International Conferences
45. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "every effort is made to clarify the fate of all persons unaccounted for".[43]

[37] UN Sub-Commission on Human Rights, Res. 1984/23, 29 August 1984; Res. 1985/28, 30 August 1985, § 2.
[38] UN Sub-Commission on Human Rights, Res. 1987/19, 2 September 1987, § 2.
[39] Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia, Statement during a briefing on progress reached in investigation of violations of international law in the areas of Srebrenica, epa, Banja Luka and Sanski Most pursuant to UN Security Council resolution 1034 (1995), Office of the UN High Commissioner for Human Rights, 22 August 1996, §§ 12–13.
[40] Council of Europe, Parliamentary Assembly, Rec. 974, 5 November 1983, p. 81.
[41] Council of Europe, Parliamentary Assembly, Rec. 1056, 5 May 1987, § 7.
[42] Council of Europe, Parliamentary Assembly, Rec. 1377, 25 June 1998, § iv.
[43] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).

IV. Practice of International Judicial and Quasi-judicial Bodies

46. In the *Cyprus case* in 2001, the ECtHR found that, in relation to Greek-Cypriot missing persons and their relatives:

> There has been a continuing violation of Article 2 [of the 1950 ECHR] on account of the failure of the authorities of the respondent State [Turkey] to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances ...
>
> There has been a continuing violation of Article 5 of the Convention [of the 1950 ECHR] by virtue of the failure of the authorities of the respondent State [Turkey] to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared.[44]

47. In the *Caballero Delgada and Santana case* before the IACtHR in 1995, the government of Colombia submitted evidence that it had made several unsuccessful attempts to recover the remains of two missing persons.[45]

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

48. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "each belligerent shall search for the persons who have been reported missing by an enemy Party. Such enemy Party shall transmit all relevant information concerning these persons in order to facilitate the searches."[46]

VI. Other Practice

49. According to a 1984 report of the Fédération Internationale des Droits de l'Homme (FIDH), the Lebanese government has established a commission on missing and kidnapped persons.[47]

50. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every possible measure shall be taken, without delay, to search for ... missing persons".[48]

[44] ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 136 and 150.
[45] IACtHR, *Caballero Delgado and Santana case*, Judgement, 8 December 1995, § 51.
[46] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 260.
[47] Fédération Internationale des Droits de l'Homme, Liban: Le problème des disparus, *La lettre de la F.I.D.H.*, No. 42, 27 January 1984.
[48] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

Provision of information on missing persons

I. Treaties and Other Instruments

Treaties

51. Article 14 of the 1899 HR provides that:

A bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and, when necessary, in the neutral countries on whose territory belligerents have been received. This bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital and deaths.

52. Article 14 of the 1907 HR provides that:

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

53. Article 122, first paragraph, GC III and Article 136, second paragraph, GC IV provide that "each of the Parties to the conflict shall establish an official Information Bureau responsible for transmitting information in respect of [the POWs and protected persons] who are in its power". Article 122, third paragraph, GC III and Article 137, first paragraph, GC IV provide that each Information Bureau shall transmit this information to the Powers of whom the persons are nationals, through the Protecting Powers or the Central Information Agency.

54. Article 33(1) AP I provides that, in order to facilitate the search, each party shall transmit all relevant information concerning the persons it has reported missing. Article 33(3) provides that:

Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

Article 33 AP I was adopted by consensus.[49]

55. According to Article 5 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, "the Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for".

56. Under Article 6 of the 1996 Agreement on the Normalization of Relations between Croatia and the FRY, the parties undertook to speed up the process of solving the question of missing persons and agreed to immediately exchange all available information about these persons.

Other Instruments

57. In Article XIX of the 1994 Agreement on the Gaza Strip, the government of Israel and the PLO agreed that "the Palestinian Authority shall cooperate with Israel by providing . . . information about missing Israelis. Israel shall cooperate with the Palestinian Authority in . . . providing necessary information about missing Palestinians."

58. In the 1996 Protocol to the Moscow Agreement on a Cease-fire in Chechnya to Locate Missing Persons and to Free Forcibly Detained Persons, the working groups decided that:

5. The competence of the joint working group shall extend to the location of persons who have been missing since 11 December 1994 . . .
6. By 11 June 1996, the working groups shall exchange lists of forcibly detained persons.

II. National Practice

Military Manuals

59. Argentina's Law of War Manual states that "information recorded shall be communicated as soon as possible to the National Office provided for, so that it can be transmitted to the adverse party, in particular through the Central Tracing Agency of the International Committee of the Red Cross".[50]

60. Australia's Defence Force Manual provides that "any request and all information which may assist in tracing or identifying [missing] persons shall be transmitted through the Protecting Power or the Central Tracing Agency of the ICRC or the national Red Cross societies".[51] The manual further states that "the report of a missing person is to be notified by each belligerents' National Bureau direct, or through a Protecting Power to the Central Agency of the ICRC".[52]

61. Canada's LOAC Manual states that "the requests and all information which may assist in tracing or identifying [missing] persons shall be transmitted

[49] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[50] Argentina, *Law of War Manual* (1989), § 6.02.
[51] Australia, *Defence Force Manual* (1994), § 994.
[52] Australia, *Defence Force Manual* (1994), § 996.

through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross (ICRC) or the national Red Cross societies".[53]

62. Germany's Military Manual provides that "each of the Parties to the conflict is obliged to forward information regarding the fate of protected civilians ... as well as of prisoners of war ... wounded, sick, shipwrecked, and dead".[54]

63. The Military Manual of the Netherlands states that:

> An important task of the Netherlands Red Cross is the establishment of a National Information Bureau. The task of this bureau consists of the collection and transmission, in cooperation with the Central Tracing Agency of the ICRC, of information about prisoners of war and other protected persons.[55]

64. New Zealand's Military Manual provides that "the requests and all information which may assist in tracing or identifying [missing] persons shall be transmitted through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or the national Red Cross societies".[56] The manual further states that:

> Each national Bureau must forward without delay information concerning protected persons to the Power of which such persons are nationals or in whose territory they formerly resided ... The national Bureau must also reply to all enquiries concerning protected persons unless sending such information would be detrimental to the person concerned or to his relatives. Even then the information must be given to the Central Agency.[57]

65. Russia's Military Manual recalls the rule of IHL, "which set the obligation: a) in peacetime: ... to provide for a set of measures relating to the organisation of tracing, registration of and reporting of missing persons, and also of a service to implement these measures".[58]

66. The US Field Manual reproduces Articles 122 GC III and 136 and 137 GC IV.[59]

National Legislation

67. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> In order to further trace such persons [considered to be missing by the adverse party], information concerning them shall be given to the adverse party directly through the Protecting Power or their substitute – the ICRC ...

[53] Canada, *LOAC Manual* (1999), p. 9-5, § 52.
[54] Germany, *Military Manual* (1992), §§ 538 and 708.
[55] Netherlands, *Military Manual* (1993), p. II-10, § 9.
[56] New Zealand, *Military Manual* (1992), § 1011(2).
[57] New Zealand, *Military Manual* (1992), § 1134(2).
[58] Russia, *Military Manual* (1990), § 14.
[59] US, *Field Manual* (1956), §§ 203, 343 and 344.

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that:

...

2) correct information concerning the missing and requests about them are given to the adverse party directly through the Protecting Power or their substitute – the International Committee of the Red Cross.[60]

68. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[61]

69. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 122 GC III and 136 and 137 GC IV, and of AP I, including violations of Article 33(1) and (3) AP I, are punishable offences.[62]

70. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[63]

National Case-law

71. No practice was found.

Other National Practice

72. According to the Report on the Practice of Algeria, in the late 1950s, during the Algerian war of independence, the ALN denied all responsibility for missing persons on the basis that it had systematically released all prisoners.[64]

73. In 1988, in a report on the Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, the Ministry of Foreign Affairs of the Netherlands stated that "the National Information Bureau has a plan for the ... registration and communication of information" with regard to missing persons.[65]

74. The Report on the Practice of the Philippines states that it is the practice of the Philippines during clashes between government troops and insurgent

[60] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 28 and 29(2).

[61] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

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

[63] Norway, *Military Penal Code as amended* (1902), § 108.

[64] Report on the Practice of Algeria, 1997, Chapter 5.2, referring to Farouk Benatïa, *Les actions humanitaires pendant la lutte de libération (1954–1962)*, Editions Dahlab, Algiers, 1997, pp. 119–126.

[65] Netherlands, Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, annexed to Letter dated 20 December 1988 from the Minister of Foreign Affairs to the Permanent Mission of the Netherlands in Geneva for submission to the ICRC, 20 December 1988, Comments on Article 33 AP I.

forces for the military to account for the number of dead insurgents and of those taken prisoner. The information collected is then passed on to the authorities with a view to transmitting the names of the missing to the rebel side. This notification is, however, frequently subject to delay.[66]

75. According to the Report on US Practice, it is the *opinio juris* of the US that the parties to all armed conflicts should take such action as may be within their power to provide information about missing persons.[67]

III. Practice of International Organisations and Conferences

United Nations

76. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, "regardless of their character or location, during and after the end of hostilities, and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power . . . to provide information about those who are missing in action".[68]

77. In resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro) "to provide information on the fate and whereabouts of the high number of missing persons from Kosovo".[69]

78. In a resolution adopted in 1994, the UN Commission on Human Rights urged all the parties in the former Yugoslavia to disclose relevant information and documentation concerning thousands of missing persons.[70]

79. In a resolution adopted in 1995 on the special process dealing with the problem of missing persons in the territory of the former Yugoslavia, the UN Commission on Human Rights emphasised the obligation contained in the 1995 Dayton Accords to disclose all relevant information concerning missing persons.[71]

80. In a resolution adopted in 1998 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights called upon Croatia to disclose all relevant material on missing persons.[72]

81. In a resolution adopted in 1992 on the situation in East Timor, the UN Sub-Commission on Human Rights urged the government of Indonesia to provide information on those persons who were reported missing following incidents in Dili.[73]

[66] Report on the Practice of the Philippines, 1997, Chapter 5.2, referring to "Soldiers Detain and Torture 5 Civilians", *Human Rights Update*, Vol. 10(8), November–December 1996.
[67] Report on US Practice, 1997, Chapter 5.2.
[68] UN General Assembly, Res. 3220 (XXIX), 6 November 1974, § 2.
[69] UN General Assembly, Res. 54/183, 17 December 1999, § 18.
[70] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 23.
[71] UN Commission on Human Rights, Res. 1995/35, 3 March 1995, §§ 2–5.
[72] UN Commission on Human Rights, Res. 1998/79, 22 April 1998, §§ 37 and 42.
[73] UN Sub-Commission on Human Rights, Res. 1992/20, 27 August 1992, § 6.

82. In 1996, its report to the 50th Session of the UN General Assembly, the UNHCR Executive Committee expressed "its utmost concern for the fate of . . . missing persons within and from the territory of the former Yugoslavia" and reiterated "the urgent appeals by the international community . . . to provide full information on the fate of those unaccounted for.[74]

Other International Organisations

83. In a resolution adopted in 1995 on the situation in some parts of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe demanded information about the whereabouts of 5,000 Bosnian Muslims from Srebrenica.[75]

84. In a recommendation adopted in 1998, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers urge the parties to the conflict in Kosovo to provide information about missing persons.[76]

85. In a resolution adopted in 1990, the European Parliament condemned the continuing lack of information on persons missing on both sides following the invasion of Cyprus in 1974 and calling for the immediate provision of information on the fate of these persons.[77]

International Conferences

86. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it recognised that "one of the tragic consequences of armed conflicts is a lack of information on persons missing, killed or deceased in captivity" and called on "parties to armed conflicts, during hostilities and after cessation of hostilities . . . to provide information about those who are missing in action". The Conference further called on parties to conflicts to:

> co-operate with Protecting Powers, with the ICRC and its Central Tracing Agency, and with such other appropriate bodies as may be established for this purpose, and in particular National Red Cross Societies, to accomplish the humanitarian mission of accounting for the dead and missing, including those belonging to third countries not parties to the armed conflict.[78]

87. The 26th International Conference of the Red Cross and Red Crescent in 1995 emphasized that "family reunification must begin with the tracing of separated family members at the request of one of them and end with their coming together as a family" and stressed "the particular vulnerability of children separated from their families as a result of armed conflict, and invites

[74] UNHCR, Addendum to the Report to the UN General Assembly, UN Doc. A/50/12/Add.1, 1 January 1996, § 31(a) and (f).
[75] Council of Europe, Parliamentary Assembly, Res. 1066, 27 September 1995, p. 2, § 6.
[76] Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(iii)(a).
[77] European Parliament, Resolution on the violation of human rights in Cyprus, 12 July 1990, §§ D and 2.
[78] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

the ICRC, the National Societies and the International Federation, within the scope of their respective mandates, to intensify their efforts to locate unaccompanied children, to identify them, to re-establish contact and reunite them with their families, and to give them the necessary assistance and support". It strongly urged States and parties to armed conflict "to provide families with information on the fate of their missing relatives" and urged them "to cooperate with the ICRC in tracing missing persons and providing necessary documentation".[79]

88. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "every effort is made to clarify the fate of all persons unaccounted for and to inform the families accordingly".[80]

IV. Practice of International Judicial and Quasi-judicial Bodies

89. In its judgement in *Kurt v. Turkey* in 1998, the ECtHR held that where it was established that a disappeared person had been in the custody of the security forces, this gave rise to a presumption of responsibility on the part of the authorities to account for that person's subsequent fate.[81]

90. On different occasions, the IACiHR recommended that the governments of Argentina, Chile and Guatemala provide detailed information to family members concerning the status of disappeared persons.[82]

91. In 1992, in a case concerning Colombia, the IACiHR concluded that:

> The Colombian Government has failed to comply with its obligation to respect and guarantee Articles 4 (the right to life), 5 (the right to humane treatment), 7 (the right to personal liberty) and 25 (on judicial protection) . . . in respect to the abduction and subsequent disappearance of Mr. Alirio de Jesús Pedraza Becerra.
>
> [It recommended that the government of Colombia] continue and enlarge the investigation into the events denounced.[83]

92. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

> The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished

[79] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(c), (d), (k) and (l).

[80] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).

[81] ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, § 124.

[82] IACiHR, *Cases of Disappeared Persons (Argentina)*, Resolution, 8 April 1983, § 2(a); *Cases of Disappeared Persons (Chile)*, Resolution, 1 July 1983, § 2(a); *Cases of Disappeared Persons (Guatemala)*, Resolution, 9 April 1986, § 4(a).

[83] IACiHR, *Case 10.581 (Colombia)*, Report, 25 September 1992, Conclusions, § 1.

under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.[84]

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

93. In 1996, the ICRC asked the authorities of a separatist entity to release information regarding the fate of persons missing as a result of the hostilities.[85]

VI. Other Practice

94. No practice was found.

International cooperation to account for missing persons

I. Treaties and Other Instruments

Treaties

95. Articles 123 GC III and 140 GC IV provide that a Central Information Agency shall be created in a neutral country for the purpose of collecting all information it may obtain through official or private channels respecting POWs or internees, and transmit it to the countries of origin or residence of the persons concerned. The ICRC shall, if it deems it necessary, propose to the powers concerned the organisation of such an agency. The parties are requested to collaborate with the Agency.

96. Chapter III of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam provided that the parties were to help each other in obtaining information about military personnel and foreign civilians of the parties missing in action and to take any measures as may be required to get information about those missing. The Four-Party Joint Military Commission was to ensure joint action by the parties in implementing this part of the agreement.

97. According to Article 5 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, "the Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for".

Other Instruments

98. Paragraph 8 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

The parties agree to set up a Joint Commission to trace missing persons: the Joint Commission will be made up of representatives of the parties concerned, all Red Cross Organisations concerned and in particular the Yugoslav Red Cross, the Croatian Red Cross and the Serbian Red Cross, with ICRC participation.

[84] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.
[85] ICRC archive document.

99. The 1991 Rules of Procedure of the Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia provides that:

Rule 1(2)
... All of the Red Cross organizations concerned ... are designated as permanent advisers to the members of the Joint Commission.
Rule 2(1)
The International Committee of the Red Cross (ICRC), acting as a neutral intermediary, shall put at the Joint Commission's disposal a delegation which will chair the meetings of the Joint Commission.
...
Rule 18(1)
The ICRC shall bring to the Joint Commission's attention, on its own initiative, any communication, proposal, plan of work or information which might contribute to the efficiency of the Joint Commission's work.

100. The Plan of Operation for the 1991 Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia states that:

2.1.1 Each party is responsible for compiling a list of its reported missing, as well as a file on each missing [person] ...
2.2.1 Each opened file shall be sent ... to the ICRC which shall arrange for it to be forwarded to the party concerned ...
2.2.2 ... the adverse party/parties shall take all possible measures (administrative steps and public appeals) to obtain information on the person reported missing ...
2.2.3 Once the enquiry has been completed, ... the form "official request for missing person" with the accompanying documents shall be returned in duplicate to the ICRC, which shall forward them to the party on which the missing person depends.

101. Paragraph 3 of the Joint Declaration by the Presidents of the FRY and Croatia (October 1992) states that "the two Presidents further agree that their representatives will provide for an exchange of information on missing persons".
102. According to Section 9.8 of the 1999 UN Secretary-General's Bulletin, "the United Nations force ... shall facilitate the work of the ICRC's Central Tracing Agency".

II. National Practice

Military Manuals
103. Statements found in military manuals concerning the provision of information through the Protecting Power, the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross societies have been quoted in Section B of this chapter and are not repeated here.

National Legislation

104. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[86]

105. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 123 GC III and 140 GC IV, is a punishable offence.[87]

106. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[88]

National Case-law

107. No practice was found.

Other National Practice

108. According to the Report on the Practice of Australia, diplomatic correspondence and press releases show that, in 1984, a joint Australian-Vietnamese operation was launched "to search for the remains and resolve the cases" of six Australian personnel listed as "missing in action" in Vietnam and "to follow up any other case which might subsequently be drawn to its attention". The report states that the motive for the operation appears to be based primarily on political considerations (i.e. improvement of bilateral relations with Vietnam).[89]

109. In 1995, in reply to a question in parliament, the German government declared that it fully supported all efforts undertaken by the UNHCR and the ICRC to find missing persons in the region of Srebrenica and to take care of them.[90]

110. In 1995, during a debate in the UN Security Council, Germany expressed its government's full support for "the ongoing efforts of the ICRC and United Nations representatives to gain access to . . . information about the fate of all missing persons".[91]

111. In 1995, during a debate in the UN Security Council, Honduras stated that it considered it "deplorable that the parties have not fulfilled their commitments to allow the International Committee of the Red Cross and other humanitarian organizations to have access to persons . . . reported missing".[92]

[86] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[87] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[88] Norway, *Military Penal Code as amended* (1902), § 108(a).
[89] Report on the Practice of Australia, 1998, Chapter 5.2.
[90] Germany, Lower House of Parliament, Reply by the government to a question, Verbleib der Verschwundenen aus Srebrenica, *BT-Drucksache* 13/2877, 7 November 1995, p. 1.
[91] Germany, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, pp. 2–3.
[92] Honduras, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, pp. 6–7.

112. In 1995, during a debate in the UN Security Council, Indonesia associated itself "with the demands that ... representatives of UNHCR, the ICRC and other international agencies [be granted] unconditional access to persons ... reported missing".[93]
113. In 1995, during a debate in the UN Security Council, Italy supported a resolution aimed at granting representatives of UNHCR, the ICRC and other international agencies unconditional access to persons reported missing.[94]
114. In 1995, during a debate in the UN Security Council, the UK stated that it was essential that the ICRC be given full access to those missing from Srebrenica and elsewhere and urged the Bosnian Serb party to comply with its obligations in this respect.[95]

III. Practice of International Organisations and Conferences

United Nations

115. In a resolution adopted in 1995 on violations of IHL in the former Yugoslavia, the UN Security Council expressed "its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to ... persons ... reported missing" and condemned "in the strongest possible terms the failure of the Bosnian Serb party to comply with their commitments in respect of such access". The Council reaffirmed its demand that "the Bosnian Serb party give immediate and unimpeded access to representatives of the United Nations High Commissioner for Refugees, the ICRC and other international agencies to persons ... reported missing".[96]
116. In a resolution adopted in 1995 on violations of IHL and of human rights in the former Yugoslavia, the UN Security Council reiterated "its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to ... persons ... reported missing" and called on all parties "to comply with their commitments in respect of such access".[97]
117. In a resolution adopted in 1994, the UN General Assembly urged all parties to the conflicts in the former Yugoslavia, and in particular in the FRY (Serbia and Montenegro):

> to cooperate with the Working Group on Enforced and Involuntary Disappearances in determining the fate of thousands of missing persons by disclosing information and documentation on inmates in prisons, camps and other places of detention in order to finally locate such persons and alleviate the suffering of their relatives.[98]

[93] Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 12.
[94] Italy, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 14.
[95] UK, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, pp. 8–9.
[96] UN Security Council, Res. 1019, 9 November 1995, preamble and § 2.
[97] UN Security Council, Res. 1034, 21 December 1995, § 4.
[98] UN General Assembly, Res. 49/196, 23 December 1994, § 25.

118. In a resolution adopted in 1995, the UN General Assembly expressed its dismay at "the huge number of missing persons still unaccounted for, particularly in Bosnia and Herzegovina and Croatia" and urged all parties, and in particular the government of the FRY (Serbia and Montenegro), "to cooperate with the 'special process' dealing with the problem of missing persons in the territory of the former Yugoslavia . . . by disclosing information and documentation on inmates in prisons, camps and other places of detention". It further urged "the de facto Bosnian Serb authorities to provide prompt access for monitors to territories controlled by them, in particular to the Banja Luka region and to Srebrenica, emphasizing that the fate of thousands of missing persons from Srebrenica requires immediate clarification".[99]

119. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly encouraged the ICRC "to pursue its clarification efforts in regard [to the high number of missing persons from Kosovo], in cooperation with other organizations such as the OSCE".[100]

120. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all the parties "to cooperate in determining the fate of thousands of missing persons".[101]

121. In a resolution adopted in 1995 on the special process dealing with the problem of missing persons in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all the parties "to cooperate by disclosing all relevant available information and documentation in order to determine the fate of the thousands of missing persons".[102]

122. In a resolution adopted in 1995, the UN Commission on Human Rights asked for the cooperation of the parties to the conflict in Afghanistan in the tracing of the many persons reported missing as a result of the war.[103]

123. In a resolution adopted in 1996 on Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights welcomed "the report of the expert member of the Working Group on Enforced and Involuntary Disappearances on the special process on missing persons in the territory of the former Yugoslavia".[104]

124. In a resolution on missing persons adopted in 2002, the UN Commission on Human Rights stated that it:

> invites States which are parties to an armed conflict to cooperate fully with the International Committee of the Red Cross in establishing the fate of missing persons and to adopt a comprehensive approach to this issue, including all practical

[99] UN General Assembly, Res. 50/193, 22 December 1995, preamble and §§ 22 and 28 (a).
[100] UN General Assembly, Res. 54/183, 17 December 1999, § 18.
[101] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 23.
[102] UN Commission on Human Rights, Res. 1995/35, 3 March 1995, § 3.
[103] UN Commission on Human Rights, Res. 1995/74, 8 March 1995, §§ 7–8.
[104] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, preamble.

and coordination mechanisms as may be necessary, based on humanitarian considerations only.

urges States and encourages intergovernmental and non-governmental organizations to take all necessary measures at the national, regional and international levels to address the problem of persons reported missing in connection with armed conflicts and to provide appropriate assistance as requested by the concerned States.[105]

125. In a resolution on Guatemala adopted in 1985, the UN Sub-Commission on Human Rights requested that the government allow international humanitarian organisations, in particular the ICRC, to investigate the fate of the disappeared.[106]

126. In 1996, in a briefing on progress made in investigating violations of international law in certain areas of Bosnia and Herzegovina, the Office of the UN High Commissioner for Human Rights noted that a Working Group chaired by the ICRC had been set up to implement a process for the tracing of missing persons, in which the three parties to the conflict also participated. As agreed in the 1995 Dayton Accords, the ICRC was to be fully involved in the question of missing persons and to collect information from families. The ICRC relied on its own extensive network of offices and local branches throughout the former Yugoslavia. In June 1996, it also implemented a new step in its tracing procedure by launching a public campaign calling for people to come forward with any information they might have. The Expert Group on Missing Persons and Exhumations was said to seek to coordinate procedures on exhumations among the concerned international authorities. The briefing also stated that international agencies and authorities indicated that they generally had no problems with immediate and unimpeded access to areas throughout the country in pursuit of their mandated activities.[107]

127. In March 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina reported that, following consultation with the parties, a Working Group on Missing Persons chaired by the ICRC had been established. He also reported that a Working Group on Missing Persons and Exhumation had been created in conjunction with several UN agencies.[108] In July 1996, the High Representative reported that considerable efforts had been made by relevant national authorities and international mechanisms, notably by the Expert Group on Missing Persons and Exhumation, the UN Special Rapporteurs on the former Yugoslavia and on missing persons and

[105] UN Commission on Human Rights, Res. 2002/60, 25 April 2002, §§ 6–7.
[106] UN Sub-Commission on Human Rights, Res. 1985/28, 30 August 1985, § 4.
[107] Office of the UN High Commissioner for Human Rights, Briefing on Progress Reached in Investigation of Violations of International Law in the areas of Srebrenica, Żepa, Banja Luka and Sanski Most pursuant to Security Council Resolution 1034 (1995), 22 August 1996, §§ 12–13, p. 20.
[108] High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, §§ 75–76.

the Working Group on Persons Unaccounted For, towards establishing the fate of missing persons and the location of mass grave sites.[109]

Other International Organisations

128. In 1981, in its consideration of a report on refugees from El Salvador presented by the Committee on Migration, Refugees and Demography, the Parliamentary Assembly of the Council of Europe noted that one of the main activities of the ICRC in El Salvador was tracing missing persons, with its Central Tracing Agency bureau acting as an intermediary between persons arrested or missing and their families.[110]

129. In a resolution on the situation in Cyprus adopted in 1984, the Parliamentary Assembly of the Council of Europe welcomed the continued consideration of the issue of missing persons on both sides in the context of the Committee on Missing Persons in Cyprus and urged the parties to continue their deliberations.[111]

130. In a recommendation adopted in 1996 on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited member States to give support to the ICRC in the implementation of the tasks conferred upon it under the 1995 Dayton Accords, namely to clarify the fate of missing persons.[112]

131. In an opinion adopted in 1996 on Croatia's request for membership of the Council of Europe, the Parliamentary Assembly of the Council of Europe expressed its expectation that Croatia would cooperate with international humanitarian organisations and take all necessary steps to solve several ongoing humanitarian problems, notably in connection with missing persons.[113]

132. In a resolution adopted in 1983 on the problem of missing persons in Cyprus, the European Parliament urged the ICRC to provide all assistance necessary for the speedy and effective completion of the investigations.[114]

133. In a resolution adopted in 1988 on the situation in Cyprus, the European Parliament suggested that the Foreign Ministers meeting in Council should endeavour to obtain an agreement from all of the parties involved to call on the ICRC to carry out independent searches whenever it was felt that relevant facts could be uncovered.[115]

[109] High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/542, 10 July 1996, Annex, § 41.
[110] Council of Europe, Parliamentary Assembly, Working Document, Report on Refugees in El Salvador, Doc. 4698, 7 April 1981, p. 10.
[111] Council of Europe, Parliamentary Assembly, Res. 816, 21 March 1984, p. 117, § 12.
[112] Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, p. 5, § viii(d).
[113] Council of Europe, Parliamentary Assembly, Opinion No. 195 (1996) on Croatia's request for membership of the Council of Europe, Human rights information sheet No. 38, April 1996, p. 110, § 10(ii).
[114] European Parliament, Resolution on the problem of missing persons in Cyprus, 11 January 1983, § 2.
[115] European Parliament, Resolution on the situation in Cyprus, 27 June 1988, §§ 7–8.

International Conferences

134. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts:

> to co-operate with Protecting Powers, with the ICRC and its Central Tracing Agency, and with such other appropriate bodies as may be established for this purpose, and in particular National Red Cross Societies, to accomplish the humanitarian mission of accounting for the dead and missing, including those belonging to third countries not parties to the armed conflict.[116]

135. The 25th International Conference of the Red Cross in 1986 adopted a resolution on cooperation between National Red Cross and Red Crescent Societies and governments in reuniting dispersed families. The resolution reaffirmed the constant willingness of National Societies to "co-operate in humanitarian action, in reuniting members of dispersed families, in exchanging information regarding families and in facilitating the search for missing persons" and called upon governments to support the efforts of National Societies "dealing with the problems of conducting searches and reuniting families".[117]

136. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require "full cooperation of the parties over . . . the provision of information about the fate of persons unaccounted for".[118]

IV. Practice of International Judicial and Quasi-judicial Bodies

137. No practice was found.

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

138. In 1980, in the context of the conflict in Lebanon, the ICRC undertook to search for missing persons.[119]

139. Following the Gulf War in 1991, a Tripartite Commission was established under ICRC auspices to trace people reported missing. The Commission is made up of representatives of Iraq, on the one hand, and of France, Kuwait, Saudi Arabia, UK and US, on the other.

140. In a joint declaration with UNICEF and UNHCR in 1994, the ICRC and the International Federation of Red Cross and Red Crescent Societies reaffirmed the need to do everything possible to ensure the survival and

[116] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.
[117] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XV, §§ 1 and 2.
[118] Peace Implementation Conference for Bosnia and Herzegovina, London, 8–9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.
[119] ICRC, *Annual Report 1980*, Geneva, 1981, p. 60.

protection of unaccompanied children, trace their families and facilitate family reunification.[120]

141. In the context of the conflict in Kosovo, although the Military Technical Agreement signed on 9 June 1999 between NATO and the Yugoslav army is different from the 1995 Dayton Accords in that it contains no provisions for the tracing of missing persons, UNMIK entrusted the ICRC, following the cessation of hostilities, with the responsibility of dealing with these matters and with the lead role regarding the issue of missing people.

VI. Other Practice

142. In 1988, the Hezb-i-Islami faction in Afghanistan advised its fighters to give all possible assistance to the ICRC in its efforts to trace missing persons.[121]

Right of the families to know the fate of their relatives

Note: *For practice concerning respect for family rights, see Chapter 32, section Q.*

I. Treaties and Other Instruments

Treaties

143. Article 26 GC IV stipulates that:

> Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

144. Article 32 AP I states that, in the implementation of the section concerning the missing and the dead, the parties "shall be prompted mainly by the right of families to know the fate of their relatives". Article 32 AP I was adopted by consensus.[122]

145. Article 19(3) of the 1990 African Charter on the Rights and Welfare of the Child provides that:

> Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

[120] ICRC, International Federation of Red Cross and Red Crescent Societies, UNHCR and UNICEF, Joint declaration on family reunification, 27 June 1994.
[121] Hezb-i-Islami, Monthly Bulletin, Communiqué on International Humanitarian Law, October 1988.
[122] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

146. Article 25(2)(b) of the 1990 African Charter on the Rights and Welfare of the Child provides that "States Parties . . . shall take all necessary measures to trace parents or relatives [of children] where separation is caused by internal and external displacement arising from armed conflicts".

Other Instruments

147. Principles 16(1) and 17(4) of the 1998 Guiding Principles on Internal Displacement specify that families of "all internally displaced persons have the right to know the fate and whereabouts of missing relatives".

148. According to Section 9.8 of the 1999 UN Secretary-General's Bulletin, "the United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives".

II. National Practice

Military Manuals

149. Argentina's Law of War Manual provides that a general principle is "for families to have the right to know the fate of their relatives".[123] It also provides that the High Contracting Parties and the parties to the conflict shall in particular:

> facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them.[124]

150. Australia's Defence Force Manual provides that:

> The request for information relating to either the missing or the dead must be humanitarian in nature and stem from the need for relatives to be notified of their whereabouts and subsequent repatriation, or re-interment. Should there be any controversy resulting from the request for information, the humanitarian needs and interests of the families concerned must prevail.[125]

151. Cameroon's Instructor's Manual provides that the families of the dead and victims of war have the right to know the fate of their relatives.[126]

152. Canada's LOAC Manual contains provisions stipulating that "belligerents must facilitate enquiries by members of families dispersed as the result of war with the object of renewing contact between them".[127]

[123] Argentina, *Law of War Manual* (1989), § 2.05.
[124] Argentina, *Law of War Manual* (1989), § 4.14.
[125] Australia, *Defence Force Manual* (1994), § 995.
[126] Cameroon, *Instructors' Manual* (1992), p. 21.
[127] Canada, *LOAC Manual* (1999), p. 11–3, § 28.

153. Kenya's LOAC Manual states that "the basis principles relating to 'missing and dead' persons, military or civilians, are based on the right of the families to know the fate of their relatives".[128]
154. Israel's Manual on the Laws of War recalls the Additional Protocols which "specify the families' right to know the fate of their relatives".[129]
155. Madagascar's Military Manual provides that "the provisions of the law of war concerning the dead are based on the right of the families to know the fate of their members".[130]
156. New Zealand's Military Manual provides that "belligerents must facilitate enquiries by members of families dispersed as a result of the war, with the object of renewing contact between them".[131]
157. Spain's LOAC Manual provides that "the provisions of the law of armed conflicts concerning the dead are based on the right of the families to know the fate of their relatives".[132]
158. The UK Military Manual states that "belligerents must facilitate enquiries by members of families dispersed as a result of war, with the object of renewing contact between them".[133]
159. The US Field Manual reproduces Article 26 GC IV.[134]
160. The US Air Force Pamphlet stipulates that GC IV contains "measures for facilitating the establishment of contact between members of a family who have been separated because of the war".[135]
161. The Annotated Supplement to the US Naval Handbook states that "the United States also supports the new principles in GP [AP] I, art. 32 & 34, that families have the right to know the fate of their relatives".[136]

National Legislation
162. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Article 26 GC IV, and of AP I, including Article 32 AP I, is a punishable offence.[137]
163. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[138]

[128] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 4, p. 5.
[129] Israel, *Manual on the Laws of War* (1998), p. 61.
[130] Madagascar, *Military Manual* (1994), Fiche No. 4-SO, § C, see also Fiche No. 1-T, § 22(3).
[131] New Zealand, *Military Manual* (1992), § 1113(2).
[132] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).
[133] UK, *Military Manual* (1958), § 38.
[134] US, *Field Manual* (1956), § 265.
[135] US, *Air Force Pamphlet* (1976), § 14-3.
[136] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.
[137] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[138] Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

164. No practice was found.

Other National Practice

165. At the CDDH in 1975, Cyprus, France, Greece and the Holy See submitted an amendment to what became Article 32 AP I which aimed at adding the following sentence: "The activity of the Parties to the conflict and the international agencies shall be mainly prompted by the fundamental right of families to know what has happened to their relatives".[139]

166. At the CDDH in 1976, Austria, Cyprus, France, Greece, the Holy See, Nicaragua and Spain submitted an amendment which aimed at introducing the following text in AP I:

> In the implementation of the provisions of this Chapter [i.e. what became Section III of AP I], the activity of the High Contracting Parties and of the international agencies shall be mainly prompted by the right of families to know what has happened to their relatives, and by the desire to spare them moral suffering.[140]

167. At the CDDH in 1975, when it introduced an amendment to what became Article 32 AP I, Germany, on behalf of the sponsors (Germany, UK and US), stated that:

> To mitigate the suffering of the families of those who disappeared in war by removing the uncertainty about their fate and to give them an opportunity to remember their dead in the place where their remains lay was a fundamental humanitarian principle. Such principle was already included in the . . . Oxford Manual of 1880 and in the Hague Regulations of 1899 and 1907 and in the Geneva Conventions of 1906, 1929 and 1949.[141]

168. At the CDDH in 1975, the Holy See stated that:

> Its [i.e. an amendment's] purpose was to remedy an omission, namely the absence of any reference to families, and to call the attention of all representatives – legal experts, politicians, doctors and soldiers – and their States to the suffering caused to families as a result of armed conflicts. It was not only separation, but anxiety, uncertainty and lack of news for months, or even years, in the case of both families and prisoners. It was not merely a question of feelings but one of respect for a fundamental right which had never been officially recognized and which was often overlooked. Indeed, in some countries the fate of certain civilians was deliberately kept secret. Unless specific mention was made of families, the bureaucrats dealing with the present provision would recognize only the technical, not the humanitarian, aspect of the problem.[142]

[139] Cyprus, France, Greece and Holy See, Amendment submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/259 and Add.1, 11 March 1975, p. 102.

[140] Austria, Cyprus, France, Greece, Holy See, Nicaragua and Spain, Amendment submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/354 and Add. 1, 28 April 1976, p. 105.

[141] Germany, Statement at the CDDH on behalf of the sponsors (Germany, UK and US), *Official Records*, Vol. XI, CDDH/II/SR.19, 13 February 1975, p. 185, § 70.

[142] Holy See, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.35, 13 March 1975, p. 363, § 2.

169. In an explanatory memorandum submitted to parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated, with reference to Articles 32–34 AP I, that all parties to the conflict were under a duty to search for missing persons, but that this principle did not include an individual and subjective right of the relatives of the person missing to gain information.[143]

170. In a resolution adopted in December 1998, the National Assembly of South Korea urged cooperation between the authorities in North and South Korea in reuniting separated family members and proposed that the National Red Cross Societies in each region proceed with their work on family reunification. In cases where family reunification was not possible, the Assembly asked the authorities and Red Cross Societies "to start working on the confirmation of their fate".[144]

171. At the CDDH in 1975, the representative of UK stated that:

He did not consider, for instance, that it could be said that it was a fundamental right of families to know what had happened to their relatives, although it was a basic need. To go further than that would not be wise.[145]

172. At the CDDH in 1974, the US referred to "the anguish of the families of persons of whom there was no word during conflicts" and stressed:

the need to inform those families of the fate of their missing relatives as soon as possible, and pointed out that the draft followed logically from resolution V adopted on that subject by the XXIInd International Conference of the Red Cross at Teheran in 1973.[146]

173. At the CDDH in 1976, the US stated that:

The statement of the right of the families to know the fate of their relatives was of primary importance for the understanding of the Section under discussion. Paragraph 1 of article 20 bis did not refer to other sections of the draft Protocol or the Geneva Conventions. If the right of the families was not specifically mentioned, the section might be interpreted as referring to the right of Governments, for instance, to know what had happened to certain missing persons . . . As regards [a] query of the Yugoslav representative whether paragraph 1 of article 20 bis was necessary, he agreed that it was unusual to state the premises on which an article was based. The paragraph had been included in response to a strong feeling of many delegations and institutions that it was important to express in the Protocol the idea that families had a right to know what had happened to their relatives. United Nations

[143] Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 109.

[144] South Korea, National Assembly, Resolution Calling for the Confirmation of Life or Death and the Reunion of Members of Separated Families in South and North Korea, 198th Regular Session, 1 December 1998.

[145] UK, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.35, 13 March 1975, p. 371, § 49.

[146] US, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.6, 14 March 1974, p. 41, § 4.

General Assembly resolution 3220 (XXIX), which the Working Group had studied when drawing up the present text, stated in the last preambular that "the desire to know . . . is a basic human need", but the next under consideration went even further by referring to the "right".[147]

174. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that families have a right to know the fate of their relatives".[148]

III. Practice of International Organisations and Conferences

United Nations

175. In a resolution adopted in 1974, the UN General Assembly recognised that "one of the tragic results of armed conflicts is the lack of information on persons, civilians as well as combatants, who are missing or dead in armed conflict". It also considered that:

> The desire to know the fate of loved ones lost in armed conflicts is a basic human need which should be satisfied to the greatest extent possible, and that provision of information on those who are missing or who have died in armed conflicts should not be delayed merely because other issues remained pending.[149]

176. In a resolution adopted in 2002, the UN Commission on Human Rights reaffirmed "the right of families to know the fate of their relatives reported missing in connection with armed conflict".[150]

177. In a resolution adopted in 1981 on the question of the human rights of persons subjected to any form of detention or imprisonment, the UN Sub-Commission on Human Rights reiterated the right of families to know the fate of their relatives.[151]

Other International Organisations

178. In a recommendation adopted in 1979 on the missing political prisoners in Chile, the Parliamentary Assembly of the Council of Europe stressed the right of families to know the fate of members who had disappeared.[152] It also adopted an order instructing the President of the Assembly to inform the Chilean government of its deep concern about the fate of missing political

147 US, Statement at the CDDH, *Official Records*, Vol. XII, CDDH/II/SR.76, 1 June 1976, p. 232, §§ 28–29.
148 US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.
149 UN General Assembly, Res. 3220 (XXIX), 6 November 1974, preamble.
150 UN Commission on Human Rights, Res. 2002/60, 25 April 2002, § 2.
151 UN Sub-Commission on Human Rights, Res. 15 (XXXIV), 10 September 1981, § 3.
152 Council of Europe, Parliamentary Assembly, Rec. 868, 5 June 1979, §§ 7–12.

prisoners, emphasising the right of families to be informed of the fate of their missing members after arrest or detention by the security forces.[153]

179. In a resolution adopted in 1980, the Parliamentary Assembly of the Council of Europe expressed its profound alarm at the disappearances of large numbers of people in Latin America.[154]

180. In a recommendation adopted in 1987 on national refugees and missing persons in Cyprus, the Parliamentary Assembly of the Council of Europe emphasised that the families of missing persons have a right to know the truth, and called upon European Foreign Ministers to step up their efforts to find a positive solution, in agreement with both parties, to this humanitarian problem.[155] In the report upon which the recommendation was based, the Committee on Migration, Refugees and Demography took the view that the Council of Europe should support the efforts of the Committee on Missing Persons to clarify the fate of the missing persons, noting that after so many years, the uncertainty was both shameful and unnecessarily cruel.[156]

181. In a resolution adopted in 1983 on the problem of missing persons in Cyprus, the European Parliament confirmed the inalienable right of all families to know the fate of members of their family who have involuntarily disappeared due to the action of governments or their agents.[157]

International Conferences

182. The 25th International Conference of the Red Cross in 1986 recalled "the principle by which families have the right to know the fate of their members".[158]

183. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared that they refused "to accept that . . . families of missing persons [are] denied information about the fate of their relatives".[159]

184. The 26th International Conference of the Red Cross and Red Crescent in 1995 stressed "the need and the right of families to obtain information on missing persons, including missing prisoners of war and those missing in action" and urged States and parties to armed conflict to "provide families with information on the fate of their missing relatives".[160]

[153] Council of Europe, Parliamentary Assembly, 31st Ordinary Session, Order No. 381, 28 June 1979.
[154] Council of Europe, Parliamentary Assembly, Res. 722, 28 January 1980, §§ 1–3.
[155] Council of Europe, Parliamentary Assembly, Rec. 1056, 5 May 1987, §§ 7–8.
[156] Council of Europe, Parliamentary Assembly, Working document: Report on national refugees and missing persons in Cyprus, Doc. 5716, 39th Ordinary Session, 6 April 1987, p. 21.
[157] European Parliament, Resolution on the problem of missing persons in Cyprus, 11 January 1983, §§ E and H(2).
[158] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, preamble.
[159] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1).
[160] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(k).

185. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "every effort is made to clarify the fate of all persons unaccounted for and to inform the families accordingly".[161]

IV. Practice of International Judicial and Quasi-judicial Bodies

186. In *Quinteros v. Uruguay* in 1983, the HRC dealt with the case of Elena Quinteros who disappeared after having been arrested, held in a military detention and subjected to torture. The Commission stated that it

> understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the [1966 ICCPR] suffered by her daughter in particular, of article 7.[162]

187. In its decision in *Amnesty International and Others v. Sudan* in 1999, the ACiHPR held that "holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family whether the individual is being held and his or her whereabouts is an inhuman treatment of both the detainee and the family concerned".[163]

188. In its judgement in *Kurt v. Turkey* in 1998, the ECtHR found that the anguish suffered by a mother at knowing that her son had been detained by the security forces, yet finding a complete absence of official information as to his subsequent fate, constituted ill-treatment of sufficient severity to fall within the scope of Article 3 of the 1950 ECHR (prohibition of inhuman or degrading treatment).[164] In its judgement in *Timurtas v. Turkey* in 2000, the Court confirmed this view.[165]

189. In its judgement in the *Cyprus case* in 2001, the ECtHR found that, in relation to Greek-Cypriot missing persons and their relatives, there had been a continuing violation of Article 3 of the 1950 ECHR in that the silence of the Turkish authorities in the face of the real concerns of the relatives attained a level of severity which could only be categorised as inhuman treatment.[166]

[161] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).
[162] HRC, *Quinteros v. Uruguay*, Views, 21 July 1983, § 14.
[163] ACiHPR, *Amnesty International and Others v. Sudan*, Decision, 1–15 November 1999, § 54.
[164] ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 130–134.
[165] ECtHR, *Timurtas v. Turkey*, Judgement, 13 June 2000, § 98.
[166] ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 157–158.

190. On different occasions, the IACiHR recommended that the governments of Argentina, Chile and Guatemala provide detailed information to family members concerning the status of disappeared persons.[167]

191. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

> The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.[168]

192. In 2000, in the *Bámaca Velásquez case* dealing with the disappearance and death of a member of the URNG, the IACtHR stated that Guatemala had violated the right to humane treatment embodied in Article 5(1) and (2) of the ACHR to the detriment of, *inter alia*, the wife, father and sisters of the victim. It found that, while the victim had been held in detention without the family being informed, several judicial proceedings had been initiated, none of which had been effective, and that exhumation procedures had been ordered but obstructed by State agents. It stated that, at the time when the facts relating to the case took place, "Guatemala was convulsed by an internal conflict", and that:

> The Court has evaluated the circumstances of this case, particularly the continued obstruction of [the victims wife's] efforts to learn the truth of the facts and, above all, the concealment of the corpse of [the victim] and the obstacles to the attempted exhumation procedures that various public authorities created, and also the official refusal to provide relevant information. Based on these circumstances, the Court considers that the suffering to which [the wife of the victim] was subjected clearly constitutes cruel, inhuman or degrading treatment, violating Article 5(1) and 5(2) of the [ACHR]. The Court also considers that ignorance of the whereabouts of [the victim] caused his next of kin . . . profound anguish . . . and, therefore, considers that they, too, are victims of the violation of the said Article.[169]

193. In its judgement in the *Bámaca Velásquez case (Reparations)* in 2002, the IACtHR stated that:

> The right of every person to know the truth has been developed in international human rights law . . . and the possibility for the next of kin of the victim to know what happened, and, in this case, where the remains are located, constitutes a means

[167] IACiHR, *Cases of Disappeared Persons (Argentina)*, Resolution, 8 April 1983, § 2(a); *Cases of Disappeared Persons (Chile)*, Resolution, 1 July 1983, § 2(a); *Cases of Disappeared Persons (Guatemala)*, Resolution, 9 April 1986, § 4(a).

[168] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.

[169] IACtHR, *Bámaca Velásquez case*, Judgement, 25 November 2000, §§ 121 (b) and (m), 165–166 and 230(2).

of reparation and, as such, an expectation of the next of kin of the victim and the society as a whole the State has to meet.[170]

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

194. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the law of war provisions relating to the dead are based on the right of families to know the fate of their relatives".[171]

VI. Other Practice

195. Section 24(1) of the SPLM/A Penal and Disciplinary Laws requires that "every Battalion Commander shall maintain a register" of military personnel and the keeping of records pertaining to such personnel in the SPLM/A headquarters, on the premise that this will facilitate the search for any persons who later go missing.[172] The Report on SPLM/A Practice notes that:

The SPLM/A also used to announce names of Government of Sudan Officers and men and any personnel that they captured from the government when Radio SPLA was operational. The SPLM/A today still publishes in their bulletins names and other particulars of officers and men and personnel that fall into the hands of the SPLA during military operations. The SPLM/A claims to do this for the benefit of the families of those who go missing from the side of the government.[173]

[170] IACtHR, *Bámaca Velásquez case (Reparations)*, Judgement, 22 February 2002, § 76.
[171] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 127.
[172] SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 24, § 1.
[173] Report on SPLM/A Practice, 1998, Chapter 5.2.

CHAPTER 37

PERSONS DEPRIVED OF THEIR LIBERTY

Note: *For practice concerning non-discrimination of persons deprived of their liberty, see Chapter 32, section B. For practice concerning humane treatment of persons deprived of their liberty, see Chapter 32, section A.*

A. Provision of Basic Necessities to Persons Deprived of Their Liberty

I. Treaties and Other Instruments

Treaties

1. Article 7 of the 1899 HR provides that:

> The Government into whose hands prisoners of war have fallen is bound to maintain them.
>
> Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them.

2. Article 7 of the 1907 HR provides that:

> The Government into whose hands prisoners of war have fallen is charged with their maintenance. In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

3. Articles 25–32 GC III deal with the provision of appropriate shelter, food, clothing, canteens, hygiene and medical care to POWs. Articles 76, 85, 87 and 89–92 GC IV contain similar provisions for internees.

4. Articles 72 and 73 GC III and Articles 76, 108 and 109 GC IV provide that POWs and detainees shall be allowed to receive individual parcels or collective shipments containing in particular foodstuffs, clothing and medical supplies. Collective shipments shall in no way free the detaining power from its obligations. The conditions for the sending of parcels and relief may be subject to special agreement between the powers concerned. In the absence of such agreement, rules and regulations concerning collective shipments are annexed to the Conventions.

5. Article 125, first paragraph, GC III provides that:

> Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, for distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps.

Article 142 GC IV contains similar provisions for protected persons.

6. Article III(57)(a) of the 1953 Panmunjon Armistice Agreement provides that joint Red Cross teams "shall visit the prisoner of war camps of both sides to comfort the prisoners of war and to bring in and distribute gift articles for the comfort and welfare of the prisoners of war". Paragraphs 14 and 17 of the Annex to the Armistice Agreement (establishing a Neutral Nations Repatriation Commission) further add that:

Each side shall provide logistical support for the prisoners of war in the area under its military control, delivering required support to the Neutral Nations Repatriation Commission at an agreed delivery point in the vicinity of each prisoner of war installation.

...

The Neutral Nations Repatriation Commission shall provide medical support for the prisoners of war as may be practicable. The detaining side shall provide medical support as practicable upon the request of the Neutral Nations Repatriation Commission and specifically for those cases requiring extensive treatment or hospitalization.

7. Article 8 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam states that all captured military personnel and captured civilians "shall be given adequate food, clothing, shelter and medical attention required for their state of health. They shall be allowed ... to receive parcels" from their families.

8. Article 5(1)(b) AP II provides that persons whose liberty has been restricted shall "be provided with food and drinking water, and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict". Article 5(1)(c) provides that "they shall be allowed to receive individual or collective relief". Article 5 AP II was adopted by consensus.[1]

Other Instruments

9. Article 76 of the 1863 Lieber Code provides that "prisoners of war shall be fed upon plain and wholesome food, whenever practicable". Article 79 stipulates that "every captured wounded enemy shall be medically treated, according to the ability of the medical staff".

10. Article 27 of the 1874 Brussels Declaration states that, in the absence of an agreement settling the conditions of maintenance of prisoners of war, they shall be treated as regards food and clothing, on the same footing as the troops of the government which captured them.

11. Article 69 of the 1880 Oxford Manual provides that:

The government into whose hands prisoners have fallen is charged with their maintenance. In the absence of an agreement on this point between the belligerent parties, prisoners are treated, as regards food and clothing, on the same peace footing as the troops of the government which captured them.

12. Rules 9–20 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provide detailed directions concerning accommodation, personal hygiene, clothing, bedding and food.

13. Rules 14–25 of the 1987 European Prison Rules provide detailed directions concerning accommodation, personal hygiene, clothing, bedding and food.

[1] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

14. Article 6 of the 1979 Code of Conduct for Law Enforcement Officials provides that "law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required".
15. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict . . . prisoners of war shall have the right to be fed, sheltered and clothed".
16. Paragraph 9 of the 1990 Basic Principles for the Treatment of Prisoners provides that "prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation".
17. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "all persons deprived of their liberty for reasons related to the armed conflict shall . . . be provided with adequate food and drinking water, and be afforded safeguards as regards to health and hygiene".
18. Section 8(c) of the 1999 UN Secretary-General's Bulletin provides that detained persons "shall be entitled to receive food and clothing, hygiene and medical attention".

II. National Practice

Military Manuals

19. Argentina's Law of War Manual (1969) states that "the power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health".[2] It further lists in detail the basic needs of POWs that must be provided for and under which specific conditions.[3]
20. Argentina's Law of War Manual (1989) provides that prisoners of war shall receive adequate accommodation, food and clothing.[4]
21. Australia's Commanders' Guide provides that "PW must at all times receive adequate medical attention, food, clothing and accommodation".[5] Under the manual, the same rule applies to captured enemy combatants, who should be treated as being entitled to PW status.[6]
22. Australia's Defence Force Manual states that "food must be sufficient to keep prisoners in good health, and the customs and normal diet of PW must be taken into account, i.e. PW dietary practices and customs must be accommodated if possible".[7] It adds that "clothing, underwear and footwear must be sufficient and take into account the climate of the region where the PW is

[2] Argentina, *Law of War Manual* (1969), § 2.014.
[3] Argentina, *Law of War Manual* (1969), §§ 2.022–2.028.
[4] Argentina, *Law of War Manual* (1989), § 3.13.
[5] Australia, *Commanders' Guide* (1994), § 716.
[6] Australia, *Commanders' Guide* (1994), § 719.
[7] Australia, *Defence Force Manual* (1994), § 1026.

detained".[8] The manual specifies that "medical personnel of the PW are to be made available to attend to PW".[9]

23. Benin's Military Manual provides that captured enemy combatants shall have the right to receive relief from their families and shall be cared for.[10]

24. Cameroon's Instructors' Manual provides that captured enemy combatants shall be cared for, fed and protected when necessary.[11]

25. Cameroon's Disciplinary Regulations states that prisoners shall be authorised to receive parcels by the intermediary of the ICRC.[12]

26. Canada's LOAC Manual provides that POWs are to receive medical attention, if possible from doctors attached to their own forces or of their own nationality.[13] In respect of internees, the manual states that "the interning power is obligated to maintain interned persons and to provide them with medical care, all free of charge".[14] It also emphasises that "effective measures must be provided with adequate food, water and clothing".[15] The manual further specifies that persons undergoing punishment in occupied territories "must enjoy conditions of food and hygiene sufficient to keep them in good health and at least equal to those obtaining in prisons in the occupied country".[16] With regard to non-international armed conflicts, the manual states that the persons whose liberty has been restricted must "receive such medical care as their condition requires" and "be supplied with food and water".[17]

27. Canada's Code of Conduct provides that "for the provision of food, water and shelter, the idea is not to treat PWs or detainees better than CF members but to treat them at least as well".[18] It further provides that "all detained persons shall be afforded the necessary medical care".[19]

28. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, the basic needs of all detained persons, such as medical assistance, food and water, shall be provided for.[20]

29. Colombia's Instructors' Manual requires that prisoners be provided with food and medical attention.[21]

30. Croatia's Instructions on Basic Rules of IHL states that captured civilians and combatants are entitled to receive relief shipments.[22]

[8] Australia, *Defence Force Manual* (1994), § 1027.
[9] Australia, *Defence Force Manual* (1994), § 1029.
[10] Benin, *Military Manual* (1995), Fascicule II, pp. 5 and 11.
[11] Cameroon, *Instructors' Manual* (1992), p. 40, § 152, p. 96, § 2 and p. 154, § 541.
[12] Cameroon, *Disciplinary Regulations* (1975), Article 33.
[13] Canada, *LOAC Manual* (1999), p. 10-4, § 36.
[14] Canada, *LOAC Manual* (1999), p. 11-6, § 50.
[15] Canada, *LOAC Manual* (1999), p. 11-6, § 55.
[16] Canada, *LOAC Manual* (1999), p. 12-7, § 62(a).
[17] Canada, *LOAC Manual* (1999), p. 17-3, § 25.
[18] Canada, *Code of Conduct* (2001), Rule 6, § 7.
[19] Canada, *Code of Conduct* (2001), Rule 6, § 9.
[20] Colombia, *Basic Military Manual* (1995), p. 21.
[21] Colombia, *Instructors' Manual* (1999), p. 22.
[22] Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.

31. The Military Manual of the Dominican Republic requires that all prisoners and detainees, whatever their status, receive the same medical attention as friendly forces would receive.[23]
32. Ecuador's Naval Manual provides that captured enemy combatants shall receive medical care without any adverse distinction.[24]
33. France's LOAC Summary Note provides that "captured combatants have the right to . . . receive assistance".[25]
34. France's LOAC Teaching Note provides that wounded POWs shall be cared for and that every prisoner of war is entitled to receive assistance.[26]
35. France's LOAC Manual provides that prisoners of war shall be cared for and provided with necessary medical care.[27] It also states that regulation of the treatment of civilian internees is very similar to that of POWs.[28]
36. Germany's Military Manual provides that "prisoners of war shall receive sufficient food and clothing as well as the necessary medical attention".[29] It also specifies that in case of the evacuation of prisoners, they "shall be supplied with sufficient food, clothing and medical care".[30]
37. Hungary's Military Manual provides that captured combatants and internees shall be protected and cared for.[31]
38. Israel's Manual on the Laws of War provides that "prisoners must be administered proper medical care, at the expense of the detaining State, and a monthly follow-up examination must be made of each detainee's state of health. It is incumbent on the detaining State to provide the prisoners with sufficient food, drink and clothing." The manual also provides that "one of the most important provisions in the Geneva Convention are the rules concerning the right of prisoners . . . to receive packages from [their families] containing food, clothes, medications, ritual articles, literature and means of study".[32]
39. Italy's IHL Manual provides that POWs shall be provided with food, clothing and medical assistance.[33]
40. Kenya's LOAC Manual provides that "captured combatants shall be cared for".[34]
41. Madagascar's Military Manual provides that "prisoners of war shall be provided free of charge with food, sufficient clothes, adequate housing and the medical care that their state of health requires".[35]

[23] Dominican Republic, *Military Manual* (1980), p. 8.
[24] Ecuador, *Naval Manual* (1989), § 11.8.
[25] France, *LOAC Summary Note* (1992), § 2.1.
[26] France, *LOAC Teaching Note* (2000), p. 3.
[27] France, *LOAC Manual* (2001), p. 102.
[28] France, *LOAC Manual* (2001), p. 73.
[29] Germany, *Military Manual* (1992), § 717.
[30] Germany, *Military Manual* (1992), § 711.
[31] Hungary, *Military Manual* (1992), pp. 75 and 99.
[32] Israel, *Manual on the Laws of War* (1998), p. 53.
[33] Italy, *IHL Manual* (1991), Vol. II, Chapter III, p. 18, §§ 51–53.
[34] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.
[35] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 26.

42. Mali's Disciplinary Regulations provides that "sick and wounded prisoners of war are to be put in the care of the health service".[36]

43. The Military Manual of the Netherlands states that prisoners shall be provided with adequate food, clothing and accommodation.[37] It further states that "prisoners of war shall be allowed to receive parcels, in particular foodstuffs, clothing, medical supplies and articles of a recreational character (books, sports outfits, musical instruments)".[38]

44. The Military Handbook of the Netherlands provides that it is forbidden to take the clothes and food of prisoners of war. It adds that "food shall be sufficient to keep prisoners of war in good health and to prevent loss of weight".[39]

45. New Zealand's Military Manual provides that "prisoners of war are to receive medical . . . attention, if possible from doctors . . . of their own forces or of their own nationality".[40] It also provides that prisoners "shall be allowed to receive parcels containing clothing, food, medical supplies, religious and educational material, books, examination papers, musical instruments and the like . . ." and that "they may receive collective relief parcels in accordance with specific agreements between the parties".[41] Concerning internees, the manual states that they "must be provided free of charge with adequate food, water and the facilities to provide themselves with clothing or, if necessary, the clothing itself. Internees shall be medically inspected once a month and shall be provided with adequate medical care free of charge."[42] In addition, the manual states that "under certain circumstances, internees are allowed to receive individual parcels or collective shipments".[43] With respect to non-international conflicts, the manual specifies that "all detainees are to be supplied with food and water and the same safeguards as regards health and hygiene".[44]

46. Nicaragua's Military Manual provides that POWs have the right to receive medical care and shall be treated in terms of food and clothing on the same footing as the detaining power's own troops.[45]

47. Nigeria's Manual on the Laws of War provides that POWs must be cared for and provided with adequate accommodation, food and clothing.[46] It also provides that POWs shall "be permitted to receive parcels containing food, clothing, medicines, etc."[47]

[36] Mali, *Disciplinary Regulations* (1979), Article 36.
[37] Netherlands, *Military Manual* (1993), pp. VII-6/VII-7, § 4.
[38] Netherlands, *Military Manual* (1993), p. VII-10.
[39] Netherlands, *Military Handbook* (1995), p. 7-41.
[40] New Zealand, *Military Manual* (1992), § 924.
[41] New Zealand, *Military Manual* (1992), § 929.
[42] New Zealand, *Military Manual* (1992), § 1123(5).
[43] New Zealand, *Military Manual* (1992), § 1127.
[44] New Zealand, *Military Manual* (1992), § 1814(2).
[45] Nicaragua, *Military Manual* (1996), Article 14(20) and (22–24).
[46] Nigeria, *Manual on the Laws of War* (undated), § 41.
[47] Nigeria, *Manual on the Laws of War* (undated), § 43.

48. The Rules for Combatants of the Philippines provides that wounded and sick prisoners must receive medical treatment.[48]

49. Romania's Soldiers' Manual provides that captured combatants and civilians in the hands of a party to the conflict shall be provided with sufficient food and decent accommodation and shall be cared for.[49]

50. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the UDHR is that "persons deprived of their liberty shall receive, to the same extent as the civilian population, food and drinking water, shall benefit from healthy and hygienic living conditions and shall be protected against the climate and the dangers of military operations". It also provides that "they shall be allowed to receive individual and collective relief".[50]

51. Spain's LOAC Manual provides that "food shall be sufficient in quantity, quality and variety to keep prisoners in good health". It adds that "respect shall be provided for the habitual diet of the prisoners. Thus, prisoners of war shall be involved in the preparation of their meals". It further states that "collective disciplinary measures affecting food are prohibited".[51] The manual restates the right of prisoners to receive a sufficient daily food ration and drinking water.[52] It also provides that "prisoners of war shall be allowed to receive by post parcels containing foodstuffs, clothing, medical supplies, etc.".[53] In addition, the manual provides that appropriate clothes and medical attention shall be provided to prisoners of war.[54]

52. Switzerland's Basic Military Manual provides that prisoners of war "shall be quartered under conditions as favourable as those for the forces of the Detaining Power".[55] It states that "their daily food shall be sufficient in quantity, quality and variety to keep prisoners of war in good health. Account shall be taken of the habitual diet of the prisoners."[56] The manual also states that "prisoners of war shall be provided with appropriate clothes and shoes, which shall take into account the climate and the nature of work demands".[57] In addition, "prisoners of war shall be allowed to receive individual or collective parcels".[58]

53. Togo's Military Manual provides that captured enemy combatants shall be cared for and that they have the right to receive relief.[59]

[48] Philippines, *Rules for Combatants* (1989), § 4.
[49] Romania, *Soldiers' Manual* (1991), Part III, § 4.
[50] Senegal, *IHL Manual* (1999), pp. 23 and 24.
[51] Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(i).20.
[52] Spain, *LOAC Manual* (1996), Vol. I, § 8.5.(b).1.
[53] Spain, *LOAC Manual* (1996), Vol. I, § 8.4.(a).6.
[54] Spain, *LOAC Manual* (1996), Vol. I, §§ 6.4.(i).14 and 6.4.(i).15.
[55] Switzerland, *Basic Military Manual* (1987), Article 119.
[56] Switzerland, *Basic Military Manual* (1987), Article 120.
[57] Switzerland, *Basic Military Manual* (1987), Article 121.
[58] Switzerland, *Basic Military Manual* (1987), Article 134.
[59] Togo, *Military Manual* (1996), Fascicule II, pp. 5 and 11.

54. The UK Military Manual provides that "belligerents who intern protected persons must provide, free of charge, for [their] maintenance (including that of their dependants if the latter are without adequate means of support or are unable to earn a living)".[60] The manual also stipulates that "the state detaining prisoners of war is bound to provide free of charge for their maintenance and medical care".[61] It further specifies that prisoners of war and internees "are allowed to receive . . . relief shipments containing, in particular, foodstuffs, clothing, medical supplies, books and objects of a devotional, educational or recreational nature".[62]

55. The UK LOAC Manual provides that "PW must be provided with free maintenance and medical attention".[63]

56. The US Field Manual reproduces Articles 25–32, 72, 73 GC III and 76, 85, 87, 89–92 GC IV.[64]

57. The US Air Force Pamphlet stresses "the obligations of the Detaining Power in furnishing quarters, food and clothing to POWs". It points out that "food rations, for example, must be sufficient in quality, quantity and variety to keep POWs in good health and avoid loss of weight or nutritional deficiencies".[65]

58. The US Instructor's Guide states that:

> Even though you are a prisoner, you must receive sufficient daily rations to ensure your good health. In addition, you must have sanitary living quarters which provide protection from the weather. You are also entitled to medical care . . . You may also receive parcels containing foodstuffs, clothing and educational, religious or recreational materials.[66]

59. The US Operational Law Handbook provides that "there is a legal obligation to provide adequate food, facilities and medical aid to POWs".[67]

National Legislation

60. Under Argentina's Draft Code of Military Justice, depriving prisoners of war of indispensable food or necessary medical assistance is a punishable offence.[68]

61. Australia's War Crimes Act states that "the expression 'war crime' includes the following: . . . failure to provide prisoners of war or internees with proper medical care, food or quarters".[69]

62. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "prisoners of war are entitled to the

[60] UK, *Military Manual* (1958), § 56. [61] UK, *Military Manual* (1958), § 136.
[62] UK, *Military Manual* (1958), §§ 67 and 190.
[63] UK, *LOAC Manual* (1981), Section 8, p. 29, § 7.
[64] US, *Field Manual* (1956), §§ 101–109, 148–149, 292, 294, 296–299 and 446.
[65] US, *Air Force Pamphlet* (1976), § 13-4. [66] US, *Instructor's Guide* (1985), p. 11
[67] US, *Operational Law Handbook* (1993), p. Q-184.
[68] Argentina, *Draft Code of Military Justice as amended* (1998), Article 274, introducing a new Article 746 in the *Code of Military Justice as amended* (1951).
[69] Australia, *War Crimes Act* (1945), Section 3(xxx)(b).

following in all cases: . . . to have the opportunity to receive necessary medical care, food, clothes . . . and also to receive material assistance from outside".[70]

63. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[71]

64. Under Chile's Code of Military Justice, depriving prisoners of war of indispensable food or necessary medical assistance is an "offence against international law".[72]

65. The Code of Military Justice of the Dominican Republic provides that any member of the armed forces who deprives POWs of necessary food shall be punished by imprisonment.[73]

66. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 25–32, 72, 73 and 125 GC III and 76, 85, 87, 89–92, 108, 109 and 142 GC IV, as well as any "contravention" of AP II, including violations of Article 5(1)(b) and (c) AP II, are punishable offences.[74]

67. Mexico's Code of Military Justice as amended states that persons who deprive detainees of necessary food or medical care may be imprisoned for up to two years.[75]

68. Nicaragua's Military Penal Code provides that it is an offence not to provide indispensable food and necessary medical care to prisoners of war.[76]

69. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[77]

70. Peru's Code of Military Justice provides that depriving prisoners of war of medical care and indispensable food is a punishable offence.[78]

71. Rwanda's Prison Order provides that prisoners should receive food corresponding as far as possible to their usual diet and to their state of health.[79]

72. Spain's Military Criminal Code provides that "military personnel who . . . do not provide indispensable food or necessary medical assistance" to prisoners of war commit a punishable offence against the laws and customs of war.[80]

[70] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(5).
[71] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[72] Chile, *Code of Military Justice* (1925), Article 261.
[73] Dominican Republic, *Code of Military Justice* (1953), Article 201(1).
[74] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[75] Mexico, *Code of Military Justice as amended* (1933), Article 324(III).
[76] Nicaragua, *Military Penal Code* (1996), Article 55(4).
[77] Norway, *Military Penal Code as amended* (1902), § 108.
[78] Peru, *Code of Military Justice* (1980), Article 95(1).
[79] Rwanda, *Prison Order* (1961), Article 35.
[80] Spain, *Military Criminal Code* (1985), Article 77(5).

73. Uruguay's Military Penal Code as amended provides for the punishment of "the violation of the rights of prisoners of war . . . [such as] not providing necessary food".[81]

National Case-law

74. No practice was found.

Other National Practice

75. It is reported that, during the Algerian war of independence, "French prisoners never had any reason to complain about their stay in captivity. In case they were wounded, they received adequate care."[82]

76. In 1993, Azerbaijan's Ministry of the Interior ordered that troops "in zones of combat, during military operations . . . must provide care to wounded prisoners".[83]

77. According to the Report on the Practice of Malaysia, during the communist insurgency in Malaysia, all detainees were given medical examinations and provided with necessary medical treatment.[84]

78. In a memorandum on the strict observance of human rights issued to the Philippine armed forces in 1982, the Philippine Ministry of National Defence provided that medical check-ups were mandatory for persons detained in connection with crimes against national security.[85]

79. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that "Iraqi prisoners of war . . . will not be denied food, water or medical treatment".[86] In a subsequent diplomatic note, the US reminded the government of Iraq that "prisoners of war . . . must be afforded food, water, clothing and every guarantee of hygiene and healthfulness".[87]

80. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the starvation of many US military and civilian prisoners.[88]

81. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in

[81] Uruguay, *Military Penal Code as amended* (1943), Article 58(8).
[82] La révolution algérienne tient au respect de l'homme, *El Moudjahid*, Vol. 3, p. 57.
[83] Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 3.
[84] Report on the Practice of Malaysia, 1997, Chapter 5.3.
[85] Philippines, Ministry of National Defence, Memorandum to the Chief of Staff on Strict Observance of Human Rights, Doc. AGA1 B2-29, 20 March 1982, § 2.
[86] US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.
[87] US, Department of State, Diplomatic Note to Iraq, Washington, 20 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex III, p. 4.
[88] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON.RES. 357, 106th Congress, 2nd Session, 19 June 2000.

armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[89]

82. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY (FRY) included the following example: "Accommodation in prisons is absolutely unacceptable: people sleep on concrete floors, are being kept hungry and without minimum conditions for personal hygiene."[90]

83. In 1989, the government of a State involved in a non-international armed conflict assured the ICRC that all captured combatants had received the necessary medical care.[91]

84. A memorandum on the responsibilities and obligations applicable to contacts with the local population issued in 1992 by the Ministry of Defence of a State engaged in an international military operation stated that detainees (persons detained because they posed a threat to the armed forces or obstructed their operation and which were not POWs) should be supplied with "sufficient food, water and other necessities of life, including clothing, shelter and medical care".[92]

85. In 1999, the exchange committees of the parties to a non-international armed conflict signed an agreement concerning the treatment of prisoners, which provided that:

> 2. Chains and handcuffs should be removed from the prisoners of both sides.
> 3. Prisoners should be provided with fresh and warm food two times on a daily basis.
> 4. Prisoners should be put in the detention rooms according to the capacity and spaces of each room, so that they can rest.
> ...
> 8. Sick prisoners must be taken to hospitals whenever necessary.[93]

III. Practice of International Organisations and Conferences

United Nations

86. In a resolution adopted in 1992, the UN Security Council demanded that all detainees in camps, prisons and detention centres in Bosnia and Herzegovina "receive humane treatment, including adequate food, shelter and medical care".[94]

[89] Report on US Practice, 1997, Chapter 5.3.
[90] SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 3(iii).
[91] ICRC archive document.
[92] ICRC archive document.
[93] ICRC archive document.
[94] UN Security Council, Res. 770, 13 August 1992, § 3.

Other International Organisations

87. In a resolution adopted in 1995 on health and prison, the OAU Conference of African Ministers of Health stated that:

Recalling that there are established international standards for the treatment of detainees, recognised and accepted by States and constituting a useful reference framework for ensuring that detained persons are accorded humane treatment:

1. Urges Member States to be responsive to the health needs of detained persons;
2. Exhorts Member States to pursue their efforts towards a lasting solution to the serious problems posed by overcrowding at places of detention;
3. Calls on Member States to take appropriate measures to ensure that persons deprived of their liberty are given a balanced and adequate diet suited to their needs, as well as an adequate supply of drinking water;
4. Further calls on Member States to provide adequate premises for the accommodation of detained persons in conformity with the requirements of hygiene and housing standards, and to strengthen the health services destined for detained persons by ensuring that the penitentiary system is endowed with adequate food, nutritional conditions, sanitary facilities and medicine;
5. Requests the Secretary-General of OAU with technical support of ICRC to submit to the Conference of African Ministers of Health, a report on the progress made in the area of prison health care in Africa;
6. Urges Member States to ensure that persons deprived of liberty enjoy access to curative health care equal to that accorded to the rest of the population.[95]

International Conferences

88. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, "the international community has consistently demanded humane treatment for prisoners of war, including . . . provision of an adequate diet and medical care".[96]

IV. Practice of International Judicial and Quasi-judicial Bodies

89. In the *Krnojelac case* before the ICTY in 1997, the accused was charged with inhuman acts, wilfully causing great suffering and cruel treatment on the basis of inhumane conditions of detention consisting of locking detainees in their cells except when taken to eat or work duties, overcrowded cells with insufficient facilities for bedding and personal hygiene, starvation rations, lack of changes of clothing, absence of heating and lack of proper medical treatment.[97]

90. In its judgement in the *Aleksovski case* in 1999, the ICTY Trial Chamber held, in relation to detention conditions, that:

[95] OAU, Conference of African Ministers of Health, Res. 7(V), 24–29 April 1995, preamble and §§ 1–6.
[96] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.
[97] ICTY, *Krnojelac case*, Initial indictment, 17 June 1997, § 5.32.

158. The evidence clearly demonstrated that the premises were not appropriate for the number of detainees. The Trial Chamber finds that the inadequate space and heating which made the detention particularly difficult has been established . . .
164. The sanitary conditions could have been considered reasonable for a number of detainees proportional to its prison capacity. However, they were highly unsatisfactory in view of the number of individuals detained throughout the period covered by the indictment . . .
173. The testimony does not show serious food shortage in Kaonik prison. The detainees were fed and the relative lack of food was the result of shortages caused by the war and affected everyone, detainees and non-detainees alike. The testimony moreover in no way demonstrates a desire to starve the detainees or to differentiate the detainees from prison staff . . .
182. The testimony demonstrates that, in general, the detainees did receive [medical] treatment. Although it would probably be considered insufficient in ordinary times, the detainees' general conditions do not appear to have been so bad that they demonstrate a deliberate resolve to cause the persons concerned great suffering or serious injury to body or health. The testimony also demonstrates that the accused usually did whatever was in his power to ensure that the detainees received the necessary medical care or, at the very least, treatment available at the closest medical centre. In the result, the Trial Chamber finds the accused not culpable on this ground.[98]

91. On numerous occasions, the HRC found violations of Article 7 of the 1966 ICCPR (prohibition of torture or cruel, inhuman or degrading treatment or punishment) in respect of prison conditions. For example, the overall approach seems to have been set in *Mukong v. Cameroon* in 1992:

As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with rules 10, 12, 17, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.[99]

92. In the section of its Annual Report 1990–1991 concerning El Salvador, the IACiHR expressed profound concern over the poor prison conditions in which political prisoners were held (overcrowded facilities in bad condition, poor food and medical attention).[100]

93. In 1993, in a report on the situation of human rights in Peru, the IACiHR recommended, with reference to a prison to which members of the Tupac Amaru Revolutionary Movement were transferred, that Peru allow into the

[98] ICTY, *Aleksovski case*, Judgement, 25 June 1999, §§ 158, 164, 173 and 182.
[99] HRC, *Mukong v. Cameroon*, Views, 8 July 1992, § 9.3.
[100] IACiHR, *Annual Report 1990-1991*, Doc. OEA/Ser.L/V/II.79.rev.1 Doc. 12,22 February 1991, p. 440.

prison clothing, medicine, coats and toiletries required by the inmates to meet their vital needs.[101]

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

94. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the detaining power is bound to provide, free of charge, for the maintenance of prisoners of war and for the medical attention required by their state of health". They further teach that "the daily food and the clothing shall be sufficient to keep prisoners of war in good health (e.g. quantity and quality adapted to climate)" and that "the medical service shall be adapted to the prisoners' needs (e.g. cleanliness of camp, conditions of health and hygiene, adequate infirmary, monthly medical inspection of prisoners)". Delegates also teach that POWs shall be allowed to "receive individual parcels or collective shipments".[102]

95. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that particular care should be taken to ensure that detained persons were provided "satisfactory material conditions with respect to hygiene, food and accommodation".[103]

96. Since 1995, the ICRC has supplemented the Rwandan government's provision for the basic needs of detainees. For instance, in 1999, the ICRC provided 11,399 tonnes of food to detainees in civilian prisons and detainees in a military prison to supplement their government-supplied rations; supplied Nutriset-enriched milk to severely malnourished detainees and carried out Body Mass Index tests to assess inmates' nutritional condition; distributed 321 tonnes of material assistance (mainly hygiene products) and basic medical supplies to detainees; and carried out repairs and renovation work to kitchens, firewood shelters, prison cells, sewers and waste-water and rainwater drainage systems to counter unhealthy conditions of detention.[104]

VI. Other Practice

97. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle

[101] IACiHR, Report on the Situation of Human Rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, pp. 27–29.

[102] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 668, 705, 706 and 716, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

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

[104] ICRC, *Annual Report 1999*, Geneva, 2000, p. 93.

that "captured combatants and civilians under the authority of an adverse party . . . have the right . . . to receive relief".[105]

98. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "all persons deprived of their liberty shall be . . . provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions".[106]

B. Accommodation for Women Deprived of Their Liberty

Note: *For practice concerning the specific needs of women in general, see Chapter 39, section A.*

I. Treaties and Other Instruments

Treaties

99. Article 25, fourth paragraph, and Article 29, second paragraph, GC III provide that in any camps in which men and women prisoners are accommodated together, separate dormitories and conveniences shall be provided for women.

100. Article 97, fourth paragraph, and Article 108, second paragraph, GC III provide that women POWs undergoing disciplinary punishment or convicted of an offence shall be confined in separate quarters from men and shall be under the immediate supervision of women.

101. Article 76, fourth paragraph, GC IV provides that women accused of an offence "shall be confined in separate quarters and shall be under the direct supervision of women".

102. Article 82, third paragraph, GC IV provides that "wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life".

103. Article 85, fourth paragraph, GC IV provides that:

> Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

104. Article 124, third paragraph, GC IV provides that "women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women".

[105] ICRC archive document.

[106] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4 (2), *IRRC*, No. 282, p. 332.

105. Article 75(5) AP I provides that:

> Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

Article 75 AP I was adopted by consensus.[107]
106. Article 5(2)(a) AP II provides, with regard to persons deprived of their liberty for reasons related to the armed conflict, that whether they are interned or detained, "except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women". Article 5 AP I was adopted by consensus.[108]

Other Instruments
107. Rule 8(a) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "men and women shall so far as possible be kept in separate institutions. In institutions which receive both men and women the whole of the premises allocated to women shall be entirely separate."
108. Rule 11(2) of the 1987 European Prison Rules provides that "males and females shall in principle be detained separately, although they may participate together in organised activities as part of an established treatment programme".
109. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75(5) AP I.
110. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75(5) AP I.
111. Section 8(e) of the 1999 UN Secretary-General's Bulletin provides that "women whose liberty has been restricted shall be held in quarters separated from men's quarters, and shall be under the immediate supervision of women".

II. National Practice

Military Manuals
112. Argentina's Law of War Manual provides that "women [deprived of their liberty] shall be separated from men, unless they are from the same family".[109]

[107] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.
[108] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.
[109] Argentina, *Law of War Manual* (1989), § 7.07.

113. Australia's Defence Force Manual provides that the sex of female prisoners "must be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".[110]

114. Cameroon's Instructors' Manual provides that separate accommodation shall be provided to women prisoners.[111]

115. Canada's LOAC Manual provides that in the treatment of female POWs, "their gender must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".[112] Concerning internees, the manual states that "the treatment of internees [is] comparable to [the] provisions of GC III [including Articles 25 and 29] concerned with PWs".[113] It further refers to AP I and specifies that "women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women."[114] The manual also provides that women undergoing sentences of imprisonment in occupied territories "must be confined in separate quarters and placed under the direct supervision of women".[115] In addition, the manual states that "the authority responsible for the detention or internment of persons during a non-international armed conflict shall, unless family members are detained together, detain men and women separately, with women under the direct supervision of women".[116]

116. Italy's IHL Manual provides that POWs shall be separated, if possible, according to sex.[117]

117. The Military Manual of the Netherlands provides that "women must, if possible, be based in separate camps and barracks. In any case, separate dormitories shall be provided for them."[118] With respect to non-international armed conflicts in particular, the manual states that "men and women [whose liberty has been restricted] must be separated".[119]

118. New Zealand's Military Manual provides that the sex of female detainees "must be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".[120] It further states that "AP II provides that the authority responsible for detention or internment of persons during a non-international conflict shall, unless family members are detained together, detain men and women separately, with women under the direct supervision of women".[121]

[110] Australia, *Defence Force Manual* (1994), § 1010.
[111] Cameroon, *Instructors' Manual* (1992), p. 117, § 431.
[112] Canada, *LOAC Manual* (1999), p. 10-3, § 21.
[113] Canada, *LOAC Manual* (1999), p. 11-6, § 49.
[114] Canada, *LOAC Manual* (1999), p. 11-8, § 66.
[115] Canada, *LOAC Manual* (1999), p. 12, § 62(b).
[116] Canada, *LOAC Manual* (1999), p. 17-3, § 26.
[117] Italy, *IHL Manual* (1991), Vol. II, Chapter III, § 6.
[118] Netherlands, *Military Manual* (1993), p. VII-7.
[119] Netherlands, *Military Manual* (1993), p. XI-5.
[120] New Zealand, *Military Manual* (1992) § 916.
[121] New Zealand, *Military Manual* (1992), § 1814(3).

119. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is that, in the treatment of persons deprived of their liberty, "except when men and women of the same family are accommodated together, women shall be held in separate quarters and under the immediate supervision of women".[122]

120. Spain's LOAC Manual provides that detained women shall be housed separately.[123] According to the manual, the same rule applies to interned women.[124]

121. Sweden's IHL Manual considers that "the fundamental guarantees for persons in the power of one party to the conflict", as contained in Article 75 AP I, is part of customary international law.[125]

122. Switzerland's Basic Military Manual provides that "women shall be provided separate dormitories".[126]

123. The UK Military manual provides that "when men and women prisoners of war are accommodated in the same camp, separate sleeping quarters must be provided".[127]

124. The US Field Manual reproduces Articles 25 GC III and 76 and 124 GC IV.[128]

125. The US Soldier's Manual provides that "it is particularly important to treat every captured or detained female with appropriate respect".[129]

National Legislation

126. Argentina's Draft Code of Military Justice provides a penalty for members of the armed forces who, in the event of an armed conflict, "breach the provisions governing the accommodation of women or families".[130]

127. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[131]

128. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 25, 29, 97 and 108 GC III and 76, 82, 85 and 124 GC IV, and of AP I, including violations of Article 75(5) AP I, as well as any "contravention" of AP II, including violations of Article 5(2)(a) AP II, are punishable offences.[132]

[122] Senegal, *IHL Manual* (1999), pp. 3 and 24.
[123] Spain, *LOAC Manual* (1996), Vol. I, §§ 6.4.(b).1 and 6.4.(f).1.
[124] Spain, *LOAC Manual* (1996), Vol. I, § 6.8.(f).2.
[125] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[126] Switzerland, *Basic Military Manual* (1987), Article 119.
[127] UK, *Military Manual* (1958), § 148.
[128] US, *Field Manual* (1956), §§ 101, 331 and 446.
[129] US, *Soldier's Manual* (1984), p. 14.
[130] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[131] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[132] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

129. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[133]
130. Pakistan's Prisons Act stipulates that separate cells shall be provided for female prisoners.[134]
131. Rwanda's Prison Order states that women are to be housed separately from men.[135]

National Case-law
132. No practice was found.

Other National Practice
133. Indian regulations provide that detained women may not be housed with men, and that, where possible, women should be looked after by female police officers.[136]
134. An Indian police order dating from 1984 states that detained women shall be looked after by female police officers.[137]
135. The Report on the Practice of Jordan asserts that "Article 75 AP I embodies customary law".[138]
136. Based on a memo on accommodation in detention camps dating from 1950, the Report on the Practice of Malaysia states that during the communist insurgency, women and children were detained in separate facilities. Women were guarded exclusively by female guards.[139]
137. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[140]

[133] Norway, *Military Penal Code as amended* (1902), § 108.
[134] Pakistan, *Prisons Act* (1894), Article 27.
[135] Rwanda, *Prison Order* (1961), Articles 28–29.
[136] India, Ministry of Home Affairs, Circular on the treatment of women demonstrators by the police, Doc. No. VI-25013/4/81-GPA.II, 4 April 1981, Report on the Practice of India, 1997, Chapter 5.3.
[137] India, Commissioner of Police, Standing Order No. 93, Arrest of Women, Doc. No. 9609-9909/C&T-AC-II, 5 May 1984, Article 9, Report on the Practice of India, 1997, Chapter 5.3.
[138] Report on the Practice of Jordan, 1997, Chapter 5.6.
[139] Report on the Practice of Malaysia, 1997, Chapter 5.3, referring to Memo on Accommodation in Detention Camps, December 1950, Archives ref: (56) in DCHQ/187/50.
[140] Report on US Practice, 1997, Chapter 5.3.

III. Practice of International Organisations and Conferences

United Nations

138. In a resolution adopted in 1980 on measures to prevent the exploitation of prostitution, ECOSOC appealed to governments to pay particular attention to the conditions of detention of women, especially in relation to their physical security.[141]

139. In a resolution adopted in 1984 on physical violence against detained women that is specific to their sex, ECOSOC called on member States to take measures to eradicate physical violence against detained women and to submit their views on the matter to the UN Secretary-General.[142] It repeated this request in resolutions adopted in 1986 and 1990.[143]

Other International Organisations

140. No practice was found.

International Conferences

141. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

142. No practice was found.

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

143. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "women's quarters shall be separated from men's quarters. They shall be under the immediate supervision of women."[144]

VI. Other Practice

144. No practice was found.

C. Accommodation for Children Deprived of Their Liberty

Note: *For practice concerning the specific needs of children in general, see Chapter 39, section B.*

[141] ECOSOC, Res. 1980/4, 16 April 1980, §§ 3–4.
[142] ECOSOC, Res. 1984/19, 24 May 1984, §§ 1–3.
[143] ECOSOC, Res. 1986/29, 23 May 1986, §§ 2–5; Res. 1990/5, 24 May 1990, §§ 1–4.
[144] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 689, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

I. Treaties and Other Instruments

Treaties

145. Article 76, fifth paragraph, GC IV provides that, in the treatment of protected persons accused of an offence, "proper regard shall be paid to the special treatment due to minors" who are detained.

146. Article 82, second and third paragraphs, GC IV provides that:

> Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.
>
> Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

147. Article 10(2)(b) of the 1966 ICCPR provides that "accused juveniles shall be separated from adults". Article 10(3) provides that "juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status".

148. Article 77(4) AP I provides that, "if arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5". Article 77 AP I was adopted by consensus.[145]

149. Article 37(c) of the 1989 UN Convention on the Rights of the Child provides that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so".

150. Upon ratification of the 1989 Convention on the Rights of the Child, Australia stated that "the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families".[146]

151. Upon ratification of the 1989 Convention on the Rights of the Child, Canada reserved the right "not to detain children separately from adults where this is not appropriate or feasible".[147]

152. Upon ratification of the 1989 Convention on the Rights of the Child, Iceland stated that:

[145] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[146] Australia, Reservation made upon ratification of the Convention on the Rights of the Child, 17 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 12.
[147] Canada, Reservation made upon ratification of the Convention on the Rights of the Child, 13 December 1991, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 14.

The separation of juvenile prisoners from adult prisoners is not obligatory under Icelandic law. However, the law relating to prisons and imprisonment provides that when deciding in which penal institution imprisonment is to take place account should be taken of, *inter alia*, the age of the prisoner. In light of the circumstances prevailing in Iceland it is expected that decisions on the imprisonment of juveniles will always take account of the juvenile's best interests.[148]

153. Upon ratification of the 1989 Convention on the Rights of the Child, Japan reserved the right not to apply Article 37(c) "considering the fact that in Japan as regards persons deprived of liberty, those who are below 20 years of age are to be generally separated from those who are of 20 years of age and over under its national law".[149]

154. Upon ratification of the 1989 Convention on the Rights of the Child, New Zealand reserved the right not to apply Article 37(c) "in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable" and "where mixing is considered to be of benefit to the persons concerned".[150]

155. Upon ratification of the 1989 Convention on the Rights of the Child, the UK reserved the right not to apply Article 37(c) "where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial".[151]

Other Instruments

156. Rule 8(d) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "young prisoners shall be kept separate from adults".

157. Rule 11(4) of the 1987 European Prison Rules provides that "young prisoners shall be detained under conditions which as far as possible protect them from harmful influences and which take account of the needs peculiar to their age".

158. Rule 13.4 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice provides that "juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults".

159. Rule 29 of the 1990 Rules for the Protection of Juveniles Deprived of their Liberty provides that "in all detention facilities juveniles should be separated from adults, unless they are members of the same family".

[148] Iceland, Declarations made upon ratification of the Convention on the Rights of the Child, 28 October 1992, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 20.

[149] Japan, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 22 April 1994, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 22.

[150] New Zealand, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 April 1993, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

[151] UK, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 16 December 1991, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 31.

160. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(4) AP I.
161. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(4) AP I.
162. According to Principles 17(4) of the 1998 Guiding Principles on Internal Displacement, "members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together".
163. Section 8(f) of the 1999 UN Secretary-General's Bulletin provides that:

> In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families.

II. National Practice

Military Manuals
164. Argentina's Law of War Manual (1969) provides that:

> During internment, members of the same family, and in particular parents and children, shall be held in the same place of internment . . .
>
> Internees can request that their children, left at liberty without the supervision of their parents, shall be interned with them.
>
> As much as possible, interned members of the same family shall be accommodated in the same place, and shall be housed separately from the other internees. They shall be afforded the necessary facilities for leading a normal family life.[152]

165. Argentina's Law of War Manual (1989) provides that arrested children shall be lodged together with their families in the same place of internment.[153] It further provides that, in non–international armed conflict, "children shall receive assistance . . . in order to reunite them with their families when they are temporarily separated from them".[154]
166. Australia's Defence Force Manual specifies that "in case of arrest, children should be kept in separate quarters from those of adults".[155]
167. Cameroon's Instructors' Manual provides that separate accommodation shall be provided to children.[156]

[152] Argentina, *Law of War Manual* (1969), § 4.022.
[153] Argentina, *Law of War Manual* (1989), § 4.12.
[154] Argentina, *Law of War Manual* (1989), § 7.04.
[155] Australia, *Defence Force Manual* (1994), § 947.
[156] Cameroon, *Instructors' Manual* (1992), p. 117, § 431.

168. Canada's LOAC Manual states that, wherever possible, interned "family members must be housed in the same place and premises".[157] With respect to non–international armed conflicts, the manual provides that "family members are detained together".[158]

169. Germany's Military Manual provides that "the detaining power shall ensure that members of the same family are lodged together in the same place of internment".[159]

170. Spain's LOAC Manual provides that children under six years shall be housed with their mothers.[160] It also states, regarding the placing of prisoners in camps, that "family sections" are provided "in order to house family groups".[161]

171. The UK Military Manual states that "the general provisions of [GC IV] lay down, *inter alia*, . . . that as far as possible families must not be separated but must be given separate accommodation as family units".[162]

172. The US Field Manual reproduces Article 76 GC IV.[163]

National Legislation

173. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[164]

174. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 76 and 82 GC IV, and of AP I, including violations of Article 77(4) AP I, are punishable offences.[165]

175. Nicaragua's Constitution provides that minor offenders shall not be detained in "centres of criminal readaptation" but shall be accommodated in "centres under the responsibility of a special organism".[166]

176. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[167]

177. Pakistan's Prisons Act provides that separate cells shall be provided for prisoners under 21 years of age.[168]

[157] Canada, *LOAC Manual* (1999), p. 11-6, § 51.
[158] Canada, *LOAC Manual* (1999), p. 17-3, § 26.
[159] Germany, *Military Manual* (1992), § 593.
[160] Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(f).1.
[161] Spain, *LOAC Manual* (1996), Vol. I, § 6.8.f.(1).
[162] UK, *Military Manual* (1958), § 56.
[163] US, *Field Manual* (1956), § 446.
[164] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[165] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[166] Nicaragua, *Constitution* (1987), Article 35.
[167] Norway, *Military Penal Code as amended* (1902), § 108.
[168] Pakistan, *Prisons Act* (1894), Article 27.

178. The Act on Child Protection of the Philippines states that any child involved in an armed conflict, whether as a spy, courier, guide or combatant, shall be entitled to separate detention facilities, free legal assistance, notice of arrest to parents and release of the child to the social services department for protective custody.[169]
179. Rwanda's Prison Order states that prisoners under the age of 18 are to be held separately.[170]

National Case-law
180. No practice was found.

Other National Practice
181. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.[171]
182. On the basis of a memo on accommodation in detention camps dating from 1950, the Report on the Practice of Malaysia states that during the period of the communist insurgency, women and children were detained in separate facilities.[172]
183. In 1993, Peru informed the CRC that under Peruvian law, "children tried for terrorist activities must be detained separately from adults".[173]
184. In 1993, in its initial report to the CRC, the Philippines stated that "in any case where a child is arrested for reasons related to armed conflict, he or she shall be entitled to separate detention from adults".[174]
185. In presenting his government's report to the HRC in 1985, the UK representative explained that while a derogation from the provision on housing detained minors separately from adults had been necessitated by the large numbers of juveniles convicted of terrorist offences, the situation had been remedied by the construction of two new juvenile detention centres.[175]

III. Practice of International Organisations and Conferences

186. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

187. In its General Comment on Article 10 of the 1966 ICCPR (humane treatment of persons deprived of their liberty), the HRC held that:

[169] Philippines, *Act on Child Protection* (1992), Article X.
[170] Rwanda, *Prison Order* (1961), Articles 28–29.
[171] Report on the Practice of Syria, 1997, Chapter 5.3.
[172] Report on the Practice of Malaysia, 1997, Chapter 5.3, referring to Memo on Accommodation in Detention Camps, December 1950, Archives ref: (56) in DCHQ/187/50.
[173] Peru, Statement before the CRC, UN Doc. CRC/C/SR.84, 30 September 1993, § 25.
[174] Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, § 203.
[175] UK, Statement before the HRC, UN Doc. CCPR/C/SR.594, 9 April 1985, § 23.

Moreover, the Committee notes that in the reports of some States parties no information has been provided concerning the treatment accorded to accused juvenile persons and juvenile offenders. Article 10, paragraph 2 (b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant . . . Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation.[176]

188. In 1979, in a report on the situation of human rights in Nicaragua, the IACiHR censured the Nicaraguan government for its failure to adhere to the requirements of the Nicaraguan Constitution which provides that minors should not be incarcerated with adults.[177]

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

189. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "children's quarters shall be separated from adults' quarters, except where families are accommodated as family units".[178]

VI. Other Practice

190. No practice was found.

D. Location of Internment and Detention Centres

I. Treaties and Other Instruments

Treaties

191. Article 22, first paragraph, GC III provides that "prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness".

192. Article 23, first paragraph, GC III provides that "no prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone".

[176] HRC, General Comment No. 21 (Article 10 ICCPR), 10 April 1992, § 13.

[177] IACiHR, Report on the situation of human rights in Nicaragua, Doc. OEA/Ser.L/V/II.45 Doc. 16 rev. 1, 17 November 1979, p. 64.

[178] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 690, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

193. Article 83, first paragraph, GC IV provides that "the Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war".
194. Article 85, first paragraph, GC IV provides that:

> The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts, the climate of which is injurious to the internees.

195. Article 5(1)(b) AP II provides that persons whose liberty has been restricted shall be "afforded safeguards as regards health and hygiene". Article 5(2)(c) provides that "places of internment or detention shall not be located close to the combat zone". Article 5 AP II was adopted by consensus.[179]

Other Instruments
196. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "all persons deprived of their liberty for reasons related to the armed conflict shall . . . be confined in a secure place".
197. Section 8(b) of the 1999 UN Secretary-General's Bulletin provides that detained persons "shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone".

II. National Practice

Military Manuals
198. Argentina's Law of War Manual (1969) provides that "prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness".[180]
199. Argentina's Law of War Manual (1989) provides that "prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness". It adds that "no prisoners may be detained in areas where they may be exposed to the fire of the combat zone".[181]
200. Australia's Defence Force Manual states that "PW camps must not be located near military objectives with the intention of securing exemption from attack for those objectives".[182] It further states that "PWs may only be interned

[179] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.
[180] Argentina, *Law of War Manual* (1969), § 2.019.
[181] Argentina, *Law of War Manual* (1989), § 3.12.
[182] Australia, *Defence Force Manual* (1994), § 1014.

on land and centres of internment must be established in healthy areas, with prisoners having facilities guaranteeing hygiene and health".[183]

201. Belgium's Law of War Manual provides that POWs shall be evacuated as soon as possible to camps located away from the combat zone so as to be out of danger.[184]

202. Belgium's Teaching Manual for Soldiers provides that "to the extent possible, POWs must be kept away from combat zones and from possible violence by the hostile population".[185]

203. Cameroon's Instructors' Manual provides that internment centres "shall be located at a sufficient distance between military objectives and civilian or sanitary objects". It also states that "prisoners of war camps shall not be improvised . . . and guarantee sufficient conditions of hygiene and healthfulness".[186]

204. Canada's LOAC Manual provides that "POWs may only be interned on land. Centres of internment must be established in healthy areas, with POWs having facilities guaranteeing hygiene and healthfulness."[187] Concerning the treatment of internees, the manual stresses that "internment camps must not be located in areas particularly exposed to the dangers of war".[188] With respect to non-international armed conflicts, the manual provides that "places of internment or detention shall not be located close to the combat zone. When the place of detention becomes particularly exposed to danger from the conflict, persons held shall be evacuated."[189]

205. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, internment and detention centres shall be located in secure areas, away from the combat zones.[190]

206. Croatia's Commanders' Manual states that POW and internment camps must not be situated in combat zones.[191]

207. France's LOAC Manual provides that "prisoners of war shall not be needlessly exposed to the dangers of combat".[192] It also states that "the regulation of treatment of civilian internees is very similar to that of prisoners of war".[193]

208. France's LOAC Summary Note provides that POW camps and civilian internment camps must not be exposed to the combat zone.[194]

[183] Australia, *Defence Force Manual* (1994), § 1016.
[184] Belgium, *Law of War Manual* (1983), p. 45.
[185] Belgium, *Teaching Manual for Soldiers* (undated), p. 20.
[186] Cameroon, *Instructors' Manual* (1992), p. 117, § 431.
[187] Canada, *LOAC Manual* (1999), p. 10-3, § 32.
[188] Canada, *LOAC Manual* (1999), p. 11-6, § 52.
[189] Canada, *LOAC Manual* (1999), p. 17-3, § 26.
[190] Colombia, *Basic Military Manual* (1995), p. 21.
[191] Croatia, *Commanders' Manual* (1992), §§ 99 and 100.
[192] France, *LOAC Manual* (2001), p. 102.
[193] France, *LOAC Manual* (2001), p. 73.
[194] France, *LOAC Summary Note* (1992), § 2.1.

209. France's LOAC Teaching Note states that internment camps for POWs "must not be exposed to the combat zone".[195]
210. Germany's Military Manual provides that "POW camps shall not be situated in danger zones".[196]
211. Israel's Manual on the Laws of War provides that "the detaining state must evacuate the prisoners from the front as soon as possible, to get them out of harm's way".[197]
212. Italy's IHL Manual provides that POWs shall be located far enough from the combat line and in healthy areas.[198]
213. Madagascar's Military Manual provides that "PW camps shall not be situated in combat zones".[199]
214. Mali's Army Regulations provides that "prisoners shall be evacuated as soon as possible to a gathering point located far enough from the combat zone. While waiting for their evacuation, they should not be unnecessarily exposed to danger."[200]
215. The Military Manual of the Netherlands provides that "camps must not be located in areas where they may be exposed to the fire of the combat zone".[201] With respect to non-international armed conflicts in particular, the manual states that "detention and internment camps must not be located too close to the combat zone".[202]
216. New Zealand's Military Manual provides that "camps must not be located near military objectives with the intention of securing exemption from attack for these objectives, and must be provided with the same protective measures against aerial attack as is the civilian population". It adds that "the practice, common during World War I, of placing camps near military objectives as prophylactic reprisals on the ground that the enemy's own forces had indulged in illegal activities is clearly forbidden".[203] The manual further points out that "internment camps must not be located in areas particularly exposed to the dangers of war".[204] With respect to non-international armed conflicts, the manual states that according to AP II, "places of internment or detention shall not be located close to the combat zone".[205]
217. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is that detention centres shall

[195] France, *LOAC Teaching Note* (2000), p. 3.
[196] Germany, *Military Manual* (1992), § 714.
[197] Israel, *Manual on the Laws of War* (1998), p. 52.
[198] Italy, *IHL Manual* (1991), Vol. II, Chapter III, § 6 and Chapter XVI, § 118.
[199] Madagascar, *Military Manual* (1994), No. 8-0, § 01.
[200] Mali, *Army Regulations* (1979), Article 36.
[201] Netherlands, *Military Manual* (1993), p. VII-6, § 4.
[202] Netherlands, *Military Manual* (1993), p. XI-5.
[203] New Zealand, *Military Manual* (1992), § 922(1), note 65.
[204] New Zealand, *Military Manual* (1992), § 1123(3).
[205] New Zealand, *Military Manual* (1992), § 1814(3).

not be located close to trouble zones. Persons deprived of their liberty shall be evacuated when the place becomes particularly dangerous.[206]

218. Spain's LOAC Manual provides that detention centres must be located in an area far enough from the combat zones.[207]

219. Switzerland's Basic Military Manual provides that "internment shall always take place in premises located on land, where the climate is favourable and where security conditions are sufficient".[208]

220. The UK Military Manual states that "internment camps must be outside the combat zone".[209] It also provides that "prisoners of war may be interned only in premises which are on land and which are in every way healthy and hygienic".[210]

221. The UK LOAC Manual states that "PW camps must be located on land, not in prison ships, and afford every guarantee of hygiene and health".[211]

222. The US Field Manual states that "the Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war".[212] It also states that "prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness".[213]

223. The US Air Force Pamphlet requires "internment only on land and not in unhealthy areas".[214]

National Legislation

224. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the Armed Forces of Azerbaijan, the appropriate authorities and governmental bodies are not allowed to keep prisoners of war in the territory of Azerbaijan in the zone of hostilities".[215] It further provides that prisoners of war are entitled "to be kept in buildings situated in a zone ensuring protection of security, hygiene and health".[216]

225. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[217]

226. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 22 and 23

[206] Senegal, *IHL Manual* (1999), pp. 3 and 24.
[207] Spain, *LOAC Manual* (1996), Vol. I, § 6.4.a.
[208] Switzerland, *Basic Military Manual* (1987), Article 118.
[209] UK, *Military Manual* (1958), § 147.
[210] UK, *Military Manual* (1958), § 146.
[211] UK, *LOAC Manual* (1981), Section 8, p. 30, § 16(a).
[212] US, *Field Manual* (1956), § 290.
[213] US, *Field Manual* (1956), § 98.
[214] US, *Air Force Pamphlet* (1976), § 13-4.
[215] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 19.
[216] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(4).
[217] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

GC III and 83 and 85 GC IV, as well as any "contravention" of AP II, including violations of Article 5(1)(b) and (2)(c) AP II, are punishable offences.[218]

227. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[219]

National Case-law

228. No practice was found.

Other National Practice

229. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US advised the government of Iraq that "Iraqi prisoners of war ... will not be exposed to danger ... [and] will be safeguarded against harm during combat operations".[220]

230. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that "Iraqi authorities have continued to ignore the standards of the Geneva conventions in blatant disregard for international law. They have ... deliberately exposed [coalition prisoners of war] to combat danger."[221]

231. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[222]

232. In 1977, in a meeting with the ICRC, a government official of a State involved in an internal armed conflict initially denied that the armed forces took prisoners, stating that combatants of the adverse party were simply disarmed and sent home. He subsequently admitted that a limited number of prisoners were detained in various areas throughout the combat zone. The ICRC pointed out that, according to the Geneva Conventions, prisoners must be located far enough from the dangers of war and interned in one or more safe areas.[223]

[218] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[219] Norway, *Military Penal Code as amended* (1902), § 108.
[220] US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.
[221] US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2; see also Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991.
[222] Report on US Practice, 1997, Chapter 5.3.
[223] ICRC archive document.

III. Practice of International Organisations and Conferences

233. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

234. No practice was found.

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

235. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

> No prisoner of war may at any time be sent to or detained in areas where he may be exposed to combat actions. Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate . . . Prisoner of war camps shall not be located in areas exposed to combat action.[224]

236. In a press release in 1985, the ICRC stated that the closure of the Insar camp in southern Lebanon and the subsequent transfer by the Israeli occupation authorities of more than 1,000 of the inmates to Israel was a violation of Articles 49 and 76 GC IV.[225]

237. In 1992, in a letter to the authorities of a State involved in a non-international armed conflict, the ICRC recalled the obligation to detain prisoners in places protected from the hostilities.[226]

238. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "persons deprived of their freedom, both civilians and military personnel, . . . must not be detained in the vicinity of combat zones".[227]

239. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that particular care should be taken to ensure that persons are "detained at locations where their safety is guaranteed".[228]

[224] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 671, 672 and 675, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).
[225] ICRC, Press Release No. 1504, South Lebanon: Closure of Insar Camp, 4 April 1985.
[226] ICRC archive document.
[227] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.
[228] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

VI. Other Practice

240. Between 1985 and 1986, the leaders of several armed opposition groups involved in the same non-international armed conflict suggested at different times the creation of safe areas, either on national or third State territory, where captured combatants could be detained and their safety ensured.[229]

E. Pillage of the Personal Belongings of Persons Deprived of Their Liberty

Note: *For practice concerning pillage in general, see Chapter 16, section D.*

I. Treaties and Other Instruments

Treaties

241. Article 18 GC III provides that:

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

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

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

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

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

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

242. Article 97 GC IV provides that:

Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.

[229] ICRC archive documents.

The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.

Articles which have above all a personal or sentimental value may not be taken away.

A woman internee shall not be searched except by a woman.

On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt begin given. At no time shall internees be left without identity documents. If they have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.

Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

243. Article 4(2)(g) AP II provides for the prohibition of acts of pillage against "all persons who do not take a direct part or who have ceased to take part in hostilities". Article 4 AP II was adopted by consensus.[230]

Other Instruments

244. Section 7.2 of the 1999 UN Secretary-General's Bulletin states that pillage of persons *hors de combat* is prohibited.

II. National Practice

Military Manuals

245. Canada's Code of Conduct provides that "the personal property of . . . detained persons . . . shall not be taken".[231]

246. The Military Manual of the Netherlands provides that the appropriation of personal property of POWs is an ordinary breach of IHL.[232]

247. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . taking and keeping a captured enemy soldier's personal property".[233]

[230] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[231] Canada, *Code of Conduct* (2001), Rule 8, § 2.
[232] Netherlands, *Military Manual* (1993), p. IX-6.
[233] US, *Instructor's Guide* (1985), pp. 13 and 14.

National Legislation

248. Argentina's Draft Code of Military Justice punishes any soldier who "plunders the . . . prisoner of war or civilian internee".[234]

249. Australia's Defence Force Discipline Act, in an article on looting, provides that:

> A person, being a defence member or a defence civilian, who, in the course of operations against the enemy, or in the course of operations undertaken by the Defence Force for the preservation of law and order or otherwise in aid of the civil authorities –
>
> . . .
>
> takes any property from the body of a person . . . captured in those operations . . . is guilty of [a punishable] offence.[235]

250. Bulgaria's Penal Code as amended provides that any "person who, on the battlefield, takes away objects from . . . a captive . . . person, with the intention to unlawfully appropriate them" commits a punishable crime.[236]

251. Under Chad's Code of Military Justice, taking property from prisoners of war is a criminal offence.[237]

252. Chile's Code of Military Justice provides for a prison sentence for "anyone who plunders the clothing or other objects belonging to . . . a prisoner of war in order to appropriate them".[238]

253. Colombia's Penal Code imposes a sanction on "anyone who, during an armed conflict, despoils . . . a protected person".[239]

254. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, for personal gain, plunders the money or other belongings of . . . prisoners".[240]

255. El Salvador's Code of Military Justice provides that "a soldier who plunders the clothes or other personal effects of . . . a prisoner of war in order to appropriate them" commits a punishable offence.[241]

256. Under Greece's Military Penal Code, "the soldier who takes money or other belongings away from a prisoners of war" is to be punished.[242]

257. Iraq's Military Penal Code states that "every person who, with the intent to appropriate for himself or unjustifiably, . . . takes the property of the prisoner whom he is ordered to guard, shall be punished".[243]

[234] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(8) in the *Code of Military Justice as amended* (1951).
[235] Australia, *Defence Force Discipline Act* (1982), Section 48(1).
[236] Bulgaria, *Penal Code as amended* (1968), Article 405.
[237] Chad, *Code of Military Justice* (1962), Article 62.
[238] Chile, *Code of Military Justice* (1925), Article 263.
[239] Colombia, *Penal Code* (2000), Article 151.
[240] Cuba, *Military Criminal Code* (1979), Article 43(1).
[241] El Salvador, *Code of Military Justice* (1934), Article 70.
[242] Greece, *Military Penal Code* (1995), Article 164.
[243] Iraq, *Military Penal Code* (1940), Article 115(a).

258. Ireland's Geneva Conventions Act as amended provides that any "contravention" of AP II, including violations of Article 4(2)(g) AP II, is a punishable offence.[244]

259. Italy's Wartime Military Penal Code provides that the soldier who steals money or other objects from a prisoner of war, with the intent to appropriate them for himself or for others, is guilty of a punishable offence.[245]

260. New Zealand's Armed Forces Discipline Act provides that:

> Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who –
>
> (a) Steals from, or with intent to steal searches, the person of anyone . . . captured in the course of any war or warlike operations in which New Zealand is engaged, or . . . detained in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil power.[246]

261. Nicaragua's Military Penal Law punishes "anyone who, in military operations, steals, for personal gain, the money or other belongings of . . . prisoners".[247]

262. Nicaragua's Military Penal Code provides for the punishment of the soldier who, in the zone of operations, "despoils . . . a prisoner of war of his or her clothes or other personal effects".[248]

263. Under Nigeria's Armed Forces Decree 105 as amended, looting is a punishable offence. A person is guilty of looting who "steals from, or with intent to steal, searches the body of a person . . . captured in the course of war-like operations, or . . . detained in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities".[249]

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

265. Paraguay's Military Penal Code punishes "any soldier who has plundered . . . a prisoner of war".[251]

266. Peru's Code of Military Justice provides that despoiling prisoners of war is punishable.[252]

[244] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[245] Italy, *Wartime Military Penal Code* (1941), Article 214.
[246] New Zealand, *Armed Forces Discipline Act* (1971), Section 31(a).
[247] Nicaragua, *Military Penal Law* (1980), Article 81.
[248] Nicaragua, *Military Penal Code* (1996), Article 56(1).
[249] Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51(a).
[250] Norway, *Military Penal Code as amended* (1902), § 108(b).
[251] Paraguay, *Military Penal Code* (1980), Article 293.
[252] Peru, *Code of Military Justice* (1980), Article 95(5).

267. Singapore's Armed Forces Act as amended provides that:

Every person subject to military law who –

(a) steals from or, with intent to steal, searches the person of anyone . . . captured in the course of warlike operations, or . . . detained in the course operations undertaken by the Singapore Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities . . . shall be guilty of looting and shall be liable on conviction by a subordinate military court to imprisonment.[253]

268. Under Spain's Military Criminal Code, "the soldier who . . . strips . . . a prisoner of war of his personal effects in the area of operations, with the intent to appropriate them," commits a punishable offence against the laws and customs of war.[254]

269. Under Spain's Penal Code, "anyone who, on the occasion of an armed conflict . . . strips . . . a prisoner of war or an interned civilian of his personal effects" commits a punishable "offence against protected persons and objects in the event of armed conflict".[255]

270. The UK Army Act as amended provides that:

Any person subject to military law who –

(a) steals from, or with intent to steal searches, the person of anyone . . . captured in the course of warlike operations, or . . . detained in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities, . . . shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.[256]

271. The UK Air Force Act as amended provides that:

Any person subject to air-force law who –

(a) steals from, or with intent to steal searches, the person of anyone . . . captured in the course of warlike operations, or . . . detained in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities, . . . shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.[257]

272. Under Venezuela's Code of Military Justice as amended, it is a crime against international law to "plunder . . . prisoners of war".[258]

273. Under Yemen's Military Criminal Code, any person who despoils a prisoner is guilty, upon conviction, of a war crime.[259]

[253] Singapore, *Armed Forces Act as amended* (1972), Section 18(a).
[254] Spain, *Military Criminal Code* (1985), Article 77(2).
[255] Spain, *Penal Code* (1995), Article 612(7).
[256] UK, *Army Act as amended* (1955), Section 30(a).
[257] UK, *Air Force Act as amended* (1955), Section 30(a).
[258] Venezuela, *Code of Military Justice as amended* (1998), Article 474(11).
[259] Yemen, *Military Criminal Code* (1998), Article 20.

National Case-law
274. No practice was found.

Other National Practice
275. No practice was found.

III. Practice of International Organisations and Conferences

United Nations
276. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law . . . Under the Statute of the International Criminal Court (ICC), . . . they are recognized as war enimes".[260]

Other International Organisations
277. No practice was found.

International Conferences
278. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

279. In the *Tadić case* before the ICTY in 1995, the accused was charged with participation in the plunder and destruction of personal and real property of non-Serbs and looting of valuables of non-Serbs both when they were captured and upon their arrival in camps and detention centres.[261] In its judgement in 1997, the ICTY Trial Chamber held that, in the absence of evidence, the accused could not be convicted of having taken part in the plunder and looting of valuables or personal property.[262]
280. In the *Jelisić case* before the ICTY in 1995, the accused was charged with violation of the laws and customs of war (plunder of private property).[263] In its judgement in 1999, the ICTY Trial Chamber found the accused guilty of the plunder of private property under Article 3(e) of the 1993 ICTY Statute. It held that plunder was the "fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto". It further held that "the individual acts of plunder

[260] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[261] ICTY, *Tadić case*, Second Amended Indictment, 14 December 1995, §§ 4 and 4.2.
[262] ICTY, *Tadić case*, Judgement, 7 May 1997, §§ 448 and 464.
[263] ICTY, *Jelisić case*, Initial Indictment, 21 July 1995, § 42.

perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators". The defendant pleaded guilty to the offence of having stolen money, watches, jewellery and other valuables from detainees on their arrival at Luka camp in Bosnia and Herzegovina.[264]

281. In the *Delalić case* before the ICTY in 1996, the accused were charged, *inter alia*, with violations of the laws and customs of war (plunder of private property) for having "participated in the plunder of money, watches and other valuable property belonging to persons detained at Čelebići camp".[265] However, in its judgement in 1998, the ICTY eventually dismissed this count.[266] It stated that:

> . . . even when considered in the light most favourable to the Prosecution, the evidence before the Trial Chamber fails to demonstrate that any property taken from the detainees in the čelebići prison-camp was of sufficient monetary value for its unlawful appropriation to involve grave consequences for the victims. Accordingly, it is the Trial Chamber's opinion that the offences, as alleged, cannot be considered to constitute such serious violations of international humanitarian law that they fall within the subject matter jurisdiction of the International Tribunal pursuant to Article 1 of the Statute. Count 49 of the Indictment is thus dismissed.[267]

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

282. No practice was found.

VI. Other Practice

283. No practice was found.

F. Recording and Notification of Personal Details of Persons Deprived of Their Liberty

I. Treaties and Other Instruments

Treaties

284. Article 14, first paragraph, of the 1899 HR provides that:

> A bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and, when necessary, in the neutral countries on whose territory belligerents have been received. This bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to

[264] ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 46–49.
[265] ICTY, *Delalić case*, Initial Indictment, 21 March 1996, § 37.
[266] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 584–592 and 1154, and Part VI (Judgement).
[267] ICTY, *Delalić case*, Judgement, 16 November 1998, § 1154

keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital and death.

285. Article 14, first paragraph, of the 1907 HR provides that:

> An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in the neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war.

286. Article 122 GC III provides that each party shall institute an official Information Bureau for POWs whose function it is to collect detainees' details and location and forward them to the powers concerned.

287. Article 123 GC III provides that "a Central Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency." Its function is to collect all information respecting detainees – notably the capture cards – and transmit it to the powers concerned.

288. With respect to civilian internees, Articles 136, 137 and 140 GC IV contain regulations that are analogous to those applicable to prisoners of war found in Articles 122 and 123 GC III.

289. Article XI of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that "States Parties shall establish and maintain official up-to-date registries of their detainees and shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities".

290. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords stated that, in order to speed up the release process, the parties were to draw up comprehensive lists of prisoners, including details of their nationality, name, rank, and any internment or military serial number, and provide these to the ICRC, the other parties, the Joint Military Commission and the High Representative within 21 days.

Other Instruments

291. Rule 7 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that:

> In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
> (a) information concerning his identity;
> (b) the reasons for his commitment and authority therefor;
> (c) the day and hour of his admission and release.

292. Rule 8 of the 1987 European Prison Rules provides that:

> In every place where persons are imprisoned a complete and secure record of the following information shall be kept concerning each prisoner received:
> *a.* information concerning the identity of the prisoner;
> *b.* the reasons for commitment and the authority therefor;
> *c.* the day and hour of admission and release.

293. Principle 16 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

> Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

294. Paragraph 3 of the 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that "both Parties shall exchange the lists of all prisoners, with precise indication of the place where these prisoners are detained, and copies of these lists shall be handed over to the representative of the ICRC".

295. Paragraph 2 of Agreement No. 2 on the Implementation of the Agreement of 22 May 1992 between the Parties to the Conflict in Bosnia and Herzegovina provided that a Commission, consisting of four liaison officers appointed by the parties, would be created under the auspices of the ICRC and assume the exchange of lists of prisoners.

296. Section IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina provided that "the parties will notify the ICRC of the identity of all persons captured or detained".

297. Article 6(2) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that "each party will notify the ICRC . . . of the name and location of any other places where prisoners are being held on the territory under its control and of all prisoners held in those places".

298. Article 3 of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that:

> Shall remain prohibited at any time and in any place whatsoever with respect to persons [*hors de combat*] . . . failure to report the identity, personal condition and circumstances of a person deprived of his/her liberty for reasons related to the armed conflict to the Parties to enable them to perform their duties and responsibilities under this Agreement and under international humanitarian law.

299. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "sufficient information shall be made available concerning persons who have been deprived of their liberty".

300. Section 8(a) of the 1999 UN Secretary-General's Bulletin, regarding the treatment of detained persons, provides that "their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families".

II. National Practice

Military Manuals

301. Argentina's Law of War Manual provides that "upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power". It further notes that each of the Parties to the conflict shall give its Bureau the information regarding any enemy person who has fallen into its Power. The manual adds that:

> The information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent . . .
>
> A Central Prisoners of War Information Agency shall be created in a neutral country . . . The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend.[268]

302. Australia's Commanders' Guide provides that "basic identifying information is required by the enemy to enable notification of capture to the Central PW Information Bureau".[269]

303. Burkina Faso's Disciplinary Regulations provides that "a list of evacuated prisoners shall be established as soon as possible".[270]

304. Cameroon's Instructors' Manual provides that all prisoners arriving in camps shall be identified, registered and recorded.[271] It further states that a list of prisoners shall be established and sent to the National Information Bureau.[272]

305. Cameroon's Disciplinary Regulations provides that "a list of prisoners must be established as soon as possible. When operations permit, the list must be communicated to the official organs of the Red Cross."[273]

[268] Argentina, *Law of War Manual* (1969), §§ 2.101 and 2.102.
[269] Australia, *Commanders' Guide* (1994), § 710.
[270] Burkina Faso, *Disciplinary Regulations* (1994), Article 36(4).
[271] Cameroon, *Instructors' Manual* (1992), p. 118, § 431.
[272] Cameroon, *Instructors' Manual* (1992), p. 46, § 163.
[273] Cameroon, *Disciplinary Regulations* (1975), Article 33.

306. Canada's LOAC Manual provides that an official information bureau shall be established at the outbreak of hostilities to gather and pass on all information concerning POWs.[274] It further states that:

> Each party is bound, as soon as possible, to give its bureau full particulars relating to the placing in custody for more than 2 weeks, the placing in assigned residence, or internment, of any protected person . . . It is the duty of each party to see that its various departments give the bureau prompt information concerning the protected persons, e.g., transfers, releases, repatriations, escape, admissions to hospital, births and deaths.[275]

307. Congo's Disciplinary Regulations states that "a list of evacuated prisoners must be established as soon as possible".[276]

308. El Salvador's Soldiers' Manual provides that "suspected civilian persons who have been detained must be listed in the register of accused persons, which has to be notified to the ICRC delegate on the day of his or her visit to the place of detention".[277] It also states that "enemies who surrender must be captured [and] . . . their names must be listed in the register of accused persons".[278]

309. France's LOAC Summary Note provides that "the identity of POWs shall be established as soon as possible".[279]

310. France's LOAC Teaching Note provides that the identity of every prisoner of war "shall be established as soon as possible and be mentioned on an identity card which shall be given to him at this occasion".[280]

311. Germany's Military Manual provides that:

> The Detaining Power is obliged to forward information regarding the fate of prisoners of war . . . For this purpose each of the Parties to the conflict shall institute a National Information Bureau upon the outbreak of a conflict and in all cases of occupation. The Bureau shall cooperate with the Central Tracing Agency of the ICRC.[281]

312. India's Manual of Military Law provides that after arrest under the Armed Forces (Special Powers) Act, a list of persons arrested shall be prepared.[282]

313. Indonesia's Military Manual states that "the parties to the conflict should maintain a register of captured persons, imprisoned persons, detainees and those who have died after capture".[283]

314. According to Israel's Manual on the Laws of War, during the Yom Kippur War, "the Arab States deprived Israeli prisoners of war of their rights according

[274] Canada, *LOAC Manual* (1999), p. 10-6, § 50.
[275] Canada, *LOAC Manual* (1999), p. 11-7, § 59.
[276] Congo, *Disciplinary Regulations* (1986), Article 33.
[277] El Salvador, *Soldiers' Manual* (undated), p. 6.
[278] El Salvador, *Soldiers' Manual* (undated), p. 9.
[279] France, *LOAC Summary Note* (1992), § 2.1.
[280] France, *LOAC Teaching Note* (2000), p. 3.
[281] Germany, *Military Manual* (1992), § 708.
[282] India, *Manual of Military Law* (1983), §§ 5/3 and 5/6.
[283] Indonesia, *Military Manual* (1982), § 98.

to the Geneva Convention, and even refused to hand over lists of the prisoners held by them".[284]

315. Madagascar's Military Manual provides that to protect victims of armed conflict, the ICRC shall "record the prisoners of war to prevent their disappearance".[285]

316. Mali's Disciplinary Regulations provides that "the list of evacuated prisoners must be established as soon as possible".[286]

317. Morocco's Disciplinary Regulations provides that a list of evacuated prisoners must be established as soon as possible.[287]

318. The Military Manual of the Netherlands provides that:

> Upon the outbreak of an armed conflict, each of the Parties to the conflict shall institute an Information Bureau. The Bureau shall be charged with the collecting and the forwarding of information concerning prisoners of war and other protected persons. The Bureau shall also make any enquiries to obtain the desired information about prisoners of war.[288]

319. New Zealand's Military Manual provides that an official information bureau shall be set up at the outbreak of hostilities in order to collect and transfer all information concerning POWs.[289] According to the manual, the same rule applies to protected persons falling under GC IV.[290]

320. Senegal's IHL Manual provides that, in a situation of internal disturbances, a list of arrested persons shall be made and sent to the ICRC.[291]

321. Spain's LOAC Manual provides that:

> Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, serial number or equivalent, and date of birth. The identity card may, furthermore, bear any other information the party to the conflict may wish to add concerning persons belonging to its armed forces.[292]

Concerning interned persons, the manual states that "family or identity documents in the possession of internees may not be taken away without a receipt being given".[293]

322. Switzerland's Basic Military Manual states that "upon the outbreak of a conflict and in all cases of occupation, official bureaux of information shall be created on the territory of the Parties to the conflict and on those of the Neutral Powers having received members of foreign armed forces". It adds that "a Central Prisoners of War Information Agency shall be created in a neutral country by the ICRC. The Agency shall collect all the important information

[284] Israel, *Manual on the Laws of War* (1998), p. 43.
[285] Madagascar, *Military Manual* (1994), Fiche No. I-T, § 22.
[286] Mali, *Disciplinary Regulations* (1979), Article 36.
[287] Morocco, *Disciplinary Regulations* (1974), Article 25(3).
[288] Netherlands, *Military Manual* (1993), pp. VII-12/VII-13.
[289] New Zealand, *Military Manual* (1992), § 936.
[290] New Zealand, *Military Manual* (1992), § 1134(1).
[291] Senegal, *IHL Manual* (1999), p. 15.
[292] Spain, *LOAC Manual* (1996), Vol. I, § 8.2.(d).2.
[293] Spain, *LOAC Manual* (1996), Vol. I, § 6.8.(d).

on prisoners and transmit it as rapidly as possible to the country of origin of the prisoners of war."[294]

323. The UK Military Manual provides that:

> At the beginning of hostilities, each belligerent is to set up an official information bureau for prisoners of war whom it holds . . .
>
> A belligerent must inform its information bureau as soon as possible about all persons who have fallen into its power. The information bureau must be supplied with information as to transfers, releases, repatriations, escapes, admissions to hospital, and death. The bureau will then transmit all such information immediately to the Powers concerned through the intermediary of the Protecting Powers, and likewise through the Central Agency.[295]

324. The US Field Manual reproduces Articles 122 and 123 GC III.[296]

325. The US Air Force Pamphlet provides that "each party to the conflict must issue an identity card to every person under its jurisdiction liable to become a PW showing name, rank, serial number, and date of birth".[297]

National Legislation

326. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the Armed Forces of Azerbaijan Republic, the appropriate authorities and governmental organs shall ensure the registration of all prisoners of war of the adverse party by recording their name, surname, military rank, date of birth and place of permanent residence".[298]

327. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[299]

328. China's Martial Law Enforcement Act provides that, during periods of martial law, the provisions of the Code of Criminal Procedure relating to procedures and time limits for arrest and detention no longer apply. Nevertheless, it specifies that the personnel on duty shall register all those detained under the Act and shall immediately release those who no longer need to be detained.[300]

329. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 122 and 123 GC III and 136, 137 and 140 GC IV, is a punishable offence.[301]

330. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[302]

[294] Switzerland, *Basic Military Manual* (1987), §§ 115–116.
[295] UK, *Military Manual* (1958), § 269.
[296] US, *Field Manual* (1956), §§ 203 and 204.
[297] US, *Air Force Pamphlet* (1976), § 13-3.
[298] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 20.
[299] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[300] China, *Martial Law Enforcement Act* (1996), Article 27.
[301] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[302] Norway, *Military Penal Code as amended* (1902), § 108(a).

National Case-law

331. No practice was found.

Other National Practice

332. In 1995, during a debate in the UN Security Council regarding persons unaccounted for in Bosnia and Herzegovina, Botswana stressed that the Bosnian Serbs had an obligation under international law to facilitate the registration of all persons they held prisoner.[303]

333. The Report on the Practice of Israel states that "the IDF takes great care to ensure that all individuals detained or captured by it are meticulously documented, so as to enable their speedy identification and repatriation where feasible.[304]

334. In 1991, in a report submitted the UN Security Council on operations in the Gulf War, the UK stated that:

> The Iraqi Ambassador was asked whether the Iraqi Government was holding any British prisoners of war and reminded of Iraq's obligations under the Third Geneva Convention to notify the names of any prisoners held . . . The Iraqi Ambassador gave an assurance that any British prisoners of war would be treated in accordance with the Geneva Conventions and their names would be given to the ICRC.[305]

335. In 1990, in a meeting with the ICRC, a senior police official of a State engaged in a non-international armed conflict, commenting on the possibility that the police force might be engaged in hiding detainees, stated that all detainees were registered as required.[306]

336. In 1990, ICRC efforts in a State engaged in a non-international armed conflict resulted in the adoption of guidelines issued by the government to be followed when persons were in custody, including a requirement that detainees be registered immediately and their names transmitted to the central authorities within 24 hours.[307]

III. Practice of International Organisations and Conferences

United Nations

337. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly demanded that the representatives of the FRY "provide an updated list of all persons detained and transferred from Kosovo to other parts of the FRY, specifying the charge, if any, under which each individual is detained".[308]

[303] Botswana, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 5.
[304] Report on the Practice of Israel, 1997, Chapter 5.2.
[305] UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.
[306] ICRC archive document.
[307] ICRC archive document.
[308] UN General Assembly, Res. 54/183, 17 December 1999, § 9.

338. In a resolution adopted in 1985 on the question of human rights of persons subjected to any form of detention or imprisonment, the UN Sub-Commission on Human Rights recommended the adoption of a Declaration against Unacknowledged Detention providing that governments shall:

> disclose the identity, location and condition of all persons detained by members of their police, military or security authorities or others acting with their knowledge, together with the cause of such detention . . . In countries where legislation does not exist to this effect, steps shall be taken to enact such legislation as soon as possible.[309]

Other International Organisations

339. No practice was found.

International Conferences

340. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that irrespective of GC III, "the international community has consistently demanded humane treatment for prisoners of war, including identification and accounting for all prisoners".[310]

IV. Practice of International Judicial and Quasi-judicial Bodies

341. In its report in *Kurt v. Turkey* in 1996, the ECiHR found that "the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention . . . [had to] be seen as incompatible with the very purpose of Article 5 of the Convention" on the right to liberty and security.[311] In its judgement in this case in 1998, the ECtHR confirmed this view.[312]

342. In the section of its Annual Report 1980–1981 concerning disappearance after detention, the IACiHR recommended that "central records be established to account for all persons that have been detained, so that their relatives and other interested persons may promptly learn of any arrests".[313] Similar recommendations were made specifically in the contexts of Argentina in 1980,[314] Chile in 1985[315] and Peru in 1993.[316]

[309] UN Sub-Commission on Human Rights, Res. 1985/26, 29 August 1985, Article 2, p. 107.
[310] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.
[311] ECiHR, *Kurt v. Turkey*, Report, 5 December 1996, § 125.
[312] ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, § 125.
[313] IACiHR, *Annual Report 1980-1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, 16 October 1981, pp. 113 and 129.
[314] IACiHR, Report on the situation of human rights in Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19, 11 April 1980, p. 264.
[315] IACiHR, Report on the situation of human rights in Chile, Doc. OEA/Ser.L/V/II.66 Doc. 17, 9 September 1985, p. 72.
[316] IACiHR, Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 60.

343. In the section of its Annual Report 1987–1988 concerning Guatemala, the IACiHR made the following recommendation to the government of Guatemala:

> To cause the Central Register of Detainees to function as originally proposed, that is, that every judicial, police, security and military authority competent to make arrests be required to inform this Central Register of the detention of any person within 24 hours of having done so, and that the record made thereof shall include the detainee's name, the date and hour of his detention, the identity of the detaining authority, the date on which the detainee was brought before a competent court, an itemized account of every transfer of the detainee from place to place and, if he is released, the date and place thereof and the reason thereof.[317]

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

344. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that POWs shall be identified, listed and the location of camps given to the parties concerned.[318]

345. According to the ICRC, all parties to an international armed conflict have the obligation to collect and forward information on protected persons. The detaining party must notify the adverse party, via the Protecting Power and the Central Tracing Agency, of all the details specified under IHL. In practice, the Tracing Agency does not always confine itself to playing the role of intermediary, but actively seeks to ensure that the parties collect and pass on such information; in some cases, it even does so itself. In non-international armed conflicts, international humanitarian treaty law does not provide for the collection of information on persons deprived of their liberty to the same extent as it does in international armed conflicts. However, it is essential that such information be gathered if detainees are to be followed individually, in some cases after their release. The ICRC therefore asks the authorities for lists of persons deprived of their liberty with whom it is concerned. If no lists are forthcoming, it draws them up itself when conducting its visits. By recording names and keeping track of the persons it visits, the ICRC can prevent extra-judicial executions and enforced disappearances and follow each person throughout his/her period of deprivation of liberty (arrest, transfer, release, etc.). Moreover, in cases where the authorities do not draw up lists or keep a register of names, the ICRC recommends that such a register be kept along with reliable information on the arrest, transfer, whereabouts and release of persons deprived of their liberty. In non-international armed conflicts, as opposed to international ones, the Tracing Agency does not notify the names of detainees to the adverse party. Whether an armed conflict is international or not, the

[317] IACiHR, *Annual Report 1987–1988*, Doc. OEA/Ser.L/V/II.74 Doc. 10 rev. 1, 16 September 1988, p. 302.

[318] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 676, 682 and 683, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

ICRC never forwards information on persons deprived of their liberty if this could have adverse consequences for them or their families.

346. In 1992, the ICRC solemnly appealed to all parties to the conflict in Bosnia and Herzegovina to "notify [it] immediately of all places of detention in Bosnia and Herzegovina, and [to] supply accurate lists of all persons held in such places".[319]

347. In 1996, the ICRC requested that a separatist entity engaged in armed conflict provide it with details of all new detainees.[320]

VI. Other Practice

348. Section 24(1) of the SPLM/A Penal and Disciplinary Laws requires that "every Battalion Commander shall maintain a register" of military personnel and the keeping of records pertaining to such personnel in the SPLM/A headquarters, on the premise that this will facilitate the search for any persons who later go missing.[321] The Report on SPLM/A Practice notes that:

> The SPLM/A also used to announce names of Government of Sudan Officers and men and any personnel that they captured from the government when Radio SPLA was operational. The SPLM/A today still publishes in their bulletins names and other particulars of officers and men and personnel that fall into the hands of the SPLA during military operations.[322]

349. In 1994, in a meeting with the ICRC, an armed opposition group agreed to notify the ICRC of all detained soldiers and officers.[323]

350. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "accurate information on . . . detention and whereabouts [of persons deprived of their liberty], including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information".[324]

G. ICRC Access to Persons Deprived of Their Liberty

I. Treaties and Other Instruments

Treaties

351. Article 126 GC III and Articles 76, sixth paragraph, and 143 GC IV provide that the representatives or delegates of the protecting powers and the delegates

[319] ICRC, Solemn Appeal to All Parties to the Conflict in Bosnia and Herzegovina, 13 August 1992, *IRRC*, No. 290, 1992, pp. 492–493.
[320] ICRC archive document.
[321] SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 24, § 1.
[322] Report on SPLM/A Practice, 1998, Chapter 5.2.
[323] ICRC archive document.
[324] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4(1), *IRRC*, No. 282, p. 332.

of the ICRC (whose appointment shall be submitted to the approval of the detaining power) shall have permission to go to all places where POWs and protected persons may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by them. They shall be able to interview the detainees, and in particular the detainees' representatives, without witnesses, either personally or through an interpreter. They shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. The detaining power and the power on which the detainees depend may agree, if necessary, that compatriots of these detainees be permitted to participate in the visits.

352. Articles 56, third paragraph, GC III and Article 96 GC IV provide that delegates of the protecting power, the ICRC or other agencies giving relief to POWs may visit labour detachments.

353. Article 125 GC III provides that any organisation assisting prisoners of war shall receive "all necessary facilities for visiting the prisoners . . . The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times." Article 142 GC IV contains the same provision as in Article 125 GC III for protected persons.

354. Common Article 3 of the 1949 Geneva Conventions provides that, in the case of armed conflict not of an international character, "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict".

355. Article 9 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel designated Red Cross Societies with the task of visiting all places of detention.

356. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords provided that the ICRC was to enjoy "full and unimpeded access to all places where prisoners are kept and to all prisoners".

Other Instruments

357. In the 1969 Agreement between the Government of Greece and the ICRC, it was agreed that ICRC delegates shall have access:

> to all places where administrative deportees are permanently or temporarily held, namely: camps for deportees, places of temporary detention pending transfer, infirmaries and hospitals . . .
>
> . . . to all prisons and other premises within the country where persons accused of or condemned for political offences are detained . . .

... to all police stations where people are temporarily detained pending preliminary enquiries into political offences, so that they may form a personal opinion on the state of the premises and the conditions of detention.

358. Article 5(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement provides that it is the role of the ICRC "to undertake the tasks incumbent upon it under the Geneva Conventions" and "to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results". Article 5(3) provides that the ICRC "may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution".

359. Principle 29 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

360. Paragraph 4 of the 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that "the signatories of the agreement agree to proceed to the exchange immediately after the ICRC has recorded and visited the prisoners in conformity with its specific criteria".

361. Section IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina provided that:

- ICRC delegates will have free access to all persons captured or detained;
- ICRC delegates will be authorized to interview these persons without witnesses, to register them, to inform their families about their welfare and whereabouts, and to repeat such visits whenever necessary.

362. Article 8 of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that "the ICRC shall have free access to all prisoners and may make a census of the population of any place of detention with a view to drawing up a specific plan of operation as provided in Article 3".

363. Paragraph 2.4 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the ICRC

shall have free access to all captured combatants in order to fulfil its humanitarian mandate according to the third Geneva Convention of 12 August 1949".
364. In paragraph 5 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition agreed "to confirm their earlier commitment to ensure the unimpeded access by delegates of ICRC and members of the Joint Commission to places where the detainees and prisoners of war are being held, both during the present operation [of prisoner exchange] and in future".
365. Section 8(g) of the 1999 UN Secretary-General's Bulletin provides that the "ICRC's right to visit prisoners and detained persons shall be respected and guaranteed".

II. National Practice

Military Manuals
366. Argentina's Law of War Manual provides that:

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter . . .

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and the frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure . . .

The delegates of the ICRC shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.[325]

367. Belgium's Law of War Manual provides that "Prisoners of War have the right to apply to the representative of the Protecting Power". It further states that "the Protecting Power and the ICRC shall have access to all premises occupied by prisoners of war".[326]
368. Benin's Military Manual provides that one of the functions of the ICRC is to protect and assist the victims by visiting prisoners of war, security detainees and interned persons.[327]
369. Canada's LOAC Manual provides that:

In accordance with GC III, delegates or representatives of Protecting Powers and of the ICRC shall be permitted to visit all places where PWs may be, including places

[325] Argentina, *Law of War Manual* (1969), § 2.105.
[326] Belgium, *Law of War Manual* (1983), p. 47.
[327] Benin, *Military Manual* (1995), Fascicule I, p. 8.

of detention and labour, and may interview PWs and PWs' representatives without witnesses, either personally or through interpreters.[328]

Concerning persons undergoing sentence of imprisonment, the manual provides that "protected persons who are detained have the right to be visited by delegates of the Protecting Power and of the ICRC".[329]

370. Ecuador's Naval Handbook recognises the special status of the ICRC and recalls its specific tasks: visiting and interviewing prisoners of war.[330]

371. El Salvador's Soldiers' Manual provides that the prisoners' "control book", which contains the names of all civilian and combatant detainees, shall be notified to the ICRC the day of its visit to the detention centre.[331] It states that one of the principal functions of the ICRC is to visit prisoners and to talk with them without witnesses.[332]

372. Israel's Manual on the Laws of War provides that, during their captivity, prisoners are to be concentrated in internment camps and must be under Red Cross supervision.[333]

373. Madagascar's Military Manual provides that to protect the victims of war, the ICRC shall repeat its visits to prisoners of war.[334]

374. New Zealand's Military Manual stipulates that:

> Delegates or representatives of Protecting Powers and of the ICRC shall be permitted to visit all places where prisoners of war may be, including places of detention and labour, and may interview prisoners and prisoners' representatives without witnesses, either personally or through interpreters.[335]

375. Spain's LOAC Manual provides that the ICRC shall be allowed to visit POWs and internees under the usual conditions.[336]

376. Sweden's IHL Manual provides that "inspection of prisoner of war camps under the III Geneva Convention has become one of the most important duties of a Protecting Power and of the ICRC".[337]

377. Switzerland's Basic Military Manual provides that:

> The Protecting Powers and the ICRC shall ensure respect for the international rules established in favour of prisoners of war to protect their interests. To this effect, they shall cooperate with the Detaining Power, which shall facilitate their tasks. The prisoners of war shall always have the ability to lodge complaints to the Protecting Power.[338]

[328] Canada, *LOAC Manual* (1999), p. 10-6, § 51.
[329] Canada, *LOAC Manual* (1999), p. 12-7, § 62(c).
[330] Ecuador, *Naval Manual* (1989), § 6.2.2.
[331] El Salvador, *Soldiers' Manual* (undated), p. 6.
[332] El Salvador, *Soldiers' Manual* (undated), p. 11.
[333] Israel, *Manual on the Laws of War* (1998), p. 52.
[334] Madagascar, *Military Manual* (1994), Fiche No. I-T, § 22.
[335] New Zealand, *Military Manual* (1992), § 937.
[336] Spain, *LOAC Manual* (1996), Vol. I, §§ 6.4.j and 6.8.j.
[337] Sweden, *IHL Manual* (1991), Section 4.1, p. 92.
[338] Switzerland, *Basic Military Manual* (1987), Article 108.

378. Togo's Military Manual provides that one of the functions of the ICRC is to protect and assist the victims by visiting prisoners of war, security detainees and interned persons.[339] The manual, referring to the Geneva Conventions, further reaffirms the right of the ICRC to visit these persons.[340]

379. The UK Military Manual states that "if no protection can be arranged, the Detaining Power must request, or shall accept, the offer of the services of a humanitarian organisation, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by the Protecting Power".[341] It further provides that representatives or delegates of the protecting powers or the ICRC shall be allowed to visit all POW camps. It points out that "delegates of the International Committee of the Red Cross enjoy the same privileges as those of Protecting Powers. Their appointment must be submitted to the Detaining Power for approval."[342] The manual specifies that "refusing prisoners of war access to the Protecting Power" is a war crime.[343]

380. The US Field Manual reproduces Articles 126 GC III and 142 and 143 GC IV.[344]

381. The UK LOAC Manual states that:

> The Protecting Power has various functions, notably to inspect PW camps and to deal with prisoners' appeals for help in correcting any violations of the [Third Geneva] Convention by the Detaining Power. If no neutral Protecting Power has been appointed, its functions can be exercised by the ICRC or some other humanitarian organisation, subject to the consent of the parties to the conflict concerned.[345]

382. The US Operational Law Handbook provides that, subject to essential security needs and other reasonable requirements, the ICRC must be permitted to visit POWs and provide them with certain types of relief.[346]

383. The US Naval Handbook recognises the special status of the ICRC and recalls its specific tasks: visiting and interviewing prisoners of war.[347]

National Legislation

384. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[348]

385. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 56, 125 and 126 GC III and 76, 96, 142 and 143 GC IV, is a punishable offence.[349]

[339] Togo, *Military Manual* (1995), Fascicule I, p. 8.
[340] Togo, *Military Manual* (1995), Fascicule I, p. 11.
[341] UK, *Military Manual* (1958), § 277.
[342] UK, *Military Manual* (1958), § 278.
[343] UK, *Military Manual* (1958), § 626.
[344] US, *Field Manual* (1956), §§ 207 and 349–350.
[345] UK, *LOAC Manual* (1981), Section 8, p. 33, § 20.
[346] US, *Operational Law Handbook* (1993), p. Q-187.
[347] US, *Naval Handbook* (1995), § 6.2.2.
[348] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[349] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

386. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... is liable to imprisonment".[350]

National Case-law

387. No practice was found.

Other National Practice

388. In 1982 and 1987, the government in Afghanistan allowed the ICRC to conduct visits to prisoners according to its criteria, but occasionally revoked that permission.[351]

389. In 1989, in a statement before the HRC, Chile reported that Red Cross delegates had been able to visit all detainees including those held incommunicado.[352]

390. In 1983, in a statement before the HRC, El Salvador reported that an agreement had been signed by the Salvadoran government to enable the ICRC to be notified of the detention of prisoners and to visit and interview them with a doctor and without government witnesses.[353] In 1987, it emphasised that the ICRC was informed of arrests and could visit detainees in any detention centre whatsoever.[354]

391. According to the Report on the Practice of France, access to prisoner camps, wherever they are, must be granted, in particular to the ICRC, to allow it to monitor the conditions of detention and bring humanitarian aid.[355]

392. In 1995, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Germany expressed its full support for the ongoing efforts of the ICRC to gain access to detainees.[356]

393. The Lebanese authorities have permitted the ICRC to visit detained persons on several occasions, in accordance with ICRC procedures.[357]

394. In 1995, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Oman stated that it was unacceptable to the international community that neither the UN nor the ICRC had been granted access in order to establish the whereabouts of detainees.[358]

[350] Norway, *Military Penal Code as amended* (1902), § 108(a).
[351] ICRC, Press Release No. 1449, Afghanistan: the ICRC is authorized to visit prisoners, 27 August 1982; Press Release No. 1531, Resumption of ICRC Activities in Afghanistan, 3 February 1987.
[352] Chile, Statement before the HRC, UN Doc. CCPR/C/SR.943, 6 November 1989, § 42.
[353] El Salvador, Statement before the HRC, UN Doc. CCPR/C/SR.468, 31 October 1983, § 37.
[354] El Salvador, Statement before the HRC, UN Doc. CCPR/C/SR.719, 2 April 1987, § 3.
[355] Report on the Practice of France, 1999, Chapter 5.3.
[356] Germany, Statement before the UN Security Council, UN Doc. S/PV.3564, 10 August 1995, p. 4.
[357] ICRC, *Annual Report 1990*, Geneva, 1991, p. 84.
[358] Oman, Statement before the UN Security Council, UN Doc. S/PV.3564, 10 August 1995, p. 5.

395. In May 2000, visits to detainees in Northern Caucasus began after the ICRC received formal authorisation from the President of the Russian Federation granting access to "all persons held in connection with security operations" in Chechnya. The ICRC carried out visits to detainees held under the responsibility of the Ministries of Justice and the Interior and the Federal Security Service.[359]

396. In 1990, in a speech following the arrest of 2,500–3,000 persons on suspicion of collaboration with the RPF, the President of Rwanda declared that "the ICRC . . . had already visited all our prisons, according to its methods, . . . without any impediment whatsoever, . . . and in accordance with international agreements".[360]

397. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that:

> On 19 January [1991] the Iraqi Ambassador was asked whether the Iraqi Government was holding any British prisoners of war and reminded of Iraq's obligations under the Third Geneva Convention to . . . arrange access by the ICRC. The Iraqi Ambassador gave an assurance that any British prisoners of war would be treated in accordance with the Geneva Conventions . . . The British Government has made clear to the Iraqi Ambassador . . . [that] the British Government will be allowing full access by the ICRC both to Iraqi prisoners of war and to Iraqi citizens detained in the United Kingdom.[361]

398. In 1991, in another report submitted to the UN Security Council on operations in the Gulf War, the UK reported that:

> We have made the strongest representations again to the International Committee of the Red Cross, the representatives of which have been here seeking access to Iraqis who have been detained to ensure that they are receiving proper treatment. They were naturally granted access we gave them every opportunity, to which they are entitled, to visit Iraqis to see whether they are receiving proper treatment. We have insisted that similar facilities must be available to representatives of the International Red Cross in Baghdad.[362]

399. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle . . . that the ICRC and the relevant Red Cross or Red Crescent organizations be granted all necessary facilities and access to enable them to carry out their humanitarian functions".[363]

[359] ICRC, *Annual Report 2000*, Geneva, 2001, p. 168.
[360] Rwanda, Speech by the President, 15 October 1990, p. 6.
[361] UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.
[362] UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 2; see also Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/2221, 13 February 1991, p. 2.
[363] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

400. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that it expected "the Government of Iraq . . . to provide the International Committee of the Red Cross with access to prisoners of war as will be done by the United States".[364]

401. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that:

> The coalition forces are granting ICRC timely access to all Iraqi prisoners of war. Iraqi authorities have continued to ignore the standards of the Geneva conventions in blatant disregard for international law. They have denied access to coalition prisoners of war by ICRC.[365]

402. In 1982, in a statement before the HRC, Uruguay stated that even at the height of the crisis, the government had invited the ICRC to visit the prisons in which all subversives had been incarcerated and they had been able to interview the prisoners in private.[366]

403. In a press release issued in 1994, the ICRC noted that the parties to the internal conflict in Yemen had agreed to allow it to visit interned combatants.[367]

404. In 1979, the Interior Minister of a State emphasised that the ICRC was not covered by the introduction of restrictions on visits to prisoners and that the government wanted to continue its collaboration with the organisation.[368]

405. In 1985, a third State on whose territory an armed opposition group held its prisoners agreed to allow the ICRC to visit all captured combatants.[369]

406. In 1987, in the context of a non-international armed conflict, the authorities stated that the ICRC did not have the right to visit persons deprived of their liberty, but later granted it access to detainees.[370]

407. In 1991, in the context of a non-international armed conflict, the authorities stated that the ICRC did not have the right to visit persons deprived of their liberty, but later granted it access to detainees.[371]

408. In 1992, a State involved in a non-international armed conflict agreed to allow the ICRC to visit all detention facilities in accordance with the ICRC's standard procedures.[372]

409. In 1994, a State denied charges by a separatist entity of impeding visits by ICRC delegates and issued in 1995 specific orders to allow the ICRC to conduct visits according to its criteria.[373]

[364] US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, Annex I, p. 2, see also Annex III, p. 4.
[365] US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2; see also Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991.
[366] Uruguay, Statement before the HRC, UN Doc. CCPR/C/SR.355, 8 April 1982, § 10.
[367] ICRC, Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.
[368] ICRC archive document.
[369] ICRC archive document.
[370] ICRC archive document.
[371] ICRC archive document.
[372] ICRC archive document.
[373] ICRC archive documents.

410. In 1995 and 1996, in the context of a non-international armed conflict, the governmental authorities permitted the ICRC to visit detained persons on several occasions, in accordance with ICRC procedures.[374]

III. Practice of International Organisations and Conferences

United Nations

411. In two resolutions adopted in 1992, the UN Security Council demanded that the relevant international humanitarian organisations, and in particular the ICRC, be granted immediate, unimpeded and continued access to camps, prisons and detention centres within the territory of the former Yugoslavia and appealed to the parties to the conflict to do all in their power to facilitate such access.[375]

412. In a resolution adopted in 1994, the UN Security Council called for unhindered access by the ICRC to all persons detained by all parties to the conflict in Tajikistan.[376]

413. In a resolution adopted in 1995, the UN Security Council reminded the government of Croatia of its responsibility to allow access by representatives of the ICRC to members of the local Serb forces detained by Croatian government forces.[377]

414. In a resolution adopted in 1995, the UN Security Council demanded that the Bosnian Serb party permit representatives of the ICRC to visit and register any persons detained against their will, including any members of the forces of Bosnia and Herzegovina.[378]

415. In two resolutions adopted in 1995 in the context of the conflicts in the former Yugoslavia, the UN Security Council reiterated "its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to . . . persons detained" and condemned "in the strongest possible terms the failure of the Bosnian Serb party to comply with their commitments in respect of such access". It also reaffirmed its demand that:

> the Bosnian Serb party give immediate and unimpeded access to representatives of . . . the ICRC and other international agencies . . . to persons detained . . . and permit representatives of the ICRC (i) to visit and register any persons detained against their will, whether civilians or members of the forces of Bosnia and Herzegovina.[379]

416. In 1995, in a statement by its President, the UN Security Council reiterated its demand that the Bosnian Serb party permit representatives of the

[374] ICRC archive documents.
[375] UN Security Council, Res. 770, 13 August 1992, preamble; Res. 771, 13 August 1992, § 4.
[376] UN Security Council, Res. 968, 16 December 1994, § 10.
[377] UN Security Council, Res. 1009, 10 August 1995, § 3.
[378] UN Security Council, Res. 1010, 10 August 1995, § 1.
[379] UN Security Council, Res. 1019, 9 November 1995, preamble and § 2; Res. 1034, 21 December 1995, preamble and §§ 2-5.

ICRC to visit and register any persons detained against their will, including any members of the forces of Bosnia and Herzegovina.[380]

417. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties involved in armed conflicts to allow the ICRC to have access to POWs and to all places of detention.[381]

418. In a resolution adopted in 1992, the UN General Assembly requested that the ICRC:

> be granted immediate, unimpeded and continued access to all camps, prisons and to other places of detention within the territory of the former Yugoslavia and that all parties ensure complete safety and freedom of movement for the International Committee and otherwise facilitate such access.[382]

419. In a resolution adopted in 1998 on the question of human rights in Afghanistan, the UN Commission on Human Rights urged the parties to the Afghan conflict to provide the ICRC with access to all prisoners.[383]

420. In 1996, in a statement by its Chairman on the situation of human rights in Chechnya, the UN Commission on Human Rights called for "the International Committee of the Red Cross to be permitted to have regular access to all detainees, in conformity with its standard criteria, in order to verify the conditions of their detention and treatment".[384]

421. In 1999, in the context of the conflict in East Timor, the ICRC reported that the multinational force in East Timor, INTERFET:

> arrests and detains, generally for short periods, persons suspected of engaging in militia activities. The ICRC was consulted by INTERFET in the development of detention procedures to ensure that they were in accordance with international standards. [The ICRC] has access to persons arrested and detained by INTERFET, and regularly visits them in accordance with standard ICRC working procedures.[385]

Other International Organisations

422. In a resolution adopted in 1985 on the deteriorating situation in Afghanistan, the Parliamentary Assembly of the Council of Europe urged "the governments of member states of the Council of Europe . . . to intervene with all

[380] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/43, 7 September 1995.
[381] UN General Assembly, Res. 2676 (XXV), 9 December 1970, § 1.
[382] UN General Assembly, Res. 46/242, 25 August 1992, § 9; see also Res. 48/153, 20 December 1993, §§ 14–16, Res. 49/10, 3 November 1994, § 25 and Res. 49/196, 23 December 1994, §§ 23–24.
[383] UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(f).
[384] UN Commission on Human Rights, Chairman's statement on the situation of human rights in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/1996/L.10/Add.10, 24 April 1996, § 87.
[385] ICRC, Update No. 99/05 on ICRC Activities in Indonesia/East Timor, 29 November 1999, § 4.

United Nations member states to grant free access facilities for the Red Cross and Red Crescent to all the places they wish to visit".[386]

423. In a resolution adopted in 1994, the Parliamentary Assembly of the Council of Europe asked the government of Rwanda to encourage the ICRC to continue to visit places of detention of POWs, as well as police stations, and to allow international observers to visit other places of detention.[387]

424. In a resolution adopted in 1995 on the situation in some parts of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe demanded that UNHCR, the ICRC and other humanitarian organisations be given access to Bosnian Serb prisoner camps.[388]

425. In a resolution on Kosovo adopted in 1996, the Parliamentary Assembly of the Council of Europe called upon the governments of the FRY and the Republic of Serbia "to allow the ICRC immediate access to detainees".[389]

426. In a resolution adopted in 1996 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe invited member States to "give representatives of the ICRC access to persons detained in international or internal armed conflicts".[390]

427. In a recommendation on Kosovo in 1998, the Parliamentary Assembly of the Council of Europe urged the parties to the conflict to provide access to humanitarian organisations to detained persons.[391]

428. In a resolution adopted in 2000 on violations of human rights and humanitarian law in Chechnya, the European Parliament urged that "full access and appropriate conditions be ensured to enable international humanitarian assistance to be delivered and that access to detainees and internally displaced persons be granted".[392]

429. In 1995, in a statement before the OSCE Permanent Council, the EU requested that the ICRC be given unrestricted access to detainees in the context of the conflict in Chechnya.[393]

430. In a resolution adopted in 1997, the Council of the League of Arab States decided:

> To urge the Member States of the League [of Arab States] to use their good offices in international organisations so that all necessary representations are made to government of Israel, the occupying power, to enable the International Committee of the Red Cross and other humanitarian organisations to visit the detainees in Khiam and Marj Uyun periodically and on a regular basis, and to ensure that the

[386] Council of Europe, Parliamentary Assembly, Res. 854, 20 November 1985, § 6.
[387] Council of Europe, Parliamentary Assembly, Res. 1050, 10 November 1994, § 6(i)(c).
[388] Council of Europe, Parliamentary Assembly, Res. 1066, 27 September 1995, § 6(iv).
[389] Council of Europe, Parliamentary Assembly, Res. 1077, 24 January 1996, § 5(i)(b).
[390] Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(f)
[391] Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(iii)(a).
[392] European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, § 5.
[393] EU, Statement by the Presidency before the OSCE Permanent Council concerning the situation in Chechnya, 2 February 1995, pp. 3–4.

conditions in which they are being kept are inspected, that they are provided with health and humanitarian care and that their relatives are allowed to visit them regularly.[394]

431. In 1995, the OSCE Permanent Council requested that the ICRC be given unrestricted access to detainees in the context of the conflict in Chechnya.[395]
432. In a decision on the OSCE Minsk Process adopted in 1995, the OSCE Ministerial Council urged the parties to the conflict in Nagorno-Karabakh "to provide the ICRC unimpeded access to all places of detention and all detainees".[396]

International Conferences
433. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it called upon all authorities involved in an armed conflict "to ensure ... that the International Committee of the Red Cross is enabled to carry out its traditional humanitarian functions to ameliorate the condition of prisoners of war".[397]
434. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it called upon all parties "to allow the Protecting Power or the International Committee of the Red Cross free access to prisoners of war and to all places of their detention".[398]
435. The 24th International Conference of the Red Cross in 1981 adopted a resolution on humanitarian activities of the ICRC for the benefit of victims of armed conflicts in which it deplored the fact that "the ICRC is refused access to the captured combatants and detained civilians in the armed conflicts of Western Sahara, Ogaden and later on Afghanistan". It urged all parties concerned to enable the ICRC "to protect and assist persons captured, detained, wounded or sick and civilians affected by these conflicts".[399]
436. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions in which it appealed to parties involved in armed conflicts to "grant regular access to the ICRC to all prisoners in armed conflicts covered by international humanitarian law".[400]
437. In a resolution on Bosnia and Herzegovina adopted in 1992, the 88th Inter-Parliamentary Conference insisted that "appropriate international humanitarian organizations and, in particular, the International Committee of the Red

394 League of Arab States, Council, Res. 5635, 31 March 1997, § 4.
395 OSCE, Permanent Council, Resolution on Chechnya, 3 February 1995, §§ 6 and 11.
396 OSCE, Ministerial Council, Decision on the Minsk Process, Doc. MC(5).DEC/3, 8 December 1995, § 3.
397 20th International Conference of the Red Cross, Vienna, 2-9 October 1965, Res. XXIV.
398 21st International Conference of the Red Cross, Istanbul, 6-13 September 1969, Res. XI.
399 24th International Conference of the Red Cross, Manila, 7-14 November 1981, Res. IV.
400 25th International Conference of the Red Cross, Geneva, 23-31 October 1986, Res. I, § 3.

Cross, be granted immediate, unimpeded and continued access to all camps, prisons and other places of detention".[401]

438. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require "full and immediate access by the ICRC to all places where prisoners and detainees are kept, to interview and register all of them prior to their release".[402]

IV. Practice of International Judicial and Quasi-judicial Bodies

439. In the *Peruvian Prisons case (Provisional Measures)* in 1993, the IACiHR requested the IACtHR to indicate provisional measures with respect to the situation in four Peruvian prisons and noted in the description of the "grave and urgent nature" of the case that "the International Committee of the Red Cross is not currently authorized to inspect those prisons".[403]

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

440. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Representatives of the Protecting Powers and of the International Committee of the Red Cross:

a) have access to all places and premises where prisoners of war are located;
b) are allowed to visit prisoners of war in transfer;
c) are allowed to interview prisoners of war without witnesses;
d) have full liberty so select the places they wish to visit.[404]

441. In international armed conflict, the Geneva Conventions give express competence to the ICRC as a protection mechanism (Article 126 GC III and Article 143 GC IV). According to these provisions, ICRC delegates shall have permission to go to all places where persons protected by the Third and Fourth Geneva Conventions may be held, have access to all premises occupied by them, and be able to interview them without witnesses, either personally or through an interpreter. In non-international armed conflict, according to common Article 3 of the 1949 Geneva Conventions and the 1986 Statutes of

[401] 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 4.

[402] Peace Implementation Conference for Bosnia and Herzegovina, London, 8–9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.

[403] IACtHR, *Peruvian Prisons case (Provisional Measures)*, Order, 27 January 1993, § 3.

[404] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 719, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

the International Red Cross and Red Crescent Movement (Article 5(2)), the ICRC may offer its services to ensure protection and assistance of military and civilian victims of such situations and of their direct results. Protection of the lives, physical and mental integrity and the dignity of persons deprived of their liberty are at the heart of the ICRC's action. The objective of ICRC visits to persons deprived of their liberty is basically to prevent and put a stop to such occurrences as enforced disappearances, extra-judicial executions, torture and other cruel, inhuman or degrading treatment or punishment, as well as to improve detention conditions and restore family links. Preliminary conditions are required for the development of an action aimed at protecting persons deprived of their liberty, namely:

- Access to all persons deprived of their liberty for reasons related to armed conflict or internal violence, at all stages of their detention and in all places where they are held.
- Possibility to talk freely and in private with the persons deprived of their liberty of its choice.
- Possibility to register the identity of the persons deprived of their liberty.
- Possibility to repeat its visits to persons deprived of their liberty on a regular basis.
- ICRC must be authorized to inform families of the detention of their relatives and to ensure family news between persons deprived of their liberty and their families, whenever necessary.

In practice, the authorities often restrict access by the ICRC to persons deprived of their liberty during the first stage of detention. Such restrictions are not acceptable to the ICRC, unless it is for a short period, and have been the subject of many representations by the ICRC to the authorities concerned.

442. In a press release in 1973, the ICRC responded to press reports which had erroneously stated that it was visiting detainees in Con Son prison in South Vietnam. The ICRC stated that it had ceased visiting the prison as it was only allowed to see "several dozen prisoners of war" and not the "civilian detainees who constituted the immense majority of the inmates" and that it was "precisely because of the restrictions imposed by the South Vietnam government – particularly the prohibition of private talks with detainees – that in March 1972 it discontinued visits to interned civilians".[405]

443. In an appeal launched in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front "allow the ICRC to visit captured enemy combatants and civilians regularly, and without witness, wherever they are detained".[406]

[405] ICRC, Press Release No. 1152b, ICRC puts the Record Straight on Con Son, 21 March 1973.
[406] ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 7, *IRRC*, No. 209, 1979. p. 89.

444. On several occasions between 1992 and 1996, the ICRC reminded a State engaged in an internal armed conflict of its obligation to detain prisoners in places where ICRC delegates could visit them.[407]

445. In a press release issued in 1993 on the situation in eastern Bosnia and Herzegovina, the ICRC called on all parties "to facilitate ICRC access to all the victims".[408]

446. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "the visiting rights of the ICRC shall be respected and safeguarded".[409]

447. In a press release issued in 1995 concerning Turkey's military operations in northern Iraq, the ICRC requested "immediate access to Kurdish combatants and civilians detained by the Turkish armed forces".[410]

448. In 1995, an article in the *Bangkok Post* stated that the ICRC had closed its delegation in Rangoon because it had "failed to get proper access to political prisoners in Burma". An ICRC statement quoted in the article said that the ICRC had first requested access to political prisoners in Burma in May 1994 but it did not receive a response from the ruling State Law and Order Restoration Council (SLORC) until March 1995. The ICRC stated in relation to the response received that "this reply was not satisfactory as it took no account of the customary procedures for visits to places of detention followed by the ICRC in all countries where it conducts such activities".[411]

449. In 1995, the ICTY President wrote to the President of the ICRC proposing that the ICRC:

> undertake, in accordance with the modalities set out below, the inspection of conditions of detention and the treatment of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal in the Penitentiary Complex or in the holding cells located at the premises of the Tribunal.

The "modalities" proposed included that the ICRC would be able to inspect and report on all aspects of conditions of detention; that it would have unlimited access to the detention facilities; and that it would be free to communicate with the detainees without witnesses being present.[412] In response, the ICRC President stated that it was within the mandate of the ICRC to visit

[407] ICRC archive documents.

[408] ICRC, Press Release No. 1744, Eastern Bosnia: ICRC unable to assist conflict victims, 17 April 1993.

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

[410] ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and Northern Iraq, 22 March 1995.

[411] *Bangkok Post*, Red Cross shuts office in Burma out of frustration, 20 June 1995.

[412] ICTY, Letter from the President of the International Criminal Tribunal for the Former Yugoslavia to the President of the International Committee of the Red Cross, 28 April 1995, *IRRC*, No. 311, 1996, pp. 238–242.

persons detained in connection with armed conflicts and that the organisation was, therefore, ready to carry out visits to detainees held by the ICTY. The conditions outlined in the letter from the ICTY were described as corresponding to "the traditional modalities under which the ICRC assesses the conditions of detention and the treatment of detainees, in particular by interviewing them in private, and makes the appropriate recommendations to the authorities concerned".[413]

450. In 1995, the ICRC reminded the parties to an internal armed conflict that "in order to be able to carry out its humanitarian mission, it has to have access to all persons captured or arrested and detained in connection with the conflict situation". The ICRC outlined the conditions for its visits and stated that "these customary working procedures are accepted by all States where the ICRC is conducting visits to prisoners/detainees. They help to provide the protection which the parties to a conflict expect for people from their side who are held by the adversary."[414]

451. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that "the detaining authority must authorize the ICRC to have access to . . . persons [arrested], wherever they may be, so that its delegates may ascertain their well-being and forward news to their families".[415]

VI. Other Practice

452. In 1977, an armed opposition group agreed to allow the ICRC to visit all detained combatants where the places of detention were not subject to security concerns. It also stated that it would not make visits conditional on the provision of information about its own missing combatants.[416]

453. In 1979, an armed opposition group agreed to allow the ICRC to visit captured combatants.[417]

454. In 1981, an armed opposition group permitted the ICRC to visit captured combatants of a third State in its power.[418]

455. In 1982, a separatist entity agreed to allow the ICRC to visit its prisoners.[419]

456. In 1987, an armed opposition group stated that it would in principle allow the ICRC to visit its prisoners, but that visits would be possible only if prisoners could be moved to a safe area.[420]

[413] ICRC, Letter from the President of the International Committee of the Red Cross to the President of the International Criminal Tribunal for the Former Yugoslavia, 5 May 1995, *IRRC*, No. 311, 1996, pp. 238–242.
[414] ICRC archive document.
[415] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.
[416] ICRC archive documents. [417] ICRC archive document. [418] ICRC archive document.
[419] ICRC archive document. [420] ICRC archive documents.

457. In 1988, an armed opposition group allowed the ICRC to visit its prisoners.[421]
458. In 1988, an armed opposition group accepted ICRC visits in principle, but in the end these visits were not carried out owing to geographical isolation.[422]
459. In 1988, after an initial refusal, an armed opposition group undertook to grant permission to the ICRC to visit all prisoners.[423]
460. In 1988, an armed opposition group accepted ICRC visits in principle.[424]
461. In 1988 and 1989, an armed opposition group accepted ICRC visits in principle.[425]
462. In 1992, an armed opposition group undertook to allow the ICRC to visit all captured combatants.[426]
463. In 1993 and 1996, a separatist entity allowed the ICRC to visit detainees, but refrained from allowing unlimited access owing to security concerns.[427]
464. In 1994, a separatist entity stated that it believed that granting permission to ICRC delegates to visit places of detention to be an obligation under international law and denounced a State's refusal to do so.[428]
465. In 1990, an armed opposition group expressed the intention to allow ICRC visits and undertook to inform the ICRC of all detained prisoners so as to enable visits to take place.[429]

H. Correspondence of Persons Deprived of Their Liberty

I. Treaties and Other Instruments

Treaties
466. Article 70 GC III provides that:

> Immediately upon capture, or not more than one week after arrival at a camp, . . . every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency . . . on the other hand, a card . . . informing his relatives of his capture, address and state of health.

Article 106 GC IV contains a similar provision for internees upon arrival in their place of internment.
467. Article 71, first paragraph, GC III provides that "prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly". The second paragraph, provides that "prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin, or to give them news by the ordinary postal route, as well as those who

[421] ICRC archive document. [422] ICRC archive document. [423] ICRC archive document.
[424] ICRC archive document. [425] ICRC archive document. [426] ICRC archive document.
[427] ICRC archive document. [428] ICRC archive document. [429] ICRC archive document.

are at a great distance from their home, shall be permitted to send telegrams". Article 107, first and second paragraphs, GC IV contains similar provisions for internees.

468. Article 25, first paragraph, GC IV provides for the right of all persons in the territory of a party to the conflict "to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them". According to the second paragraph, the Central Agency may play a role as a neutral intermediary in this respect. The third paragraph provides that:

> If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

469. Article 8 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel states that all captured military personnel and captured civilians "shall be allowed to exchange post cards and letters with their families".

470. Article 5(2)(b) AP II provides that persons whose liberty has been restricted "shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary. Article 5 AP II was adopted by consensus.[430]

471. Article 37 of the 1989 Convention on the Rights of the Child provides that every child deprived of liberty "shall have the right to maintain contact with his or her family through correspondence . . . save in exceptional circumstances".

Other Instruments

472. Rule 37 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals . . . by correspondence".

473. Rule 43(1) of the 1987 European Prison Rules provides that "prisoners shall be allowed to communicate with their families and, subject to the needs of treatment, security and good order, persons or representatives of outside organisations".

474. Principle 15 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "notwithstanding the exceptions contained in Principle 16, paragraph 4, and Principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days".

[430] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

II. National Practice

Military Manuals

475. Argentina's Law of War Manual (1969) reproduces Articles 71 GC III and 25 GC IV.[431]

476. Argentina's Law of War Manual (1989), referring to Articles 71, 72, 74, 75 and 76 GC III, provides that "prisoners of war shall be allowed to send and receive letters and cards".[432] It also provides that internees shall be enabled "to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them".[433]

477. Australia's Commanders' Guide provides that POWs "have the right to send and receive letters".[434] It further states that captured enemy combatants should be treated as being entitled to POW status.[435]

478. Belgium's Law of War Manual provides that "not more than one week after his arrival at a camp, even if it is a transit camp, every prisoner of war should be enabled to write, directly to his family and to the Central Prisoners of War Agency, a card of a special model". It adds that POWs should be allowed to send and receive cards.[436]

479. Benin's Military Manual provides that captured enemy combatants and civilians shall have the right to exchange news with their families.[437]

480. Cameroon's Instructors' Manual provides that the correspondence of POWs shall reach them regularly and shall not be interfered with.[438]

481. Cameroon's Disciplinary Regulations states that prisoners shall be authorised to send and receive correspondence by the intermediary of the ICRC.[439]

482. Canada's LOAC Manual provides that "POWs shall be allowed to send and receive letters and cards and, in exceptional circumstances, telegrams as well".[440] With regard to non-international armed conflicts, the manual states that "detained persons shall be allowed to send and received letters and cards".[441]

483. Colombia's Circular on Fundamental Rules of IHL provides that "captured combatants and civilian persons who are under the power of the adverse Party . . . have the right to exchange news with their families".[442]

[431] Argentina, *Law of War Manual* (1969), §§ 2.066 and 4.008.
[432] Argentina, *Law of War Manual* (1989), § 3.16.
[433] Argentina, *Law of War Manual* (1989), § 4.14.
[434] Australia, *Commanders' Guide* (1994), § 716.
[435] Australia, *Commanders' Guide* (1994), § 719.
[436] Belgium, *Law of War Manual* (1983), p. 47.
[437] Benin, *Military Manual* (1995), Fascicule II, p. 5.
[438] Cameroon, *Instructors' Manual* (1992), p. 154, § 541.
[439] Cameroon, *Disciplinary Regulations* (1975), Article 33.
[440] Canada, *LOAC Manual* (1999), p. 10-5, § 45.
[441] Canada, *LOAC Manual* (1999), p. 17-3, § 25.
[442] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.

484. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, detained persons shall have the right to communicate with their families and receive letters.[443]
485. Croatia's Instructions on Basic Rules of IHL provides that detainees have the right to correspond with their families.[444]
486. France's LOAC Summary Note provides that "captured combatants have the right to exchange news".[445]
487. France's LOAC Teaching Note provides that every prisoner of war "is entitled to exchange news, to send letters and to receive mail".[446]
488. Germany's Military Manual states that "not more than one week after the arrival at a camp, every prisoner of war shall be enabled to inform his family and the Central Prisoners of War Agency by letter of his captivity and to regularly correspond with his relatives henceforth".[447]
489. Israel's Manual on the Laws of War provides that:

> One of the most important provisions in the Geneva Convention are the rules concerning the right of prisoners to maintain correspondence with their relatives . . . The detaining State may censor the mail of detainees, so long as censorship is not used as a pretext for withholding mail from prisoners.[448]

490. Madagascar's Military Manual provides that captured combatants and civilians in the power of the adverse party "shall have the right to exchange news with their families".[449] It also provides that POWs "shall be allowed to inform their families and the Central Tracing Agency of the ICRC so that they can correspond regularly with their families".[450]
491. The Military Manual of the Netherlands provides that "prisoners of war shall be allowed to send and receive letters and cards".[451]
492. The Military Handbook of the Netherlands provides that "correspondence from and for prisoners of war can be limited and censored".[452]
493. New Zealand's Military Manual provides that:

> Immediately upon capture and upon transfer from one place of detention to another, prisoners shall be allowed to send a card to their families and to the Central Prisoners of War Agency giving information of their capture, address and state of health. They shall be allowed to send and receive letters and cards and, in exceptional circumstances, telegrams as well.[453]

[443] Colombia, *Basic Military Manual* (1995), p. 21.
[444] Croatia, *Instructions on Basic Rules of IHL* (1993), § 4.
[445] France, *LOAC Summary Note* (1992), § 2.1.
[446] France, *LOAC Teaching Note* (2000), p. 3.
[447] Germany, *Military Manual* (1992), § 721.
[448] Israel, *Manual on the Laws of War* (1998), p. 53.
[449] Madagascar, *Military Manual* (1994), p. 91, Rule 4.
[450] Madagascar, *Military Manual* (1994), Fiche 2-T, § 26.
[451] Netherlands, *Military Manual* (1993), p. VII-10.
[452] Netherlands, *Military Handbook* (1995), p. 7-42.
[453] New Zealand, *Military Manual* (1992), § 929.

The manual further states that "all persons in the territory of the belligerent or in territory occupied by him must be enabled to transmit to, and receive from, members of their families, wherever they may be, news of a strictly personal nature".[454] It also states that:

> As soon as he is interned, transferred, or becomes sick, the internee is entitled to send a card to his family and to the Central Information Agency indicating his present location and his state of health. An internee is allowed to correspond frequently but letters may be limited in number, if the Detaining Power finds it necessary, and are subject to its censorship.[455]

Lastly, the manual specifies that in non-international armed conflicts, detained and interned persons "shall be allowed to send and receive letters and cards".[456]

494. Nicaragua's Military Manual provides that POWs have the right to send and receive letters.[457]

495. Nigeria's Manual on the Laws of War provides that "POWs should be allowed to send and receive cards and letters, free of charge".[458]

496. Romania's Soldiers' Manual provides that captured combatants and civilians in the hands of a party to the conflict shall have the right to communicate with their families.[459]

497. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is the right of detained persons to send and receive letters and cards whose number may be limited by the competent authority if it deems necessary.[460]

498. Spain's LOAC Manual provides that "prisoners of war shall be allowed to send and receive letters and cards. Such authorisation may be limited by the Detaining Power and correspondence may be censored."[461] Referring to Article 71 GC III, the manual notes that if the detaining power decides to limit the correspondence sent by the prisoners, the number shall not be less than two letters and four cards monthly.[462] It also points out that further limitations on the correspondence may only be decided by the protecting power.[463]

499. Switzerland's Basic Military Manual states that:

> Each prisoner of war shall be enabled to inform immediately or as rapidly as possible his family and the Central Prisoners of War Agency in case of illness or transfer to another camp. The prisoner shall be allowed to receive and send correspondence, and in urgent cases it shall be permitted to send telegrams . . .

[454] New Zealand, *Military Manual* (1992), § 1113.
[455] New Zealand, *Military Manual* (1992), § 1127.
[456] New Zealand, *Military Manual* (1992), § 1814(3).
[457] Nicaragua, *Military Manual* (1996), Article 14(27) and (41).
[458] Nigeria, *Manual on the Laws of War* (undated), § 43.
[459] Romania, *Soldiers' Manual* (1991), Part III, § 4.
[460] Senegal, *IHL Manual* (1999), pp. 3 and 24.
[461] Spain, *LOAC Manual* (1996) Vol. I, § 8.4.(a).6, see also §§ 6.4.(g).1, 6.4.(g).3 and 6.4.(g).4.
[462] Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(g).1.
[463] Spain, *LOAC Manual* (1996), Vol. I, § 8.4.(a).6.

Any prohibition of correspondence ordered for military or political reasons shall be only temporary and its duration shall be as short as possible.[464]

The same rules are also applicable to internees.[465]

500. Togo's Military Manual provides that captured enemy combatants and civilians shall have the right to exchange news with their families.[466]

501. The UK Military Manual states that:

Internees must be permitted to send and receive letters and postcards. If the Detaining Power deems it necessary to impose limitations, the number permitted must not be less than two letters and four cards monthly. Letters and cards must be conveyed with reasonable dispatch and must not be held up as a disciplinary measure. Internees who have been a long time without news or cannot obtain news from their relatives and those who are a long distance from their homes must be allowed to send telegrams at their own expense.[467]

The manual further specifies that:

Prisoners of war must be allowed to send and receive letters and cards. In addition to the capture card, they must be allowed to send at least two letters and four cards every month. Limitations on correspondence addressed to prisoners of war may be imposed only by the state on which they depend. The Detaining Power may request such a limitation. All correspondence must be conveyed as rapidly as possible, and must not be delayed or retained for disciplinary reasons. Prisoners of war who have not been in touch with their families for a long time or who are at a great distance from their homes must be allowed to send telegrams at their own expense. The same applies in case of emergency. As a general rule they must be permitted to correspond in their native language. Bags containing prisoner of war mail must be labelled as such, sealed and addressed to offices of destination.[468]

In addition, the manual provides that "prisoners undergoing disciplinary punishment must be allowed to read and write and to send and receive letters".[469]

502. The UK LOAC Manual provides that "PW must be allowed to send a capture card to the Protecting Power and to their next of kin no later than the time of their arrival in a PW camp".[470]

503. The US Field Manual reproduces Articles 70 and 71 GC III and 25, 106 and 107 GC IV.[471]

504. The US Instructor's Guide provides that "even though you are a prisoner (or internee), you are entitled to send and receive mail. Each prisoner must be allowed to write a minimum of two letters and four postal cards per month."[472]

[464] Switzerland, *Basic Military Manual* (1987), Articles 133 and 137.
[465] Switzerland, *Basic Military Manual* (1987), Article 182.
[466] Togo, *Military Manual* (1996), Fascicule II, p. 5.
[467] UK, *Military Manual* (1958), § 67.
[468] UK, *Military Manual* (1958), § 189.
[469] UK, *Military Manual* (1981), § 219.
[470] UK, *LOAC Manual* (1981), Section 8, p. 31, § 16(f).
[471] US, *Field Manual* (1956), §§ 146, 147, 264, 313 and 314.
[472] US, *Instructor's Guide* (1985), p. 11.

505. The US Air Force Pamphlet provides that "the prisoner of war shall be permitted to send out a capture card addressed to the Central Prisoners of War Agency for its card index system". The Pamphlet further specifies that Article 71 GC III entitles them "to mail a minimum of 2 letters and 4 cards each month". It adds that "this minimum may be reduced if the protecting power finds that to be required by necessary censorship. POWs are also allowed to send telegrams under certain circumstances."[473]

National Legislation

506. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "prisoners of war are entitled to the following in all cases: . . . to write messages to their relatives (directly through the adverse party and points of exchange, or through the Protecting Powers or their substitute – ICRC)".[474]

507. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[475]

508. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 70 and 71 GC III and 25 and 107 GC IV, as well as any "contravention" of AP II, including violations of Article 5(2)(b) AP II, are punishable offences.[476]

509. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[477]

510. Rwanda's Prison Order provides that prisoners are entitled to correspond with their families.[478]

National Case-law

511. No practice was found.

Other National Practice

512. It is reported that, during the Algerian war of independence, "French prisoners never had any reason to complain about their stay in captivity . . . They had the right to write to their families via the Algerian Red Crescent."[479]

[473] US, *Air Force Pamphlet* (1976), § 13-7.
[474] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(5).
[475] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[476] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[477] Norway, *Military Penal Code as amended* (1902), § 108.
[478] Rwanda, *Prison Order* (1961), Article 51.
[479] La révolution algérienne tient au respect de l'homme, *El Moudjahid*, Vol. 3, p. 57.

513. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that detainees "have the right to correspond with their families".[480]
514. According to the Report on the Practice of Malaysia, during the communist insurgency, correspondence was allowed in detention camps.[481]
515. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that no POW in the hands of Iraq "was permitted the rights otherwise afforded them by [GC III], such as the right of correspondence authorised by Article 70".[482]
516. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[483]

III. Practice of International Organisations and Conferences

United Nations
517. No practice was found.

Other International Organisations
518. No practice was found.

International Conferences
519. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it recognised that "the international community has consistently demanded . . . the facilitation of communication between prisoners of war and the exterior".[484]
520. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, "the international community has consistently demanded humane treatment for prisoners of war, including . . . authorisation for prisoners to communicate with each other and with the exterior".[485]

[480] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.
[481] Report on the Practice of Malaysia, 1997, Chapter 5.3.
[482] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 630.
[483] Report on US Practice, 1997, Chapter 5.3.
[484] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIV.
[485] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

IV. Practice of International Judicial and Quasi-judicial Bodies

521. No practice was found.

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

522. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "prisoner of war are allowed to send and receive letters and cards" and that "the censoring of correspondence . . . shall be done as quickly as possible."[486]
523. In the context of the Iran–Iraq War, the ICRC had registered some 6,800 Iranian prisoners of war by 1 March 1983. The organisation stated that these prisoners had been able "to correspond with their families in a satisfactory manner".[487]

VI. Other Practice

524. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "captured combatants and civilians under the authority of an adverse party . . . have the right to correspond with their families".[488]

I. Visits to Persons Deprived of Their Liberty

Note: *For practice concerning visits by the ICRC, see section G of this chapter. For practice concerning visits by religious personnel, see section J of this chapter. For practice concerning visits of counsel, see Chapter 32, section M.*

I. Treaties and Other Instruments

Treaties
525. Article 116, first paragraph, GC IV provides that "every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible".
526. Article 37 of the 1989 Convention on the Rights of the Child provides that every child deprived of liberty "shall have the right to maintain contact with his or her family through . . . visits, save in exceptional circumstances".

[486] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 716–717, see also 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).
[487] ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.
[488] ICRC archive document.

Other Instruments

527. Rule 37 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "prisoners shall be allowed to receive visits from their family and reputable friends".

528. Rule 43(1) of the 1987 European Prison Rules provides that "prisoners shall be allowed to communicate with their families and, subject to the needs of treatment, security and good order, persons or representatives of outside organisations and to receive visits from these persons as often as possible".

529. Principle 19 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "a detained or imprisoned person shall have the right to be visited by . . . members of his family . . . subject to reasonable conditions and restrictions as specified by law or lawful regulations".

530. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict . . . it is a duty to arrange visits or reunions of the families separated by the circumstances of war".

II. National Practice

Military Manuals

531. Argentina's Law of War Manual (1969) reproduces Article 116 GC IV.[489]

532. Argentina's Law of War Manual (1989) reproduces Article 116 GC IV.[490]

533. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "family members, relatives . . . of detainees or arrested persons must be granted free access to the detention center/jail where the detainees are held, in accordance with the law and [Armed Forces of the Philippines/Philippines National Police] policy".[491]

534. The UK Military Manual provides that:

> Every internee must be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible. When possible, internees must also be allowed to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.[492]

535. The US Field Manual reproduces Article 116 GC IV.[493]

National Legislation

536. Numerous pieces of domestic legislation and administrative regulations provide for the right of detainees to be visited by their relatives. For instance,

[489] Argentina, *Law of War Manual* (1969), § 4.047.
[490] Argentina, *Law of War Manual* (1989), § 4.35(5).
[491] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § b(2).
[492] UK, *Military Manual* (1958), § 70.
[493] US, *Field Manual* (1956), § 323.

under Rwanda's Prison Order, detainees are entitled to have contacts with the outside world, including visits.[494]

537. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[495]

538. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 116 GC IV, is a punishable offence.[496]

539. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[497]

National Case-law

540. No practice was found.

Other National Practice

541. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

542. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly demanded that the FRY government guarantee the families of persons detained and transferred from Kosovo to other parts of the FRY and NGOs and international observers unimpeded and regular access to those who remained in detention.[498]

Other International Organisations

543. No practice was found.

International Conferences

544. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

545. In the *Greek case* in 1969, the ECiHR concluded that "the extreme manner of separation of detainees from their families and in particular, the severe

494 Rwanda, *Prison Order* (1961), Article 50.
495 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
496 Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
497 Norway, *Military Penal Code as amended* (1902), § 108(a).
498 UN General Assembly, Res. 54/183, 17 December 1999, § 9.

limitations, both practical and administrative, on the family visits" constituted a breach of Article 3 of the 1950 ECHR.[499]

546. In it admissibility decision in *X. v. UK* in 1982, the ECiHR held that a general limitation of visiting facilities to relatives and close relatives of prisoners was reasonable and constituted no interference with the prisoners' right to respect for private life according to Article 8 ECHR. The test was whether the interference with the right to family life to which the detainee was also entitled went "beyond what would be normally accepted in the case of an ordinary detainee". If the restrictions could not stand this test, the Commission had allowed the national authorities a very wide margin of appreciation in the limitation of family contacts on the basis of one of the grounds of the second paragraph of Article 8 ECHR. The Commission accepted an Austrian practice according to which those who were serving a sentence of imprisonment of more than a year were on that ground alone denied visits from their children under age, for the protection of the morals of these minors. In addition to an examination by the Strasbourg authorities of whether the restrictions were reasonable in the particular case, they should see to it that the restriction was not imposed on the prisoner as a disguised sanction on his/her behaviour, which would constitute a breach of Article 18 ECHR.[500]

547. In 1993, with reference to a prison to which members of the Tupac Amaru Revolutionary Movement were transferred, the IACiHR recommended that Peru allow relatives to visit prisoners.[501]

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

548. No practice was found.

VI. Other Practice

549. According to the Report on SPLM/A practice, the Penal and Disciplinary Laws of the SPLM/A "gives power to every officer in charge of any unit to arrest and detain accused persons". The report asserts that:

> This has led to a practice in the SPLA where many people are detained for long periods. Between 1985 and 1991, many people remained detained without charges in the Ethiopian bushes of the SPLM/A. Detainees remained incommunicado, without visits from friends or relatives, no treatment and in most cases no trials.[502]

[499] ECiHR, *Greek case*, Report, 5 November 1969, Part B, Chapter IV(B)(VI), Section D, § 21.
[500] ECiHR, *X. v. UK*, Admissibility Decision, 8 October 1982, p. 115.
[501] IACiHR, Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 29.
[502] Report on SPLM/A Practice, 1998, Chapter 5.3, referring to SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 73.

J. Respect for Convictions and Religious Practices of Persons Deprived of Their Liberty

Note: *For practice concerning respect for convictions and religious practices in general, see Chapter 32, section P.*

I. Treaties and Other Instruments

Treaties

550. Article 18 of the 1899 HR provides that "prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities".

551. Article 18 of the 1907 HR provides that "prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities".

552. Articles 34 GC III and 93 GC IV provide that detainees "shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities".

553. Articles 34 GC III and 86 GC IV provide that adequate premises shall be provided where religious services may be held.

554. Articles 35 GC III and 93 GC IV provide that retained chaplains shall be allowed to exercise freely their ministry.

555. Article 76, third paragraph, GC IV provides that protected persons accused or convicted of offences shall have the right to receive any spiritual assistance they may require.

556. Article 4(1) AP II states that "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their . . . convictions and religious practices". Article 4 AP II was adopted by consensus.[503]

557. Article 5(1)(d) AP II provides that persons whose liberty has been restricted "shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions". Article 5 AP II was adopted by consensus.[504]

Other Instruments

558. Rule 6(2) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs". Rules 41 and 42 further

[503] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[504] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

develop this rule by providing for the appointment of a qualified representative and the provision of services and readings in the institutions.

559. Rule 2 of the 1987 European Prison Rules provides that "the religious beliefs and moral precepts of the group to which a prisoner belongs shall be respected". Rules 46 and 47 further develop this rule by providing for the appointment of a qualified representative and the provision of services and readings in the institutions.

560. Paragraph 3 of the 1990 Basic Principles for the Treatment of Prisoners provides that it is "desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require".

II. National Practice

Military Manuals

561. Argentina's Law of War Manual (1969) provides that prisoners of war and internees "shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities".[505]

562. Argentina's Law of War Manual (1989) provides that "prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith". It adds that "adequate premises shall be provided where religious services may be held".[506]

563. Australia's Defence Force Manual provides that "PWs are completely free to exercise their religious duties and must be provided with adequate premises where religious services can be held".[507] The manual considers the infringement of the religious rights of prisoners of war as a war crime.[508]

564. Benin's Military Manual provides that captured enemy combatants shall be entitled to respect for their religious beliefs.[509]

565. Canada's LOAC Manual provides that POWs are to receive spiritual attention, if possible from chaplains attached to their own forces or of their own nationality. It adds that the detaining power must provide religious personnel with all the facilities necessary for the religious ministration of the POWs.[510] Concerning the treatment of internees, the manual provides that "premises for the holding of religious services must be made available".[511] It also specifies that "internees shall enjoy complete freedom to practice their own religion".[512] The manual further states that persons undergoing sentences

[505] Argentina, *Law of War Manual* (1969), §§ 2.030 and 4.031.
[506] Argentina, *Law of War Manual* (1989), § 3.14.
[507] Australia, *Defence Force Manual* (1994), § 1030.
[508] Australia, *Defence Force Manual* (1994), § 1315.
[509] Benin, *Military Manual* (1995), Fascicule II, p. 5.
[510] Canada, *LOAC Manual* (1999), p. 10-4, §§ 36–37.
[511] Canada, *LOAC Manual* (1999), p. 11-6, § 53.
[512] Canada, *LOAC Manual* (1999), p. 11-6, § 54.

of imprisonment "have the right to receive any spiritual assistance which they may require".[513] With regard to non-international armed conflicts, the manual states that the persons whose liberty has been restricted "must be allowed to practise their religion and to receive spiritual assistance from those performing religious functions".[514]

566. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, all detained persons shall receive spiritual assistance.[515]

567. Ecuador's Naval Manual provides that "the following acts are representative war crimes: offences against prisoners of war, including . . . infringement of religious rights; . . . offences against civilian inhabitants of occupied territory including . . . infringement of religious rights".[516]

568. Germany's Military Manual provides that "latitude in the exercise of religious duties of prisoners shall be ensured".[517]

569. Israel's Manual on the Laws of War provides that during their captivity, "the detaining State must allow the prisoners freedom of religion, enable them to take part in religious ceremonies and set aside a place for conducting these ceremonies".[518]

570. Italy's IHL Manual provides that "POWs shall have complete freedom in the exercise of their religion, including receiving spiritual assistance, and the commander of the camp shall facilitate such exercise so far as military discipline permits".[519]

571. Madagascar's Military Manual provides that "prisoners of war shall be allowed to receive spiritual assistance".[520]

572. The Military Manual of the Netherlands provides that "prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities".[521] With respect to non-international armed conflicts in particular, the manual states that persons whose liberty has been restricted shall be allowed to practise their religion and to receive spiritual assistance".[522]

573. New Zealand's Military Manual provides that "prisoners of war are to receive spiritual attention, if possible from chaplains attached to their own forces or of their own nationality".[523] It further points out that "internees shall

[513] Canada, *LOAC Manual* (1999), p. 12-7, § 62(b).
[514] Canada, *LOAC Manual* (1999), p. 17-3, § 25.
[515] Colombia, *Basic Military Manual* (1995), p. 21.
[516] Ecuador, *Naval Manual* (1989), § 6.2.5.
[517] Germany, *Military Manual* (1992), § 718.
[518] Israel, *Manual on the Laws of War* (1998), p. 53.
[519] Italy, *IHL Manual* (1991), Vol. II, Chapter XIV, § 105.
[520] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 26.
[521] Netherlands, *Military Manual* (1993), p. VII-7.
[522] Netherlands, *Military Manual* (1993), p. XI-5.
[523] New Zealand, *Military Manual* (1992), § 924(1).

enjoy complete freedom to practice their own religion".[524] It specifies that "premises for the holding of religious services must be made available".[525] With respect to non-international armed conflicts, the manual stresses that detainees "must be allowed to practise their religion and to receive spiritual assistance from those performing religions functions".[526]

574. Nicaragua's Military Manual provides that POWs shall have complete liberty in the exercise of their religion.[527]

575. Nigeria's Manual on the Laws of War provides that "POWs should enjoy religious freedom provided that it does not disrupt routine discipline".[528]

576. Romania's Soldiers' Manual provides that captured combatants and civilians in the hands of a party to the conflict shall have the right to practice their religion freely.[529]

577. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is the right of persons deprived of their liberty to receive spiritual assistance.[530]

578. Spain's LOAC Manual provides that "prisoners of war shall enjoy complete latitude in the exercise of their religion, including attendance at the service of their faith organised by the religious service of the camp".[531] The manual points out, however, the obligation of prisoners to "comply with the disciplinary routine prescribed by the Detaining Power".[532]

579. Switzerland's Basic Military Manual provides that "prisoners shall enjoy complete latitude in the exercise of their religion, including assistance at the service of their faith, on the condition that they comply with the disciplinary routine prescribed by the military authorities".[533] The manual further emphasises that "religious convictions must be respected".[534]

580. Togo's Military Manual provides that captured enemy combatants shall be entitled to respect for their religious beliefs.[535]

581. The UK Military Manual states that:

> Internees are to enjoy complete latitude in the exercise of their religious duties, provided that they comply with the disciplinary routine prescribed by the Detaining Powers. Ministers of religion when interned must be allowed to minister freely to the members of their community.[536]

[524] New Zealand, *Military Manual* (1992), § 1123(3).
[525] New Zealand, *Military Manual* (1992), § 1123(4).
[526] New Zealand, *Military Manual* (1992), § 1814(2).
[527] Nicaragua, *Military Manual* (1996), Article 14(26).
[528] Nigeria, *Manual on the Laws of War* (undated), § 42.
[529] Romania, *Soldiers' Manual* (1991), Part III, § 4.
[530] Senegal, *IHL Manual* (1999), pp. 3 and 24.
[531] Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(i).9.
[532] Spain, *LOAC Manual* (1996), Vol. I, § 8.5.(c).1.
[533] Switzerland, *Basic Military Manual* (1987), Article 124.
[534] Switzerland, *Basic Military Manual* (1987), Article 167.
[535] Togo, *Military Manual* (1996), Fascicule II, p. 5.
[536] UK, *Military Manual* (1958), § 63.

The manual further states that prisoners of war must be allowed complete freedom for the performance of their religious duties, and that adequate accommodation must be provided for religious services.[537]

582. The UK LOAC Manual provides that "prisoners must be allowed freedom in the exercise of their religious beliefs. Accommodation must be provided for religious services."[538]

583. The US Field Manual reproduces Articles 34 and 35 GC III and 76, 86 and 93 GC IV.[539]

584. The US Air Force Pamphlet, referring to Articles 34–38 GC III, guarantees POWs enjoyment of religious activities.[540]

585. The US Instructor's Guide provides that "even though you are a prisoner, you are entitled to practice your religious faith. All prisoners shall enjoy complete freedom in the exercise and observance of their religious faith."[541]

586. The US Naval Handbook provides that "the following acts are representative war crimes: offences against prisoners of war, including . . . infringement of religious rights; . . . offences against civilian inhabitants of occupied territory, including . . . infringement of religious rights".[542]

National Legislation

587. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "prisoners of war are entitled to the following in all cases: . . . respect for their habits, national customs and religious ceremonies".[543]

588. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[544]

589. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 34 and 35 GC III and 76, 86 and 93 GC IV, as well as any "contravention" of AP II, including violations of Articles 4(1) and 5(1)(d) AP II, are punishable offences.[545]

590. Italy's Wartime Military Penal Code provides for the punishment of anyone who arbtrarily violates or restricts the freedom of religion or belief of prisoners of war[546]

591. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to

[537] UK, *Military Manual* (1958), § 156.
[538] UK, *LOAC Manual* (1981), Section 8, p. 31, § 17(d).
[539] US, *Field Manual* (1956), §§ 110, 111, 293, 300 and 446.
[540] US, *Air Force Pamphlet* (1976), § 13-4.
[541] US, *Instructor's Guide* (1985), p. 11.
[542] US, *Naval Handbook* (1995), § 6.2.5.
[543] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(5).
[544] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[545] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[546] Italy, *Wartime Military Penal Code* (1941), Article 213.

the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[547]

National Case-law

592. No practice was found.

Other National Practice

593. According to the Report on the Practice of France, in December 1981, the French Minister of Foreign Affairs was asked in the National Assembly about two Soviet prisoners held by the Afghan faction, Hezb-i-Islami, who were being threatened with execution if they did not convert to Islam. In his reply, the Minister stated that, whatever the nature of the conflict, prisoners must be respected.[548]

594. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[549]

595. In 1993, the army of a State issued instructions in the context of a UN operation, stating that detainees should be shown respect by making reasonable provisions for their religious practices.[550]

III. Practice of International Organisations and Conferences

United Nations

596. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law".[551]

Other International Organisations

597. No practice was found.

[547] Norway, *Military Penal Code as amended* (1902), § 108.
[548] Report on the Practice of France, 1999, Chapter 5.3, Reply by the Minister of Foreign Affairs to a question in parliament, 28 December 1981, *Politique étrangère de la France*, February 1982, p. 390.
[549] Report on US Practice, 1997, Chapter 5.3.
[550] ICRC archive document.
[551] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

International Conferences

598. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

599. In its judgment in the *Aleksovski case* in 1999, the ICTY Trial Chamber held, in relation to detention conditions, that:

> In sum, it was not established that the difficulties encountered by the detainees in respect of the observance of religious rites resulted from any deliberate policy of the accused or of the men placed under his authority. In this respect, the Trial Chamber notes that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, though not directly applicable, stipulates in Article 93 that "[i]nternees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities". In the present case, the practice of religion was not prohibited and most of the victims stated that they were able to practise their religion despite the difficult conditions. The Trial Chamber would thus reject the Prosecutor's allegation on this point.[552]

600. In its General Comment on Article 18 of the 1966 ICCPR, the HRC held that "persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint".[553]

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

601. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "prisoners of war shall be allowed to exercise religious observance" and that "adequate premises shall be provided where religious services may be held".[554]

602. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that "religious customs must be respected, which implies access to places of worship to the fullest extent possible".[555]

VI. Other Practice

603. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

[552] ICTY, *Aleksovski case*, Judgement, 25 June 1999, § 168.
[553] HRC, General Comment No. 22 (Article 18 ICCPR), 30 July 1993, § 8.
[554] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 709-710, see also 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).
[555] ICRC, Communication to the Press No. 00/42, ICRC Appeal to all involved in violence in the Near East, 21 November 2000.

University in Turku/Åbo, Finland in 1990, states that "all persons, even if their liberty has been restricted, are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices".[556]

K. Release and Return of Persons Deprived of Their Liberty

Release and return without delay

Note: *For practice concerning amnesty for participation in armed conflict in general, see Chapter 44, section D.*

I. Treaties and Other Instruments

Treaties

604. Article 20 of the 1899 HR provides that "after the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible".

605. Article 20 of the 1907 HR provides that "after the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible".

606. Article 109, first paragraph, GC III provides that "Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war". The second paragraph provides that "throughout the duration of hostilities, Parties to the conflict shall endeavour, with the co-operation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war".

607. Article 118, first paragraph, GC III provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities". Article 119 contains the details of procedure.

608. Article 132 GC IV provides that:

> Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.
>
> The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

609. Article 133 GC IV provides that:

> Internment shall cease as soon as possible after the close of hostilities.
>
> Internees in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until

[556] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(1), *IRRC*, No. 282, p. 331.

the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

610. Article 134 GC IV provides that "the High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation". Article 135 deals with the costs of the return.

611. Article III(51)(a) of the 1953 Panmunjon Armistice Agreement provides that "within sixty (60) days after this Armistice Agreement becomes effective, each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture". Article III(53) adds that "all the sick and injured prisoners of war who insist upon repatriation shall be repatriated with priority". Paragraph I(1) of the Annex to the Armistice Agreement further sets the terms of reference of a Neutral Nations Repatriation Commission established "in order to ensure that all prisoners of war have the opportunity to exercise their right to be repatriated following an armistice".

612. Paragraph 5 of the 1956 Joint Declaration on Soviet-Japanese Relations states that:

> On the entry into force of this Joint Declaration, all Japanese citizens convicted in the Union of Soviet Socialist Republics shall be released and repatriated to Japan. With regard to those Japanese whose fate is unknown, the USSR, at the request of Japan, will continue its effort to discover what has happened to them.

613. Article 4 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provided that the return of all captured military personnel and civilians from the various parties concerned "shall be completed within 60 days of the signing of the Agreement . . . Persons who are seriously ill, wounded or maimed, old persons and women shall be returned first." Article 6 provides that "each party shall return all captured persons . . . without delay".

614. In the 1974 Agreement on Repatriation of Detainees between Bangladesh, India and Pakistan, the three governments agreed to facilitate the return of detainees in order to make further progress in the process of "reconciliation and normalisation among the countries of the sub-continent".

615. Under Article 85(4)(b) AP I, an "unjustifiable delay in the repatriation of prisoners of war or civilians" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.[557]

616. Upon ratification of AP I, South Korea made a declaration in relation to paragraph 4 (b) of Article 85 in which it stated that "a party detaining prisoners of war may not repatriate its prisoners [against] their openly and freely expressed

[557] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

will, which shall not be regarded as unjustifiable delay in the repatriation of prisoners of war constituting a grave breach of this Protocol".[558]

617. The 1987 Esquipulas II Accords stated that "simultaneously with the issuance of the decrees of amnesty, the irregular forces of the country concerned shall release all persons in their power".

618. Article 4 of the 1993 CIS Agreement on the Protection of Victims of Armed Conflicts provides that "the Parties will take immediate coordinated measures to protect people unlawfully detained for reasons related to the armed conflict, regardless of whether they are interned or detained, and also in order to ensure return of POWs and the unconditional release of hostages".

619. In Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords, the parties agreed to "release and transfer all combatants and civilians held in relation to the conflict . . . in conformity with international humanitarian law". All prisoners were to be released and transferred no later than 30 days after the passing of authority from UNPROFOR to IFOR.

620. Article 2(1) and (2) of the 2000 Peace Agreement between Ethiopia and Eritrea provides that:

> In fulfilling their obligations under international humanitarian law, including the 1949 Geneva Conventions, and in cooperation with the International Committee of the Red Cross, the parties shall without delay, release and repatriate all prisoners of war, . . . release and repatriate or return to their last place of residence all other persons detained as a result of the armed conflict.

Other Instruments

621. Article 119 of the 1863 Lieber Code provides that "prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole". Article 123 specifies, however, that "release of prisoners of war by exchange is the general rule; release by parole is the exception".

622. Article 75 of the 1880 Oxford Manual provides that "prisoners of war may be released in accordance with a cartel of exchange, agreed upon by the belligerent parties".

623. Article 76 of the 1880 Oxford Manual provides that "prisoners may be set at liberty on parole, if the laws of their country do not forbid it".

624. In paragraph 3 of the 1990 Government of El Salvador-FMLN Agreement on Human Rights, the parties agreed that, in the course of negotiations, appropriate legal procedures and timetables would be determined for the release of individuals who had been imprisoned for political reasons.

625. Pursuant to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, an "unjustifiable delay in the repatriation

[558] South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 2.

of prisoners of war after the cessation of hostilities" is an "exceptionally serious war crime".

626. Article 21 of the 1991 Final Act of the Paris Conference on Cambodia requested that the ICRC facilitate, in accordance with its principles, the release of POWs and civilian internees. The release of all prisoners and civilian internees was to be accomplished at the earliest possible date. Article 22 defined the expression "civilian internee" as "all persons who are not POWs and who, having contributed in any way whatsoever to the armed or political struggle, have been arrested or detained by any of the parties by virtue of their contribution thereto".

627. Under Paragraph II.3 of the 1991 Peace Accords between the Government of Angola and UNITA, all civilian and military prisoners held by either party were to be released.

628. Paragraph 1 of the 1992 Agreement between Croatia and the FRY on the Release and Repatriation of Prisoners provides that "all prisoners visited by the ICRC and mentioned on the ICRC list appearing in Annex A shall be released in an operation which will take place under ICRC supervision in Nemetin on August 14, 1992".

629. Agreement No. 2 on the Implementation of the Agreement of 22 May 1992 between the Parties to the Conflict in Bosnia and Herzegovina provided that a Commission, consisting of four liaison officers appointed by the parties, would be created under the auspices of the ICRC and "assume the following tasks: (a) exchange lists and take the necessary steps with a view to release prisoners".

630. Paragraph 2 of the Agreement on the Exchange of Prisoners between the FRY and Croatia (July 1992) provided that "the release and repatriation of all prisoners shall take place without delay".

631. Article 3(1) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that "all prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law . . . will be unilaterally and unconditionally released". Article 10 provides that "any prisoner released in or transferred to an area other than that of his or her former residence retains the right to return home at a later stage if he or she wishes to do so".

632. Part III of the 1992 General Peace Agreement for Mozambique specified that all prisoners being held, except those convicted for ordinary crimes, should be released by the parties.

633. Article 4 of the 1992 N'sele Cease-fire Agreement provided that the cease-fire shall imply "the release of all prisoners-of-war; the effective release of all persons arrested because and as a result of this war within five days following the entry into force of the Cease-fire Agreement".

634. Article 10 of the 1993 Cotonou Agreement on Liberia provided that all POWs and detainees should immediately be released. Common-law criminals were not covered by this provision.

635. Article 5 of the 1993 Afghan Peace Accord provided that there should be immediate release of all detainees held by the government and different parties during the armed hostilities.
636. Under Article 20(c)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "unjustifiable delay in the repatriation of prisoners of war" is a war crime.
637. Under Article 2 of the 1996 Moscow Agreement on a Cease-fire in Chechnya, the parties to the conflict in Chechnya agreed on certain modalities of liberating all persons being retained by force. The term "persons being retained by force" was to be understood as participants in the armed conflict who had been arrested, hostages and other civilian persons who had been detained, including those arrested at roadblocks, without the presentation of charges of accusation, or those to whom up to 27 May 1996 (the date of the cease-fire agreement) no charges or accusation had been presented within the time periods established by law. The working groups were to exchange lists of forcibly detained persons within a day of the agreement and the release of unlawfully detained persons was to commence immediately.

II. National Practice

Military Manuals
638. Argentina's Law of War Manual (1969), referring to Article 118 GC III, provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities".[559] Referring to Article 109 GC III, the manual also states that "Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel". According to the manual, the following should be repatriated directly:

(1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished;
(2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished;
(3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.[560]

639. Argentina's Law of War Manual (1989) states that "prisoners of war shall be released and repatriated without any delay after the cessation of the hostilities".[561] Referring to Articles 109 and 110 GC III, the manual also states that "the Parties to the conflict have the obligation, regardless of number or rank,

[559] Argentina, *Law of War Manual* (1969), § 2.098.
[560] Argentina, *Law of War Manual* (1969), § 2.091.
[561] Argentina, *Law of War Manual* (1989), § 3.32.

to repatriate seriously wounded and seriously sick prisoners of war".[562] The manual identifies grave breaches of Article 85 AP I as war crimes.[563]

640. Australia's Defence Force Manual provides that "PWs are to be repatriated immediately to their own country at the conclusion of the hostilities".[564]

641. Canada's LOAC Manual provides that "while all PWs are to be released and repatriated immediately upon cessation of active hostilities, parties to the conflict are to repatriate, regardless of rank or number, all seriously wounded and sick when fit to travel".[565] It further states that "interned persons must be released by the detaining power as soon as the reasons which necessitated internment cease to exist. Internment must also cease as soon as possible after the close of hostilities."[566] The manual also identifies "unjustifiable delay in repatriating prisoners of war or civilians" as a war crime.[567]

642. Cameroon's Instructors' Manual provides that release and repatriation of POWs must be obtained at the end of hostilities.[568]

643. Colombia's Basic Military Manual provides that all POWs must be repatriated at the end of hostilities.[569]

644. Croatia's LOAC Compendium states that "unjustified delay in repatriation of POWs" falls under "grave breaches (war crimes)".[570]

645. France's LOAC Summary Note provides that "retention of prisoners of war and civilians" constitutes a grave breach, which is a war crime.[571]

646. Germany's Military Manual states that "all prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. This requires neither a formal armistice agreement nor the conclusion of a peace treaty."[572] It further stresses that "seriously wounded and sick prisoners of war who are fit to travel and whose mental or physical fitness has been incurably or permanently diminished or whose recovery may not be expected within one year shall already be repatriated during the armed conflict".[573] The manual specifies that "grave breaches of international humanitarian law are in particular: . . . unjustifiable delay in the repatriation of prisoners of war and civilians".[574]

647. Hungary's Military Manual provides that one of the measures required after a conflict is the repatriation of POWs and internees.[575] It also states that

[562] Argentina, *Law of War Manual* (1989), § 3.31.
[563] Argentina, *Law of War Manual* (1989), § 8.03.
[564] Australia, *Defence Force Manual* (1994), § 1045.
[565] Canada, *LOAC Manual* (1999), p. 10-5, § 49.
[566] Canada, *LOAC Manual* (1999), p. 11-7, § 58.
[567] Canada, *LOAC Manual* (1999), Section 16.3, §§ 8 and 17.
[568] Cameroon, *Instructors' Manual* (1992), p. 154, § 541.
[569] Colombia, *Basic Military Manual* (1995), p. 31.
[570] Croatia, *LOAC Compendium* (1991), p. 56.
[571] France, *LOAC Summary Note* (1992), § 3.4.
[572] Germany, *Military Manual* (1992), § 731.
[573] Germany, *Military Manual* (1992), § 732.
[574] Germany, *Military Manual* (1992), § 1209.
[575] Hungary, *Military Manual* (1992), pp. 38 and 99.

"unjustified delay in repatriation of POWs" falls under "grave breaches (war crimes)".[576]

648. Israel's Manual on the Laws of War provides that "in any event, at the end of hostilities, the prisoners must be returned to their State of nationality".[577]

649. Italy's IHL Manual provides that "unjustified delay in repatriation of prisoners of war" is considered a war crime.[578]

650. Madagascar's Military Manual provides that "at the end of the hostilities, the prisoners of war must be released without delay". It adds that "gravely wounded and sick prisoners shall be immediately repatriated".[579]

651. The Military Manual of the Netherlands provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities". It also provides that "Parties to the conflict are bound to send back to their own country seriously wounded and seriously sick prisoners of war".[580]

652. The Military Handbook of the Netherlands provides that "seriously wounded and seriously sick prisoners of war must be repatriated by the Detaining Power".[581]

653. New Zealand's Military Manual provides that "prisoners of war must be released and repatriated without delay after the cessation of active hostilities".[582] It further states that "unjustifiable delay in repatriating prisoners of war or civilians [is a grave breach when committed wilfully and in violation of the Conventions and Protocol].[583] The manual also states that:

> Parties to the conflict are to repatriate, regardless of rank or number, all seriously wounded and sick when fit to travel and, when possible, agreements should be made between the parties, with the cooperation of neutral states, for the detention of such persons in neutral territory pending such repatriation . . .
>
> Interned persons must be released by the Detaining Power as soon as the reasons which necessitated internment cease to exist. Internment must also cease as soon as possible after the end of hostilities but internees, who are in the territory of a belligerent and who are undergoing a sentence of confinement or against whom judicial proceedings . . . are pending, may be detained until the end of the proceedings or, as the case requires, of the sentence. Each State which is a party to the IV GC must endeavour, at the end of hostilities or of the occupation, to ensure the return of all internees to their last place of residence, or at least to facilitate their repatriation.[584]

654. Nigeria's Manual on the Laws of War provides that "prisoners of war must be released and repatriated upon the cessation of the hostilities".[585]

[576] Hungary, *Military Manual* (1992), p. 90.
[577] Israel, *Manual on the Laws of War* (1998), p. 54.
[578] Italy, *IHL Manual* (1991), Vol. I, § 85.
[579] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 26.
[580] Netherlands, *Military Manual* (1993), p. VII-12, § 6.
[581] Netherlands, *Military Handbook* (1995), p. 7-42.
[582] New Zealand, *Military Manual* (1992), § 910.
[583] New Zealand, *Military Manual* (1992), § 1703(4).
[584] New Zealand, *Military Manual* (1992), §§ 935 and 1133.
[585] Nigeria, *Manual on the Laws of War* (undated), § 44.

655. South Africa's Medical Services Military Manual makes specific reference to the obligations in Articles 118 and 119 GC III and provides that, after an armistice, POWs against whom no criminal proceedings are pending have a right to be released and repatriated without delay.[586] The manual identifies as war crimes grave breaches of AP I.[587]

656. Spain's LOAC Manual provides that internees and POWs must be released and repatriated without delay after the cessation of hostilities. It specifies that certain categories of internees must be released as soon as the reasons for their internment no longer exist, regardless of whether their return to their place of residence can be authorised during the hostilities. These provisions apply to persons with incurable wounds or illnesses, who are not expected to recover within one year or those people who, although recovered, remain debilitated; children; expectant mothers or those with young children; and wounded, sick or interned persons who have been interned for long periods. It also specifies that when releasing and repatriating internees and POWs, priority should be given to the wounded and sick, the elderly and those who have been detained the longest.[588] The manual further provides that "it is a grave breach which shall be qualified war crime . . . to delay without justification the repatriation of prisoners of war and civilian internees".[589]

657. Switzerland's Basic Military Manual states that "prisoners shall be released and repatriated without delay after the cessation of active hostilities. The Detaining Power shall establish a plan of repatriation and ensure its execution."[590] It further provides that grave breaches of AP I include "the unjustified delay in repatriation of prisoners of war or civilians".[591] The manual also states that "seriously wounded and sick prisoners of war shall be repatriated as soon as their state of health permits it; the other wounded and sick may be hospitalised in neutral countries".[592] The manual stipulates that "Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners to make all appropriate decisions regarding their repatriation or hospitalisation in a neutral country".[593]

658. The UK Military Manual states that "Prisoners of war must be released and repatriated without delay after the cessation of active hostilities".[594]

659. The UK LOAC Manual provides that "PW must be released and repatriated without delay after the cessation of active hostilities".[595]

[586] South Africa, *Medical Services Military Manual* (undated), Article 36.
[587] South Africa, *Medical Services Military Manual* (undated), § 41.
[588] Spain, *LOAC Manual* (1996), Vol. I, § 6.5 and 6.9.
[589] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1)
[590] Switzerland, *Basic Military Manual* (1987), Article 141.
[591] Switzerland, *Basic Military Manual* (1987), Article 193(2).
[592] Switzerland, *Basic Military Manual* (1987), Article 142(1).
[593] Switzerland, *Basic Military Manual* (1987), Article 142(2).
[594] UK, *Military Manual* (1958), § 261.
[595] UK, *LOAC Manual* (1981), Section 8, p. 33, § 22.

660. The US Field Manual reproduces Articles 109, 118 and 119 GC III and 132 and 134 GC IV.[596]
661. The US Air Force Pamphlet provides that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities". It further stresses the obligation of the parties to the conflict to repatriate seriously wounded and sick POWs.[597]

National Legislation
662. Argentina's Draft Code of Military Justice punishes members of the armed forces who, in the event of an armed conflict, "unreasonably hinder or delay the liberation or repatriation of prisoners of war or civilian persons".[598]
663. Under Armenia's Penal Code, "unjustified delay in the repatriation of prisoners of war or civilians" during an armed conflict constitutes a crime against the peace and security of mankind.[599]
664. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".[600]
665. Australia's ICC (Consequential Amendments) Act incorporates grave breaches of AP I in the list of war crimes in the Criminal Code, including "unjustifiable delay in the repatriation of prisoners of war or civilians".[601]
666. Azerbaijan's Criminal Code provides that "unfounded delay of repatriation of POW and civilian individuals to their native country" constitutes a war crime.[602]
667. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[603]
668. The Criminal Code of Belarus provides that "unjustified delay in the repatriation of prisoners of war or civilians" is a war crime.[604]
669. Under Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, "unjustifiable delay in the repatriation of prisoners of war or civilians" is a grave breach and, as such, a criminal offence.[605]
670. The Amnesty Law as amended of the Federation of Bosnia and Herzegovina provided for the release and repatriation of POWs without delay

[596] US, *Field Manual* (1956), §§ 188, 198, 200 and 339–431.
[597] US, *Air Force Pamphlet* (1976), § 13-10.
[598] Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(7) in the *Code of Military Justice as amended* (1951).
[599] Armenia, *Penal Code* (2003), Article 390.4(2).
[600] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[601] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.99.
[602] Azerbaijan, *Criminal Code* (1999), Article 116.0.15.
[603] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[604] Belarus, *Criminal Code* (1999), Article 136(15).
[605] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(18).

upon cessation of active hostilities.[606] The Law on Amnesty as amended of the Republika Srpska contains the same provision.[607]

671. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".[608]

672. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".[609]

673. Croatia's Criminal Code provides that "whoever in violation of the rules of international law, after the termination of a war or armed conflict, orders or imposes an unjustifiable delay in the repatriation of prisoners of war or civilians shall be punished".[610]

674. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".[611]

675. The Czech Republic's Criminal Code as amended punishes "whoever in wartime . . . delays, without grounds, the return of civilians or prisoners of war".[612]

676. According to the Draft Amendments to the Penal Code of El Salvador, "anyone who, in a situation of international armed conflict, delays without justification the repatriation of protected persons, shall be punished".[613]

677. Estonia's Penal Code provides that "unjustified delay in the release or repatriation, if committed against a prisoner o war or an interned civilian" is a war crime.[614]

678. Under Georgia's Criminal Code, "unjustifiable delay in the repatriation of prisoners of war or civilians" in an international or a non-international armed conflict is a crime.[615]

679. Germany's Law Introducing the International Crimes Code punishes anyone, who, in connection with an international or non-international armed conflict, "unjustifiably delays the return home of a protected person".[616]

606 Bosnia and Herzegovina, Federation, *Amnesty Law as amended* (1996), Article 5.
607 Bosnia and Herzegovina, Republika Srpska, *Law on Amnesty as amended* (1996), Article 5.
608 Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
609 Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
610 Croatia, *Criminal Code* (1997), Article 166.
611 Cyprus, *AP I Act* (1979), Section 4(1).
612 Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(b).
613 El Salvador, *Draft Amendments to the Penal Code* (1998), Article on "Demora injustificada de repatriación".
614 Estonia, *Penal Code* (2001), § 99.
615 Georgia, *Criminal Code* (1999), Article 411(1)(h).
616 Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(1).

680. Hungary's Criminal Code as amended provides that "unjustified delay in the repatriation of prisoners of war or civilians persons" is a punishable offence.[617]

681. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.[618] It adds that any "minor breach" of the Geneva Conventions, including violations of Articles 109 and 118 GC III and 132–134 GC IV, are also punishable offences.[619]

682. Jordan's Draft Military Criminal Code states that, when committed in a situation of armed conflict, unreasonably delaying the repatriation of POWs or civilians to their country of origin, is considered a war crime.[620]

683. Under the Draft Amendments to the Code of Military Justice of Lebanon, "unjustified delay in the repatriation of prisoners of war or civilians" is a war crime.[621]

684. Under Lithuania's Criminal Code as amended, unjustified delay in the release or repatriation of prisoners of war and interned alien civilians after the termination of hostilities is a war crime.[622]

685. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".[623]

686. Under the International Crimes Act of the Netherlands, it is a crime to commit, in an international armed conflict, "the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . . unjustifiable delay in the repatriation of prisoners of war or civilians".[624]

687. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".[625]

688. Nicaragua's Draft Penal Code provides that "whoever, in the circumstances of an international armed conflict, delays without justification the repatriation of a protected person" commits a punishable offence.[626]

689. According to Niger's Penal Code as amended, "unjustified delay in the repatriation of prisoners of war or civilians", protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, constitutes a war crime.[627]

617 Hungary, *Criminal Code as amended* (1978), Section 158(3)(c).
618 Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
619 Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
620 Jordan, *Draft Military Criminal Code* (2000), Article 41(16).
621 Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(15).
622 Lithuania, *Criminal Code as amended* (1961), Articles 342 and 343.
623 Moldova, *Penal Code* (2002), Article 391.
624 Netherlands, *International Crimes Act* (2003), Article 5(2)(d)(ii).
625 New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
626 Nicaragua, *Draft Penal Code* (1999), Article 454.
627 Niger, *Penal Code as amended* (1961), Article 208.3(18).

690. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[628]
691. Slovakia's Criminal Code as amended punishes "whoever in wartime ... delays, without grounds, the return of civilians or prisoners of war".[629]
692. Slovenia's Penal Code provides that "whoever, at the end of war or armed conflict and in violation of the rules of international law, orders the postponement of the repatriation of prisoners of war or civilians, or postpones it himself" shall be punished".[630]
693. Spain's Penal Code punishes anyone who unjustifiably prevents or delays the release or repatriation of POWs or civilians.[631]
694. Tajikistan's Criminal Code punishes "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict ... [such as] unjustifiable delay in the repatriation of prisoners of war or civilians".[632]
695. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of ... [AP I]".[633]
696. The Penal Code as amended of the SFRY (FRY) provides that "whoever, in violation of the rules of international law, once the war or an armed conflict is over, orders an unjustifiable delay in the repatriation of prisoners of war or civilians or conducts it himself shall be punished".[634]
697. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of ... [AP I]".[635]

National Case-law
698. No practice was found.

Other National Practice
699. The Report on the Practice of Algeria states that "according to the documentation published by the FLN, one can conclude that a large number of prisoners were eventually released and repatriated, often through the ICRC".[636]

628 Norway, *Military Penal Code as amended* (1902), § 108.
629 Slovakia, *Criminal Code as amended* (1961), Article 263(a)(2)(b).
630 Slovenia, *Penal Code* (1994), Article 383.
631 Spain, *Penal Code* (1995), Article 611(7).
632 Tajikistan, *Criminal Code* (1998), Article 403(1).
633 UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
634 SFRY (FRY), *Penal Code as amended* (1976), Article 150-a.
635 Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).
636 Report on the Practice of Algeria, 1997, Chapter 5.4.

700. In 1992, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Bangladesh stated that a "strong signal should be conveyed to the Serbs that they must release all prisoners and detainees from the concentration camps and abolish all such camps immediately".[637]

701. According to the Report on the Practice of Botswana, it is the *opinio juris* of Botswana that persons in the power of an adversary should be released as soon as the reasons for arrest or detention have ceased to exist.[638]

702. The Report on the Practice of Colombia states that "the Colombian Government has ordered the demilitarization of certain regions of the country in order to advance dialogue conducive to the demobilisation and reintegration of guerrilla groups and also to carry out humanitarian operations, such as those designed to secure the release of persons deprived of liberty, both military and civilian".[639]

703. According to the Report on the Practice of Egypt, "Egypt always stresses on the search, repatriation and release of POWs, be they Egyptians or appertaining to the adverse party. This occurred on several occasions."[640]

704. The Report on the Practice of France points out that France has insisted on the moral necessity of releasing prisoners in connection with the conflicts in Afghanistan, Bosnia and Herzegovina and Rwanda. It even mentioned the possibility of freeing prisoners from camps by force.[641]

705. In 1989, in a reply to a question in parliament concerning the repatriation of Ethiopian prisoners of war, the German Minister of Foreign Affairs stated that:

> The Federal Government will also in future urge the Ethiopian government to agree to a return of prisoners on humanitarian grounds. However, neither the Third Geneva Convention of 1949, to which Ethiopia is a party, nor customary international humanitarian law places any obligation on Ethiopia to repatriate or take back prisoners of war during a continuing armed conflict.[642]

706. In 1995, all political parties in the German parliament requested the release of injured and handicapped prisoners, as well as women, in the conflict in Nagorno-Karabakh.[643]

[637] Bangladesh, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, p. 111.
[638] Report on the Practice of Botswana, 1998, Chapter 5.4.
[639] Report on the Practice of Colombia, 1998, Chapter 1.8, referring to President's Office, Second Report on the Peace Process, 18 May 1995, pp. 3, 11 and 12; Circular of the Major General Miguel Vega Uribe, Commander of the Colombian Armed Forces, reprinted in Arturo Alape, *La paz, la violencia: testigos de excepción*, Bogotá, Editorial Planeta, 1985, pp. 503–508.
[640] Report on the Practice of Egypt, 1997, Chapter 5.4.
[641] Report on the Practice of France, 1999, Chapter 5.4.
[642] Germany, Reply by the Federal Government to a written question submitted by a Bundestag member and the Parliamentary Green Party, Document 11/3841, Safety of 127 repatriated Ethiopian prisoners of war, Bundestag Document 11/4037, 11th legislative period, 20 February 1989.
[643] Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, alliance 90/the Greens and FDP, Initiative zum Karabach-Konflikt, *BT-Drucksache* 13/1029, 30 March 1995, p. 1.

707. According to the Report on the Practice of India, "it is very clear from the applicable law and judicial decisions that . . . when detention is no more justifiable by applicable laws, the executive authorities are bound to release the person detained".[644]

708. The Report on the Practice of Iraq refers to a military communiqué issued in 1980 during the Iran–Iraq War which pointed out that citizens of other countries who found themselves in Iraq were repatriated following evacuation.[645]

709. According to the Report on the Practice of Kuwait, "Kuwait, like the majority of States, considers he may detain POWs until the end of military operations, simply in order to neutralise them". The report states that the *opinio juris* of Kuwait is that "immediately following the conclusion of hostilities, the parties must engage in negociations, possibly via a neutral intermediary, with a view to obtaining the release and return of all POWs and internees". The report specifies, however, that spies "may only be released when they have completed their prison sentences".[646]

710. According to the Report on the Practice of Nigeria, at the end of the Nigerian civil war in 1970, the inhabitants of the former Biafran enclave were released so that they could return to their respective towns.[647]

711. In 1995, the House of Representatives of the Philippines passed a resolution appealing to the President to release political prisoners detained throughout the country.[648]

712. Following the 1992 N'sele Cease-fire Agreement, the Rwandan government adopted two amnesty laws, which led to the release of most of the persons detained in connection with the conflict. The rebels also released prisoners. In October, both parties declared that they no longer detained any POWs.[649]

713. According to the Report on US Practice, it is the *opinio juris* of the US that persons detained for their participation in an internal armed conflict and who are not serving a sentence of imprisonment lawfully imposed should be released or repatriated without delay at the end of active hostilities. Priority in release should be given to prisoners with special needs, such as the elderly and the wounded and sick. The report further states that "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. It also notes that "it is the *opinio juris* of the US that

644 Report on the Practice of India, 1997, Chapter 5.4.
645 Report on the Practice of Iraq, 1998, Chapter 5.4 and 5.6, referring to Military Communiqué No. 65, 8 October 1980.
646 Report on the Practice of Kuwait, 1997, Chapter 5.4.
647 Report on the Practice of Nigeria, 1997, Chapter 5.4, referring to *New Nigerian*, 200 Ibos released, Lagos, 24 January 1970, p. 1.
648 Philippines, House of Representatives, Res. No. 27, 28 November 1995.
649 Association Rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l'homme au Rwanda*, Kigali, 1993, pp. 45 and 51.

persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[650]

714. According to the Report on the Practice of Zimbabwe, it is the *opinio juris* of Zimbabwe that persons detained by reason of their participation in an internal armed conflict should be released or repatriated without delay at the end of active hostilities.[651]

715. In 1980, the President of the Military Commission of a State accepted to release elderly women and men, schoolgirls, women not involved with the State Research Bureau and all other non-combatants.[652]

716. In 1992, in a letter to the President of the ICRC, the President of a separatist entity agreed to release detained persons over the age of 60.[653]

717. In 1992, in a memorandum on the responsibilities and obligations applicable to contacts with the local population, the Ministry of Defence of a State engaged in an international military operation stated that detainees (persons detained because they posed a threat to the armed forces or obstructed their operation and which were not POWs) "will normally be released once they are no longer regarded as a threat to the mission or the general population".[654]

III. Practice of International Organisations and Conferences

United Nations

718. In two separate resolutions adopted in 1980, the UN Security Council called on the governments of South Africa and Zimbabwe to release all political prisoners.[655]

719. In a resolution on Tajikistan adopted in 1994, the UN Security Council welcomed the release of detainees and POWs which had taken place on 12 November 1994 and called for further similar measures.[656]

720. In 1996, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council demanded that the parties "comply fully . . . and without any further delay with their commitments regarding the release of prisoners" and expressed particular concern at the failure to comply with the relevant provisions of the 1995 Dayton Accords.[657]

721. In 1998, in a statement by its President, the UN Security Council demanded that "the Taliban release other Iranians detained in Afghanistan and ensure their . . . passage out of Afghanistan without further delay".[658]

[650] Report on US Practice, 1997, Chapters 5.3 and 5.4.
[651] Report on the Practice of Zimbabwe, 1998, Chapter 5.4.
[652] ICRC archive document.
[653] ICRC archive document.
[654] ICRC archive document.
[655] UN Security Council, Res. 463, 2 February 1980, §§ 5(ii) and 7; Res. 473, 13 June 1980, § 8.
[656] UN Security Council, Res. 968, 16 December 1994, § 10.
[657] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/15, 4 April 1996, pp. 1–2.
[658] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

722. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly strongly encouraged all parties:

> to fulfil the commitments made at Dayton, Ohio, to release without delay all civilians and combatants held in prison or detention in relation to the conflict, in conformity with international humanitarian law and the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina.[659]

723. In a resolution adopted in 1996, the UN General Assembly welcomed the reported release of female detainees with children in Sudan.[660]

724. In resolutions adopted in 1994 and 1995, the UN Commission on Human Rights demanded the immediate, internationally supervised, release of all persons arbitrarily or otherwise illegally detained in connection with the conflict in the former Yugoslavia.[661]

725. In a resolution adopted in 1996, the UN Commission on Human Rights acknowledged the release of prisoners in the former Yugoslavia and insisted that all parties continue to fulfil their commitments in conformity with the peace agreement to release without delay all civilians and combatants detained in connection with the conflict.[662]

726. In a resolution adopted in 1996, the UN Commission on Human Rights strongly urged the government of Myanmar "to release immediately . . . all detained political prisoners".[663]

727. In a resolution adopted in 1998, the UN Commission on Human Rights called upon the parties to the conflict in the former Yugoslavia "to release immediately any individuals held as a result of, or in relation to, any armed conflict between or among the parties".[664]

728. In 1996, in a statement by its Chairman on the situation of human rights in Chechnya, the UN Commission on Human Rights called for "the immediate release of all those who have been detained in connection with the conflict" in Chechnya.[665]

729. The Mission dispatched by the UN Secretary-General to investigate the situation of POWs in Iran and Iraq in 1988 reported that prisoners detained in Iran who were not Iraqi nationals were considered by Iran to be mercenaries and could therefore be executed according to custom. Iran promised, however, that they would also be released after the cessation of hostilities.[666]

[659] UN General Assembly, Res. 50/193, 22 December 1995, § 19.
[660] UN General Assembly, Res. 51/112, 12 December 1996, § 11.
[661] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 21; Res. 1995/89, 8 March 1995, § 25.
[662] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 12.
[663] UN Commission on Human Rights, Res. 1996/80, 23 April 1996, § 3.
[664] UN Commission on Human Rights, Res. 1998/79, 22 April 1998, § 41(a).
[665] UN Commission on Human Rights, Chairman's statement on the situation of human rights in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/1996/L.10/Add.10, 24 April 1996, § 87.
[666] Mission dispatched by the UN Secretary-General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq, Report, UN Doc. S/20147, 24 August 1988, § 65.

730. In 1991, in a report on the situation in the former Yugoslavia, the UN Secretary-General reported that between October and December 1991, the "ICRC has participated in a multilateral negotiating commission, meeting almost daily at Zagreb to discuss, among other issues, the release of prisoners" between Croatia and the YPA.[667]

731. In 1993, in a progress report on the situation in Somalia, the UN Secretary-General reported that, on 15 January 1993, as part of an informal preparatory meeting for a conference on national reconciliation in Somalia attended by 14 Somali political movements, it was agreed that "all POWs shall be freed and handed over to the International Committee of the Red Cross and/or UNITAF. This process shall commence immediately and be completed by 1 March 1993."[668]

732. In 1996, in relation to the 1994 Lusaka Protocol concluded between the government of Angola and UNITA, the UN Secretary-General highlighted as a positive development the release of additional prisoners registered with the ICRC.[669] In 2001, in a report on the situation concerning Western Sahara, the UN Secretary-General stated that:

> During the past two months, there has regrettably been no progress towards the repatriation of the remaining 1,481 Moroccan prisoners of war held in camps in the Tindouf area of Algeria. The plight of these men, most of whom have been held for more than 20 years, is a humanitarian and human rights issue that should be addressed on an urgent basis. I once again call on the parties to arrange for the early repatriation of all prisoners, under the auspices of the ICRC.[670]

733. In 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina commented that the release of all POWs was an important part of the Agreement and expressed his serious concern at the unwillingness of the parties to fully comply with their obligations.[671] In another report later the same year, he reported that:

> Intensive pressure has resulted in the release of most prisoners registered by the ICRC who were detained in connection with the conflict. For the remaining prisoners, a process was devised whereby case files on persons alleged to have committed war crimes were passed to the ICTY for review. The parties complied fully with this process, including release of all persons for whom ICTY determined that there was insufficient evidence to warrant further detention.[672]

[667] UN Secretary-General, Report pursuant to Security Council resolution 721 (1991), UN Doc. S/23280, 11 December 1991, p. 7, § 18.
[668] UN Secretary-General, Progress report on the situation in Somalia, UN Doc. S/25168, 26 January 1993, § 9 and Annex III, Agreement on implementing the cease-fire and on modalities of disarmament, § IV.
[669] UN Secretary-General, Report on UNAVEM III, UN Doc. S/1996/171, 6 March 1996, § 3.
[670] UN Secretary-General, Report on the situation concerning Western Sahara, UN Doc. S/2001/398, 24 April 2001, § 9.
[671] High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, § 74.
[672] High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/542, 10 July 1996, Annex, § 42.

Other International Organisations

734. In recommendation adopted in 1979 on the missing political prisoners in Chile, the Parliamentary Assembly of the Council of Europe called on member States to urge the Chilean authorities to release all detained political prisoners.[673]

735. In a resolution adopted in 1980 on the situation of human rights in Latin America, the Parliamentary Assembly of the Council of Europe invited member States "to make vigorous representations to the governments of all countries holding political prisoners, designed to secure their release, and, when release is conditional upon their leaving the country, to grant entry visas to such prisoners".[674]

736. In a recommendation adopted in 1996 on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited member States to support the ICRC in the implementation of its tasks under the 1995 Dayton Accords, namely to organise the release of prisoners as quickly as possible.[675]

737. In 1996, the Committee of Ministers of the Council of Europe reported that, in a joint communiqué in April 1996, the Presidents of Armenia and Azerbaijan had stated that the immediate release by the parties of all hostages and POWs was essential.[676]

738. In a resolution adopted in 1988 on the situation in Cyprus, the European Parliament drew the Ministers' attention to the need to find a lasting solution to the problem of missing persons, particularly through the release of those missing who might be detained in prison.[677]

739. In a resolution adopted in 1994 on the situation in Chechnya, the European Parliament urged the parties to implement the agreement signed by the two parties that same month, providing in particular for the release of soldiers taken prisoner.[678]

740. In 1991, in the Final Communiqué of its 12th Session, the GCC Supreme Council stressed, in particular, "the need for the full and speedy implementation of the terms of the cease-fire and all the provisions of Security Council resolution 687 (1991), particularly those relating to the immediate release of all prisoners and detainees, both Kuwaitis and third-country nationals".[679]

673 Council of Europe, Parliamentary Assembly, Rec. 868, 5 June 1979, § 12(ii).
674 Council of Europe, Parliamentary Assembly, Res. 722, 28 January 1980, § 11(g).
675 Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, § 19(viii)(d).
676 Council of Europe, Committee of Ministers, Doc. 7690, Supplementary reply to recommendation 1263 (1995) on the humanitarian situation of the refugee and displaced persons in Armenia and Azerbaijan, 29 October 1996, pp. 2–3.
677 European Parliament, Resolution on the situation in Cyprus, 27 June 1988, §§ 7–8.
678 European Parliament, Resolution on the situation in Chechnya, 15 December 1994, § 5.
679 GCC, Supreme Council, 12th Session, Kuwait, 23-25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1992 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991, p. 3.

741. In 1992, in the Final Communiqué of its 13th Session, the GCC Supreme Council took note of Iraq's "infringement of the conditions of the cease-fire through its refusal to release prisoners from Kuwait and from other countries" and called on the international community "to continue exercising pressure on the Iraqi Regime until it fully complies by implementing all the Security Council resolutions, especially those regarding the release of Kuwaiti and other nationals held prisoners".[680]

742. In 1993, in the Final Communiqué of its 14th Session, the GCC Supreme Council called for "the release of all prisoners and detainees, both Kuwaitis and third-country nationals" held by Iraq in the wake of the Gulf War.[681]

743. In 1994, in the Final Communiqué of its 15th Session, the GCC Supreme Council appealed to the members of the UN Security Council to "continue their earnest efforts to compel Iraq to take . . . steps towards genuine implementation of all Security Council resolutions, especially those relating to the release of all Kuwaiti and other prisoners and detainees".[682]

744. In 1995, in the Final Communiqué of its 16th Session, the GCC Supreme Council called on the international community to maintain pressure on Iraq until it completed implementation of the pertinent UN resolutions, "in particular those relating to the release of prisoners and detainees, both Kuwaitis and nationals of other States, whose extended suffering was in blatant violation of resolution 687 (1991) and the third and fourth Geneva Conventions".[683]

745. In a resolution adopted in 1989 on the Iran–Iraq situation, the Council of the League of Arab States decided:

> to intensify efforts on all fronts for both sides to release the prisoners of war and to repatriate them in conformity with the Security Council's Resolution no. 598/87 and the Third Geneva Convention, in order to end their sufferings and the social and humanitarian problems resulting from their sustained detention.[684]

746. In a resolution on Bosnia and Herzegovina adopted in 1992, the Council of the League of Arab States called upon the Serb forces "to release all the prisoners in accordance with International Charters and customs".[685]

[680] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, pp. 3–4.

[681] GCC, Supreme Council, 14th Session, Riyadh, 20-22 December 1993, Final Communiqué, annexed to Letter dated 29 December 1993 from the UAE to the UN Secretary-General, UN Doc. A/49/56-S/26926, 30 December 1993, p. 4.

[682] GCC, Supreme Council, 15th Session, Manama, 19–21 December 1994, Final Communiqué, annexed to Letter dated 22 December 1994 from Bahrain to the UN Secretary-General, UN Doc. A/49/815-S/1994/1446, 22 December 1994, p. 3.

[683] GCC, Supreme Council, 16th Session, Muscat, 4–6 December 1995, Final Communiqué, annexed to Letter dated 29 December 1995 from Oman to the UN Secretary-General, UN Doc. A/51/56-S/1995/1070, 29 December 1995, p. 4.

[684] League of Arab States, Council, Res. 4938, 13 September 1989, § 4.

[685] League of Arab States, Council, Res. 5231, 13 September 1992, § 5.

747. In two resolutions adopted in 1992 and 1993, the Council of the League of Arab States decided to call for the "release of the Lebanese nationals detained by the Israeli authorities".[686]
748. In a resolution adopted in 1994 on the follow-up of the Intifada's developments, the Council of the League of Arab States decided "to ask the International Organisations concerned with Human Rights to exercise pressure on the Israeli authorities to release the Palestinian detainees immediately".[687]
749. In a resolution adopted in 1997, the Council of the League of Arab States decided:

> To request the International Community to adopt all measures for Israel to immediately release all the Lebanese prisoners and hostages from the prisons and places of detention controlled by its forces, as this constitutes a breach of the provisions of international law, the Fourth Geneva Convention of 1949, and the Hague Convention of 1907.[688]

750. In 1997, in a report on the situation in Angola, the OAU Secretary-General reported that, in accordance with the terms of the peace accords concluded between the two belligerents, the Angolan government and UNITA had both released, under ICRC auspices, all prisoners detained as a result of the conflict.[689]
751. In a resolution adopted in 1992 in the context of the conflict in the former Yugoslavia, the OIC Foreign Ministers requested the immediate release of prisoners in accordance with the agreement signed in Geneva under the auspices of the ICRC.[690]
752. In a resolution on Nagorno-Karabakh adopted in 1995, the OSCE Ministerial Council urged the parties to the conflict "to release immediately all POWs and persons detained in connection with the conflict".[691]

International Conferences
753. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, "the international community has consistently demanded humane treatment for prisoners of war, including . . . the prompt repatriation of seriously sick or wounded prisoners".[692]
754. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for international humanitarian law in armed conflicts

[686] League of Arab States, Council, Res. 5169, 29 April 1992, § 2; Res. 5324, 21 September 1993, § 2.
[687] League of Arab States, Council, Res. 5414, 15 September 1994, § 4.
[688] League of Arab States, Council, Res. 5635, 31 March 1997, § 3.
[689] OAU Secretary-General, Report on the situation in Angola, Doc. CM/2004 (LXVI)(e), 26 May 1997, § 13.
[690] OIC, Islamic Conference of Foreign Ministers, Res. 1/6-EX, 2 December 1992, § 22.
[691] OSCE, Ministerial Council, Decision on the Minsk Process, Doc. MC(5).DEC/3, 8 December 1995, § 3.
[692] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

and action by the ICRC for persons protected by the Geneva Conventions in which it appealed to all parties involved in armed conflicts "to carry out the early repatriation by phases of prisoners of war in accordance with the Third Geneva Convention and further beyond its provisions as might be acceptable in the interest of humanitarian considerations".[693]

755. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require "full cooperation of the parties over the release of prisoners".[694]

756. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that:

> prisoners of war are released and repatriated without delay after the cessation of active hostilities, unless subject to due judicial process; the prohibition of taking hostages is strictly respected; the detention of prisoners and internees is not prolonged for bargaining purposes which practice is prohibited by the Geneva Conventions.[695]

IV. Practice of International Judicial and Quasi-judicial Bodies

757. In a report on Panama in 1989, the IACiHR recommended that the government take immediate steps to release individuals who had been detained for political reasons.[696]

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

758. According to the ICRC Commentary on the Additional Protocols, the grave breach specified in Article 85(4)(b) AP I consists in the failure to repatriate seriously sick or wounded prisoners during hostilities in accordance with Article 109 GC III and all prisoners at the end of hostilities as required by Article 118 GC III without valid and lawful reasons justifying the delay. The Commentary adds that, with regard to civilians, the breach consists in delaying the departure of foreign nationals who want to leave the territory in accordance with Articles 35 and 134 GC IV without valid and lawful reasons justifying such delay.[697]

693 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, § 3.
694 Peace Implementation Conference for Bosnia and Herzegovina, London, 8-9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.
695 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(d).
696 IACiHR, Report on the situation of human rights in Panama, Doc. OEA/Ser.L/V/II.76 Doc. 16 rev. 2, 9 November 1989, p. 61.
697 Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3508–3509.

759. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities" and that "the internment of civilian persons shall cease as soon as possible after the end of active hostilities". Delegates also teach that "unjustifiable delay in the repatriation of prisoners of war" constitutes a grave breach of the law of war.[698]

760. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most of the grave breaches of AP I, listed the "unjustifiable delay in the repatriation of prisoners of war or civilians", when committed wilfully and in violation of international humanitarian law, as a war crime to be subject to the jurisdiction of the ICC.[699]

VI. Other Practice

761. In the context of the conflict in Cuba, one commentator described witnessing "the surrender of hundreds of *Batistianos* from a small-town garrison":

> They were gathered within a hollow square of rebel Tommy-gunners and harangued by Raul Castro: "We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation – and I am not going to repeat it – you will be delivered to the Cuban Red Cross tomorrow. Once you are under Batista's orders again, we hope that you will not take arms against us. But, if you do, remember this: we took you this time. We can take you again. And when we do, we will not frighten or torture or kill you . . . If you are captured a second time or even a third . . . we will again return you exactly as we are doing now.[700]

762. In 1981, in a meeting with the ICRC, an armed opposition group said that it preferred to release a number of detained combatants when it could no longer ensure their safety.[701]

763. In 1982, in a meeting with the ICRC, an armed opposition group agreed to unilaterally release detained combatants using the ICRC as an intermediary.[702]

764. In 1987, in a meeting with the ICRC, an armed opposition group stated that 95 per cent of its prisoners were soldiers drafted by force and were therefore released after being advised never to fight against the resistance.[703]

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698 Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 256, 257, 258, 723, 724 and 776(i).

699 ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, p. 2.

700 D. Chapelle, How Castro Won, in T. N. Greene (ed.), *The Guerrilla - And How to Fight Him: Selections from the Marine Corps Gazette*, Frederick A. Praeger, New York, 1962, p. 233; also cited in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977.

701 ICRC archive document.

702 ICRC archive document.

703 ICRC archive document.

765. In Colombia in 1996, a guerrilla group (FARC-EP) made public the list of 60 soldiers captured during an attack on a military base. It stated that it considered the soldiers to be prisoners of war and intended to return them safe and sound.[704]

766. The Report on SPLM/A Practice states that, with regard to sections of the population who have fallen under its administration or who have been captured as POWs, "the SPLM/A has followed the practice of allowing people to voluntarily return to the government side if they wish and to other areas held by rival factions". According to the report, "this practice of the SPLM/A with respect to release and return of POWs and other categories loyal to the enemy side is in accordance with SPLM/A legislation on the war".[705]

Unconditional release

I. Treaties and Other Instruments

Treaties

767. No practice was found.

Other Instruments

768. Paragraph 1 of the Agreement on the Exchange of Prisoners between the FRY and Croatia (July 1992) provided that prisoners "shall be released simultaneously by both parties, according to the principle 'all for all' and without conditions".

769. Pursuant to Article 3(v) of the 1992 London Programme of Action on Humanitarian Issues, the parties to the conflict in Bosnia and Herzegovina undertook "to abide by the following provision: . . . there should be unconditional and unilateral release under international supervision of all civilians currently detained".

770. Article 3 of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provided that "all prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law . . . will be unilaterally and unconditionally released".

771. Paragraph 5 of the 1993 Afghan Peace Accord provided that there should be "immediate and unconditional release of all Afghan detainees held by the Government and different parties during the armed hostilities".

772. In paragraph 4 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition agreed "to deliver with the assistance of ICRC and in the presence of 5 family

[704] International Commission of the FARC-EP, Communiqué, 14 October 1996.
[705] Report on SPLM/A Practice, 1998, Chapter 5.4, referring to SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 32.

representatives, to return 26 prisoners of war, freed earlier by the opposition without preconditions, to their homes".

II. National Practice

Military Manuals
773. No practice was found.

National Legislation
774. No practice was found.

National Case-law
775. No practice was found.

Other National Practice
776. During the Algerian war of independence, it was reported that:

> Since the proclamation of the Provisional Government of the Algerian Republic in September 1958, 40 French soldiers who had been taken prisoner were released by the ALN without any condition. 20 were released in Algeria and 20 others were released in Tunisia and Morocco, through the Algerian Red Crescent.[706]

777. In 1992, in a letter to the ICRC, a State involved in an international armed conflict insisted that prisoners with medical problems should be released unconditionally and not be the object of exchange.[707]

III. Practice of International Organisations and Conferences

United Nations
778. In 1996, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council stressed that "the obligation to release prisoners is unconditional. Failure to do so constitutes a serious case of non-compliance" and noted "the readiness of the High Representative to propose measures to be taken against any party that fails to comply".[708]
779. In a resolution adopted in 1995, the UN Commission on Human Rights called for "the unconditional . . . release of all prisoners of war" in Afghanistan.[709] This call was repeated in a resolution adopted in 1996.[710]

[706] "La révolution algérienne tient au respect de l'homme", *El Moudjahid*, Vol. 3, p. 57.
[707] ICRC archive document.
[708] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/15, 4 April 1996, p. 2.
[709] UN Commission on Human Rights, Res. 1995/74, 8 March 1995, § 7.
[710] UN Commission on Human Rights, Res. 1996/75, 23 April 1996, § 7.

780. In a resolution adopted in 1996, the UN Commission on Human Rights strongly urged the government of Myanmar "to release . . . unconditionally all detained political prisoners".[711]
781. In a resolution adopted in 1998, the UN Commission on Human Rights welcomed the release of POWs in Afghanistan and called for "the unconditional . . . release of all remaining prisoners of war".[712]

Other International Organisations
782. No practice was found.

International Conferences
783. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

784. No practice was found.

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

785. In 1993, in a paper presented to the International Conference on the Former Yugoslavia, the ICRC reported that the agreed process for the release of detainees had come to a standstill when the Bosnian Serbs freed all prisoners and the other two parties did not release all their prisoners as promised during talks with the President of the ICRC. The Bosnian government indicated that it was "ready to release all prisoners, except war criminals, after an amnesty had been proclaimed". The Bosnian Serbs claimed that they had made "enough unilateral gestures". In response, the ICRC stated that the closure of places of detention could "no longer be contingent on considerations of reciprocity . . . [and that all prisoners should] be released under ICRC auspices in unilateral and unconditional operations".[713]

VI. Other Practice

786. In 1986, in a meeting with the ICRC, the commander of an armed opposition group stated that "the fate of prisoners would depend on their willingness to convert to [a specific religion] and on their behaviour during the detention". He also mentioned that some could be released after six months, one year or

[711] UN Commission on Human Rights, Res. 1996/80, 23 April 1996, § 3.
[712] UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 7.
[713] ICRC, Paper presented to the International Conference on the Former Yugoslavia, UN Doc. S/25050, 6 January 1993, Annex IV, pp. 14–15.

two years maximum. He also stated that, if after two years of detention no result was obtained, they would be executed.[714]

Exchange of prisoners

I. Treaties and Other Instruments

Treaties

787. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords included detailed provisions on prisoner exchange.

Other Instruments

788. Article 109(1) of the 1863 Lieber Code provides that "the exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war."

789. Article 30 of the 1874 Brussels Declaration states that "the exchange of prisoners of war is regulated by a mutual understanding between the belligerent parties".

790. Article 75 of the 1880 Oxford Manual provides that "prisoners of war may be released in accordance with a cartel of exchange, agreed upon by the belligerent parties".

791. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict . . . it is a duty to exchange prisoners of war".

792. The 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that:

1. Both Parties commonly declare that they shall exchange all prisoners and all persons deprived of their liberty, according to the principle of "all for all".
2. The word "prisoner" is understood as including all persons deprived of their liberty who are detained in detention centers or prisoner camps, regardless of whether a criminal or other procedure has been opened against them, an indictment drawn up or a condemnation, whether executory or not, pronounced, and regardless of the territory in which these persons are detained or the place where they were captured, or taken as hostages or deprived of their liberty or freedom of movement.

793. Under Article 2 of the Protocol to the 1996 Moscow Agreement on a Cease-fire in Chechnya, a mutual exchange of lists of persons being detained was to be effected, and the exchange itself was to take place within two weeks.

794. In paragraph 1 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition

[714] ICRC archive document.

agreed to conduct "a step-by-step exchange of an equal number of prisoners of war and detainees in accordance with the lists to be transmitted by the parties to the International Committee of the Red Cross (ICRC) before the end of the current round of inter-Tajik talks in Ashgabat".

795. In the 1997 Bishkek Memorandum, concluded between the President of Tajikistan and the leader of the United Tajik Opposition, an agreement was reached "to resolve . . . the problem of the exchange of POW's and prisoners in all its aspects and to work out the corresponding mechanism".

II. National Practice

Military Manuals

796. Israel's Manual on the Laws of War provides that "the parties to the conflict can reach an arrangement for the exchange of prisoners from both sides even before the war has ended. Exchanged prisoners of war may not return to active military service."[715]

797. The Military Handbook of the Netherlands provides that "exchange of prisoners may take place during the hostilities in accordance with agreements concluded between the Parties".[716]

798. The UK Military Manual provides that:

> The exchange of prisoners of war is nowadays rare. The rule generally observed is to exchange man for man and rank for rank, with due allowance if titles of ranks or grades differ or if there is no exact equivalent. A condition is often made that the men exchanged shall not participate as soldiers in the war – in fact they are paroled.[717]

The manual further specifies that:

> The exchange of prisoners may be carried out by means of so-called "cartels". Nothing more is required than a simple statement agreed by the commanders, such agreement being arrived at by parlementaires, that is, negotiations conducted during truce, or by the exchange of letters. But for exchanges on a large scale commissioners are usually appointed, and commanders ought not as a rule in such cases to act without having previously reported to their government and taken instructions. In modern war between civilised States, an exchange of prisoners will rarely be carried out except by agreement between the governments concerned.[718]

799. The US Field Manual provides that:

> Exchange of prisoners of war, other than those whose repatriation is required by . . . [GC III], may be effected by agreement between the belligerents. No belligerent is obliged to exchange prisoners of war, except if a general cartel requiring such exchange has been concluded. The conditions for exchange are as

[715] Israel, *Manual on the Laws of War* (1998), p. 54.
[716] Netherlands, *Military Handbook* (1995), p. 7-42.
[717] UK, *Military Manual* (1958), § 249.
[718] UK, *Military Manual* (1958), § 250.

prescribed by the parties thereto, and exchanges need not necessarily be on the basis of number for number or rank for rank.[719]

National Legislation

800. No practice was found.

National Case-law

801. No practice was found.

Other National Practice

802. In 1994, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, Argentina noted that the exchange of prisoners showed the will of the parties to cooperate in finding a solution to the crisis in Tajikistan.[720]

803. In 1995, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, China welcomed the agreements on the exchange of detainees and POWs.[721]

804. In 1995, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, Honduras welcomed the agreements on the exchange of detainees and POWs.[722]

805. In 1995, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, Indonesia drew particular attention to the provision asking parties to implement the agreed confidence-building measures, including the exchange of detainees and POWs.[723]

806. In 1994, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, the US encouraged the parties to resume discussions with the intention of participating in additional exchanges of prisoners.[724]

807. In 1995, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, the US stated that an exchange of prisoners between the Bosnian Serb side and the Bosnian government gave reason for hope.[725]

808. In 1985, the government of a State declared that foreign combatants captured in international armed conflicts could only be exchanged after they were tried.[726]

[719] US, *Field Manual* (1956), § 197.
[720] Argentina, Statement before the UN Security Council, UN Doc. S/PV.3482, 1 January 1994, p. 11.
[721] China, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, p. 5.
[722] Honduras, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, p. 4.
[723] Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, p. 4.
[724] US, Statement before the UN Security Council, UN Doc. S/PV.3482, 1 January 1994, p. 9.
[725] US, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 12.
[726] ICRC archive document.

III. Practice of International Organisations and Conferences

United Nations

809. In a resolution on Tajikistan adopted in 1995, the UN Security Council urged the parties to cooperate fully with the ICRC in facilitating "the exchange of detainees and prisoners of war".[727]

810. In a resolution adopted in 1995, the UN Security Council called upon the government of Angola and UNITA "to accelerate the exchange of prisoners".[728]

811. In a resolution on Afghanistan adopted in 1996, the UN Security Council noted that proposals had been made for the "exchange of prisoners of war".[729]

812. In 1998, in a statement by its President on the situation in Afghanistan, the UN Security Council called upon the parties to agree on an exchange of prisoners.[730]

813. In a resolution adopted in 1995, the UN Commission on Human Rights called for the "simultaneous release of all prisoners of war" in Afghanistan.[731] This call was repeated in a resolution adopted in 1996.[732]

814. In a resolution adopted in 1998, the UN Commission on Human Rights welcomed the release of POWs in Afghanistan and called for the "simultaneous release of all remaining prisoners of war".[733]

815. In 1991, in a report concerning the former Yugoslavia, the UN Secretary-General reported that, on 9 November 1991, in the context of the conflict in Bosnia and Herzegovina, more than 700 prisoners were released simultaneously by the parties under ICRC supervision.[734]

816. In 1992, in a report concerning the former Yugoslavia, the UN Secretary-General reported that UNPROFOR had been involved in arranging and witnessing exchanges of POWs.[735]

817. In 1995, in a report on the situation in Tajikistan, the UN Secretary-General reported that it had been agreed during the fourth round of talks in May/June 1995 that both sides would exchange an equal number of detainees and POWs by 20 July 1995.[736]

818. In 1995, in a report on violations of IHL in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most in Bosnia and Herzegovina, the UN

[727] UN Security Council, Res. 999, 16 June 1995, § 8.
[728] UN Security Council, Res. 1008, 7 August 1995, § 7.
[729] UN Security Council, Res. 1076, 22 October 1996, preamble.
[730] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998.
[731] UN Commission on Human Rights, Res. 1995/74, 8 March 1995, § 7.
[732] UN Commission on Human Rights, Res. 1996/75, 23 April 1996, § 7.
[733] UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 7.
[734] UN Secretary-General, Report pursuant to Security Council resolution 721 (1991), UN Doc. S/23280, 11 December 1991, p. 7, § 18.
[735] UN Secretary-General, Report pursuant to Security Council resolution 752 (1992), UN Doc. S/24000, 26 May 1992, p. 3, §§ 9–10.
[736] UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1995/472, 10 June 1995, pp. 2-3, § 8(b).

Secretary-General reported that a prisoner exchange between the Bosnian government and Bosnian Serb armies had occurred on 30 October 1995.[737]

819. In 1996, in a report on UNAVEM III in Angola, the UN Secretary-General, with reference to the Peace Accords concluded between the government of Angola and UNITA providing for the release of POWs based on lists presented to the ICRC, the UN Secretary-General highlighted as a positive development the release of additional prisoners registered with the ICRC.[738]

820. In 1996, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that, following a series of hostage-taking incidents, the two sides had agreed to exchange all hostages. In the space of one month, UNOMIG assisted in the exchange of 13 hostages, 11 held by the Abkhaz side, 2 by the Georgian side.[739]

821. In 1997, in a report on the situation of human rights in the Republic of Chechnya of the Russian Federation, the UN Secretary-General reported that the OSCE had provided the following information:

> There are still wartime detainees on both sides. The cease-fire and initial peace process agreements called for the exchange of prisoners all against all, a principle rhetorically accepted by both side. In fact, many prisoners held by the Chechens had been released in the past months, but there have not been commensurate releases on the federal side.[740]

822. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) found, with respect to its investigation into prison camps, that civilians were often arrested and detained by both Bosnian government and Bosnian Croat forces, as well as Croat forces in Croatia, for the purpose of collecting prisoners for exchange. It was reported that the Bosnian Croats divided their prisoners at the Central Mostar Prison into five categories, one of which was prisoners held for the purposes of exchange.[741]

823. In its report in 1993, the UN Commission on the Truth for El Salvador noted that, following the abduction of the President's daughter and a second woman by an FMLN commando in September 1985, several weeks of secret negotiations took place in which the Salvadoran Church and diplomats from the region acted as mediators. As a result, the two women were released in

[737] UN Secretary-General, Report pursuant to Security Council resolution 1019 (1995) on violations of IHL in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most, UN Doc. S/1995/988, 27 November 1995, p. 15, § 70.

[738] UN Secretary-General, Report on UNAVEM III, UN Doc. S/1996/171, 6 March 1996, § 3.

[739] UN Secretary-General, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/1996/284, 15 April 1996, § 33.

[740] UN Secretary-General, Report on the situation of human rights in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/1997/10, 20 March 1997, p. 6.

[741] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, §§ 235, 281, 289, 290, 387 and 456.

exchange for 22 political prisoners. Simultaneously, 25 mayors and local officials abducted by the FMLN were released in exchange for 101 war-wounded guerrillas, whom the government allowed to leave the country.[742]

Other International Organisations

824. In 1994, in a report on the situation in Bosnia and Herzegovina submitted to the Parliamentary Assembly of the Council of Europe, it was stated that 500 Muslim prisoners held by Bosnian Croat forces and 364 Croat prisoners held by the Bosnian governmental forces had been released simultaneously on 20 March 1994.[743]

825. In 1996, in an information report on the situation in Chechnya submitted to the Parliamentary Assembly of the Council of Europe, it was noted that the cease-fire signed by both parties included measures for the exchange of detainees and concluded that this was the first phase to be implemented.[744]

826. In a resolution adopted in 1987, the Council of the League of Arab States decided:

> To invite Iran to respond to the call for peace and to agree to a peaceful solution of the conflict, in accordance with the UN Charter and International Law reflected in the Security Council Resolution No. 58 (1986), on the following bases: . . . A comprehensive and total exchange of prisoners.[745]

International Conferences

827. The 22nd International Conference of the Red Cross in 1973 adopted a resolution in which it stated that it "received with great satisfaction the welcome news concerning the exchange of prisoners of war in the Middle East".[746]

IV. Practice of International Judicial and Quasi-judicial Bodies

828. In the section of its Annual Report 1986–1987 concerning the situation of human rights in El Salvador, the IACiHR noted that agreement was reached between the Salvadoran government and the rebel forces to release a colonel who had been kidnapped by the rebels as a POW in exchange for a number of trade unionists, members of an NGO and disabled FMLN militants.[747]

[742] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 169–170.
[743] Council of Europe, Parliamentary Assembly, Report on the situation in Bosnia and Herzegovina, Doc. 7065, 12 April 1994, p. 8.
[744] Council of Europe, Parliamentary Assembly, Information report on the situation in Chechnya, Doc. 7560, 24 June 1996, Conclusions, § 6.
[745] League of Arab States, Council, Res. 4646, 6 April 1987, § 1(3).
[746] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. XIX.
[747] IACiHR, *Annual Report 1986–1987*, Doc. OEA/Ser.L/V/II.71 Doc. 9 rev. 1, 22 September 1987, p. 225.

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

829. No practice was found.

VI. Other Practice

830. In 1984, in a letter to the ICRC, an armed opposition group denounced the refusal of other parties to conduct exchanges of prisoners and reiterated its readiness to do so.[748]
831. On two occasions in 1985 and 1988, the leader of an armed opposition group claimed that it was willing at any time to conduct prisoner exchanges with a State party to the conflict, and negotiated an exchange rate of one national of the State for 25 rebels.[749]
832. In 1986, in a letter to the ICRC, an armed opposition group asked the ICRC to encourage exchanges of captured combatants and stated that the failure of exchange negotiations had resulted in the execution of the prisoners owing to the group's inability to detain them.[750]

Voluntary nature of return

I. Treaties and Other Instruments

Treaties
833. Article 109, third paragraph, GC III provides that "no sick or injured prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities".
834. Article 118, third paragraph, GC III requires that POWs be informed of the measures adopted for their release and repatriation.
835. Article 45, fourth paragraph, GC IV provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".
836. Article 135, second paragraph, GC IV provides that an internee can elect to return to his/her country on his/her own responsibility.
837. Upon accession to the 1949 Geneva Conventions, South Korea stated that "the Republic of Korea interprets the provisions of Article 118 [GC III], paragraph 1, as not binding upon a Power detaining prisoners of war to forcibly repatriate its prisoners against their openly and freely expressed will".[751]
838. Article III(51)(a) of the 1953 Panmunjon Armistice Agreement provides that "within sixty (60) days after this Armistice Agreement becomes effective, each side shall, without offering any hindrance, directly repatriate and hand

[748] ICRC archive document. [749] ICRC archive documents.
[750] ICRC archive document.
[751] South Korea, Interpretative declarations made upon accession to the 1949 Geneva Conventions, 16 August 1966.

over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture". Article III(53) adds that "all the sick and injured prisoners of war who insist upon repatriation shall be repatriated with priority". Paragraph I(3) of the Annex to the Armistice Agreement, establishing the terms of reference of a Neutral Nations Repatriation Commission, further provides that "no force or threat of force shall be used against the prisoners of war . . . to prevent or effect their repatriation".

839. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords provided that:

> The Parties shall take no reprisals against any prisoner or his/her family in the event that the prisoner refuses to be transferred . . . The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (48) hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner.

Other Instruments

840. The 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that:

> 6. The signatories of the present agreement agree that no prisoner shall be returned against his will and that each prisoner shall have the opportunity to express freely his will to the representative of the ICRC.
> 7. The signatories of the present agreement undertake not to exercise any pressure on the prisoners in order to persuade them to refuse or accept the return.
> 8. The signatories of the present agreement solemnly undertake not to take any reprisals against prisoners who refuse to return or their families.

841. Paragraph 3 of the Agreement between Croatia and the FRY on the Exchange of Prisoners (July 1992) provided that "each prisoner is interviewed in private by ICRC delegates and is entitled to refuse repatriation".

842. Article 1(4) of the 1992 Agreement between Croatia and the FRY on the Release and Repatriation of Prisoners provides that:

> The prisoners present at this operation shall be interviewed in private by ICRC delegates on their will to be repatriated. Those who wish to be repatriated are immediately handed over by ICRC delegates to the other side. Those who refuse to be repatriated are released on the spot – except, until the amnesty provided for in Article 2(2) becomes available to them, if they are accused of or sentenced for a crime – and may reach, with the assistance of the ICRC, the place of their choice.

843. Article 3(6) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that "each prisoner to be released has the right to express to the ICRC in a private interview his free will on whether he wishes to be released and transferred according to the specific ICRC plan of operation, or wishes to be released on the spot, or wishes to remain in detention".

II. National Practice

Military Manuals

844. Argentina's Law of War Manual (1969) and Law of War Manual (1989) provide that "no sick or injured prisoner who is eligible for repatriation may be repatriated against his will during hostilities".[752]

845. Australia's Defence Force Manual states that "seriously wounded and sick PWs must be repatriated as soon as they are fit to travel except that PWs cannot be involuntarily repatriated during the hostilities".[753]

846. Canada's LOAC Manual states that "PWs should not be repatriated against their wishes during hostilities".[754]

847. Germany's Military Manual states that "no prisoner of war may be repatriated against his will during the hostilities".[755]

848. Israel's Manual on the Laws of War states that "as a general rule, prisoners of war should not be required to return to their country if they do not wish to, and an attempt should be made to find a solution to their problem via third-party States".[756]

849. The Military Manual of the Netherlands provides that "no sick or injured prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities".[757]

850. The Military Handbook of the Netherlands provides that "during the hostilities, repatriation of the wounded and sick may not take place against their will".[758]

851. Spain's LOAC Manual provides that "no prisoner of war may be repatriated against his will during the hostilities".[759]

852. Switzerland's Basic Military Manual provides that "no prisoner may be repatriated against his will during hostilities".[760]

853. The UK Military Manual provides that:

> Prisoners of war who are seriously sick are entitled to be sent back to their own country, regardless of number or rank, after having been cared for until they are fit to travel. No sick or injured prisoner of war who is eligible for repatriation under this provision may, however, be repatriated against his will during hostilities.[761]

854. The US Field Manual provides that "no sick or injured prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities".[762]

[752] Argentina, *Law of War Manual* (1969), § 2.091; *Law of War Manual* (1989), § 3.31.
[753] Australia, *Defence Force Manual* (1994), § 1046.
[754] Canada, *LOAC Manual* (1999), p. 10-6, § 49.
[755] Germany, *Military Manual* (1992), § 732.
[756] Israel, *Manual on the Laws of War* (1998), p. 54.
[757] Netherlands, *Military Manual* (1993), p. VII-12, § 6.
[758] Netherlands, *Military Handbook* (1995), p. 7-42.
[759] Spain, *LOAC Manual* (1996), Vol. I, § 8.8.(a).1.
[760] Switzerland, *Basic Military Manual* (1987), Article 142(3).
[761] UK, *Military Manual* (1958), § 251.
[762] US, *Field Manual* (1956), § 188.

855. The US Air Force Pamphlet provides that "no wounded and sick PW eligible for repatriation may be repatriated against his will during hostilities".[763]

National Legislation

856. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[764]

857. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 109 and 118 GC III and 45 and 135 GC IV, is a punishable offence.[765]

858. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... is liable to imprisonment".[766]

National Case-law

859. No practice was found.

Other National Practice

860. A communiqué issued by the Croatian Ministry of Defence after the operation in Western Slavonia in 1995, stated that During the armed conflict in Croatia, the captured combatants of the adverse party entitled to amnesty were released and, depending on their choice, were "allowed to choose either to stay in Croatia as peaceful citizens or to leave the country".[767]

861. In 1991, in the context of a non-international conflict, the ICRC noted that detained persons were sometimes exchanged against their will to remain on the territory controlled by the party which had detained them.[768]

III. Practice of International Organisations and Conferences

862. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

863. No practice was found.

[763] US, *Air Force Pamphlet* (1976), § 13-10.
[764] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[765] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[766] Norway, *Military Penal Code as amended* (1902), § 108(a).
[767] Croatia, Ministry of Defence Communiqué after the operation in Western Slavonia, 5 May 1995.
[768] ICRC archive document.

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

864. The ICRC Commentary on the Third Geneva Convention states that "where the repatriation of a prisoner of war would be manifestly contrary to the general principles of international law for the protection of the human being, the Detaining Power may, so to speak, grant him asylum". To this effect, "supervisory bodies must be able to satisfy themselves without any hindrance that the requests have been made absolutely freely and in all sincerity, and to give prisoners of war any information which may set at rest groundless fears".[769]

865. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that seriously wounded and seriously sick POWs may not be repatriated against their will during hostilities.[770]

866. According to the ICRC, in every repatriation operation in which the ICRC has played the role of neutral intermediary, the parties to the conflict have accepted the ICRC's conditions for participation. One of these conditions is that the ICRC be able to verify, during private interviews, that protected persons are not repatriated against their will.

867. In a communication to the press issued in 2000 in the context of the conflict in Western Sahara, the ICRC stated that on 14 December 2000 it had repatriated 201 Moroccan prisoners released by the Polisario Front. Before the repatriation, ICRC delegates interviewed the prisoners individually to make sure that they were being repatriated of their own free will.[771]

868. In a communication to the press issued in 2002 in the context of the conflict in Western Sahara, the ICRC stated that on 7 July 2002 it had repatriated 101 Moroccan prisoners released by the Polisario Front. Before the operation, ICRC delegates had interviewed the prisoners individually to make sure that they were being repatriated of their own free will.[772]

VI. Other Practice

869. In a resolution adopted at its conference in Seoul in November 1997, the World Veterans Federation demanded that prisoners of war and persons who went missing during the Korean War be returned according to their freely expressed will.[773]

870. The Report on SPLM/A Practice states that, with regard to sections of the population who have fallen under its administration or who have been

[769] Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, pp. 547–548.
[770] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 723.
[771] ICRC, Communication to the Press No. 00/46, Morocco/Western Sahara: 201 Moroccan prisoners released and repatriated, 14 December 2000.
[772] ICRC, Communication to the Press No. 02/38, Morocco/Western Sahara: 101 Moroccan prisoners released and repatriated, 7 July 2002.
[773] World Veterans Federation, *Chosun Daily News*, Seoul, 15 November 1997, § 2.

captured as POWs, "the SPLM/A has followed the practice of allowing people to voluntarily return to the government side if they wish and to other areas held by rival factions".[774]

Destination of returning persons

I. Treaties and Other Instruments

Treaties

871. Article 109 GC III provides that "Parties to the conflict are bound to send back *to their own country* . . . seriously wounded and seriously sick prisoners of war". (emphasis added)

872. Article 118 GC III provides that "prisoners of war shall be released and *repatriated* without delay after the cessation of active hostilities". (emphasis added)

873. Article 134 GC IV leaves the choice between return to the last place of residence and repatriation, while Article 135 provides that the internee can elect to return to his/her country on his/her own responsibility.

874. Article 45 GC IV provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".

Other Instruments

875. Pursuant to Article 2(d) of the 1992 London Programme of Action on Humanitarian Issues, the parties to the conflict in Bosnia and Herzegovina agreed that when the secure release and return of civilians to their homes was not immediately feasible, the following options should be adopted:

- repatriation to areas under the control of their respective ethnic authorities;
- choosing to stay temporarily in the area of detention;
- relocation in areas away from the conflict under international supervision;
- temporary refuge in third countries.

876. Article 10 of the 1993 Cotonou Agreement on Liberia provided that all POWs and detainees be immediately released to the Red Cross authority in an area where such prisoners or detainees were detained, for onward transmission to encampment sites or the authority of the POW or detainee.

II. National Practice

Military Manuals

877. No practice was found.

[774] Report on SPLM/A Practice, 1998, Chapter 5.4.

National Legislation

878. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[775]

879. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 109 and 118 GC III and 45, 134 and 135 GC IV, is a punishable offence.[776]

880. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[777]

National Case-law

881. No practice was found.

Other National Practice

882. In 1992, the German Foreign Minister declared that Germany was willing to receive 6,000 detainees from Serb detention camps in order to make their release possible. A statement in favour of this measure was supported by all political parties in parliament.[778]

883. According to the Report on the Practice of Nigeria, at the end of the Nigerian civil war in 1970, the inhabitants of the former Biafran enclave were released so that they could return to their respective towns.[779]

III. Practice of International Organisations and Conferences

United Nations

884. In a resolution adopted in 1980 in the context of the independence struggle in Southern Rhodesia (Zimbabwe), the UN Security Council called upon the UK government to take all necessary steps to release any South African political prisoners, including captured freedom fighters in southern Rhodesia and to ensure their safe passage to any country of their choice.[780]

Other International Organisations

885. No practice was found.

[775] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[776] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[777] Norway, *Military Penal Code as amended* (1902), § 108(a).
[778] Germany, Lower House of Parliament, Speech by Dr Kinkel, Minister of Defence, 10 December 1992, *Plenarprotokoll* 12/128, pp. 11102–11112; Speech by Representative Scharrenbroich, 10 December 1992, *Plenarprotokoll* 12/128, p. 11099.
[779] Report on the Practice of Nigeria, 1997, Chapter 5.4.
[780] UN Security Council, Res. 463, 2 February 1980, § 7.

International Conferences
886. No practice was found.

IV. International Judicial and Quasi-judicial Bodies

887. No practice was found.

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

888. No practice was found.

VI. Other Practice

889. No practice was found.

Responsibility for safe return

I. Treaties and Other Instruments

Treaties
890. Articles 46–48 GC III, which contain extensive provisions relating to the conditions in which transfer of POWs shall take place, are also applicable to the return of POWs.
891. Article 5(4) AP II provides that "if it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding". Article 5 AP II was adopted by consensus.[781]
892. Under Article VII of the Agreement between Croatia and the FRY on the Exchange of Prisoners (March 1992) the parties pledged "to undertake the necessary measures to ensure safety in the places of exchange, for all phases of the exchange, as well as during the arrival and departure of all persons included in the exchange".

Other Instruments
893. No practice was found.

II. National Practice

Military Manuals
894. Argentina's Law of War Manual reproduces Articles 46–48 GC III.[782]
895. Canada's LOAC Manual provides, with regard to non-international armed conflicts, that "when persons who have been detained or interned are released,

[781] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.
[782] Argentina, *Law of War Manual* (1969), §§ 2.042–2.044.

the detaining authority is obliged to take such steps as are necessary to ensure their safety".[783]

896. France's LOAC Manual provides that when POWs are released, their security must be ensured.[784]

897. New Zealand's Military Manual provides that, in both international and non-international armed conflicts, the detaining authority is obliged to take such steps as are necessary to ensure the safety of released detainees.[785] The manual also provides that prisoners of war are to be fed and provided with sufficient provisions if released.[786]

898. The US Field Manual reproduces Articles 46–48 GC III.[787]

National Legislation

899. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[788]

900. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 46–48 GC III, as well as any "contravention" of AP II, including violations of Article 5(4) AP II, are punishable offences.[789]

901. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[790]

National Case-law

902. No practice was found.

Other National Practice

903. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[791]

783 Canada, *LOAC Manual* (1999), p. 17-3, § 27.
784 France, *LOAC Manual* (2001), p. 102.
785 New Zealand, *Military Manual* (1992), § 1814.
786 New Zealand, *Military Manual* (1992), § 919.
787 US, *Field Manual* (1956), §§ 122–125.
788 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
789 Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
790 Norway, *Military Penal Code as amended* (1902), § 108.
791 Report on US Practice, 1997, Chapter 5.3.

III. Practice of International Organisations and Conferences

United Nations
904. In a resolution adopted in 1992 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council authorised UNPROFOR to engage in the protection of convoys of released detainees if requested by the ICRC.[792]
905. In 1998, in a statement by its President concerning Afghanistan, the UN Security Council demanded that "the Taliban release other Iranians detained in Afghanistan and ensure their safe and dignified passage out of Afghanistan without further delay".[793]

Other International Organisations
906. No practice was found.

International Conferences
907. No practice was found.

IV. International Judicial and Quasi-judicial Bodies

908. No practice was found.

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

909. No practice was found.

VI. Other Practice

910. No practice was found.

Role of neutral intermediaries in the return process

I. Treaties and Other Instruments

Treaties
911. Articles III(51)(b) and III(57)(a) of the 1953 Panmunjon Armistice Agreement provide that:

Each side shall release all those remaining prisoners of war, who are not directly repatriated, from its military control and from its custody and hand them over to the Neutral Nations Repatriation Commission for disposition in accordance with the provisions in the Annex hereto: "Terms of Reference for Neutral Nations Repatriation Commission".
. . .

[792] UN Security Council, Res. 776, 14 September 1992, § 2.
[793] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

The joint Red Cross teams shall assist in the execution by both sides of those provisions of this Armistice Agreement relating to the repatriation of all the prisoners of war specified in Sub-paragraph 51a hereof, . . . by the performance of such humanitarian services as are necessary and desirable for the welfare of the prisoners of war.

912. In Article 2(1) of the 2000 Peace Agreement between Ethiopia and Eritrea, both States agreed, in accordance with IHL, including the 1949 Geneva Conventions, and in cooperation with the ICRC, to release and repatriate without delay all POWs and other persons detained as a result of the armed conflict.

Other Instruments

913. The 1991 Peace Accords between the Government of Angola and UNITA provided that the "cease-fire entails the release of all civilian and military prisoners who were detained as a consequence of the conflict . . . Verification of such release will be performed by the International Committee of the Red Cross".

914. Paragraph 13 of the 1991 Final Act of the Paris Conference on Cambodia stated that "the States participating in the Conference requested the International Committee of the Red Cross to facilitate, in accordance with its principles, the release of prisoners of war and civilian internees. They express their readiness to assist the ICRC in this task."

915. Paragraphs 3, 4, 5, 6 and 11 of the 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provided that the ICRC were to be given the lists of prisoners before repatriation and to visit and record them. The parties also undertook to place all prisoners to be exchanged under the protection of the ICRC. Paragraph 9 also provided that EC observers were to be present during the exchange of prisoners.

916. Section IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the conflict in Bosnia and Herzegovina provided that "ICRC delegates will lend their good offices in order to help conclude agreements to release [all persons captured or detained]".

917. Article 1(1) of the 1992 Agreement between Croatia and the FRY on the Release and Repatriation of Prisoners provided that "all prisoners visited by the ICRC and mentioned on the ICRC list appearing in Annex A shall be released in an operation which will take place under ICRC supervision in Nemetin on August 14, 1992".

918. Pursuant to Article 2(f) of the 1992 London Programme of Action on Humanitarian Issues, the parties to the conflict in Bosnia and Herzegovina accepted that:

The international community will monitor the [release] . . . closely to ensure that the security and well being of those held in detention is assured. To this end, they undertake to give free access to representatives of the international community including the UN, ICRC, EC and the CSCE.

919. Article 3 of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provided that "the ICRC will draw up specific plans of operation" for the release and transfer of the prisoners and be granted "all the facilities necessary for the implementation of the specific plans". It also provided that "the ICRC shall be given the lists of prisoners before repatriation, shall visit and record them, and verify whether the return is voluntary".
920. The 1992 General Peace Agreement for Mozambique specified that arrangements for and verification of the release process were to be agreed on by the ICRC together with the parties.
921. Article II of the 1993 Agreement among the Parties to Halt the Conflict in Bosnia and Herzegovina provided that all detainees should be released on an all-for-all basis under the supervision of the Joint Commission which included the ICRC. On 9 November 1993, more than 700 prisoners were released simultaneously by the two parties to the conflict in Bosnia and Herzegovina under ICRC supervision.
922. Article 10 of the 1993 Cotonou Agreement on Liberia provided that all POWs and detainees were to be immediately released to the Red Cross authority in an area where such prisoners or detainees were held, for onward transmission to encampment sites or the authority of the POW or detainee.
923. In paragraph 2 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition agreed "to request ICRC to provide assistance in the implementation of this humanitarian operation [of prisoner exchange], on the understanding that it will be conducted in accordance with the rules and procedures of that organization".

II. National Practice

Military Manuals

924. Argentina's Law of War Manual provides that:

> The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power agreed until the close of the hostilities.[794]

National Legislation

925. No practice was found.

National Case-law

926. No practice was found.

[794] Argentina, *Law of War Manual* (1969), § 2.097.

Other National Practice

927. The Report on the Practice of Algeria states that, according to publications of the ALN, a large number of prisoners were eventually released during the Algerian war of independence, often through the intermediary of the ICRC.[795]

928. According to the Report on the Practice of Colombia, "the release and return of persons deprived of their liberty in the Colombian armed conflict are customarily guaranteed by the ICRC and sometimes other civilian social organizations such as the Church, State-controlled bodies, and journalists, subject to an accord between the parties or the exercise of the ICRC's right of initiative".[796] In 1997, according to the Report, "to obtain the release of 70 soldiers, the Government and the guerrillas agreed to the demilitarization of an area measuring 13,161 square kilometres in the department of Caquetá. To guarantee the suspension of military operations so that the soldiers could be handed over, the two sides agreed to the presence in the demilitarized zone of representatives of the ICRC, the National Conciliation Commission, the national Government and other competent bodies".[797]

929. In implementing the 1992 N'sele Cease-fire Agreement, the Rwandan government released 23 prisoners which were returned to the RPF camp in July 1992 in cooperation with the ICRC, the Neutral Military Observer Group and the OAU. Similarly, the RPF released 11 prisoners using the ICRC as an intermediary.[798]

930. In 1964, the parties to an internal armed conflict requested ICRC intervention in exchanging prisoners and gave it entire competence to fix the date and procedure of the exchange.[799]

931. In a letter to the President of the ICRC in 1995, a State involved in an international armed conflict enlisted the services of the ICRC to mediate in the release and simultaneous repatriation of prisoners of both sides.[800]

III. Practice of International Organisations and Conferences

United Nations

932. In a resolution on Tajikistan adopted in 1996, the UN Security Council urged the parties "to cooperate fully with the International Committee of the Red Cross to facilitate the exchange of prisoners and detainees between the two sides".[801]

[795] Report on the Practice of Algeria, 1997, Chapter 5.4.
[796] Report on the Practice of Colombia, 1998, Chapter 5.4.
[797] Report on the Practice of Colombia, 1998, Chapter 1.8, referring to the Agreement of Remolinos de Caguán, 3 June 1997, reprinted in *El Colombiano*, 4 June 1997, p. 5B.
[798] Association Rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l'homme au Rwanda – Année 1992*, Kigali, 1993, pp. 45 and 51.
[799] ICRC archive document.
[800] ICRC archive document.
[801] UN Security Council, Res. 1089, 13 December 1996, § 10.

933. In a resolution adopted in 1999, the UN Security Council reiterated "the obligation of Iraq, in furtherance of its commitment, to facilitate the repatriation of all Kuwaiti and third country nationals . . . and to extend all necessary cooperation to the International Committee of the Red Cross".[802]

934. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights acknowledged the release of prisoners and demanded that the parties cooperate fully with the ICRC in the matter of release.[803]

935. In 1991, the UN Secretary-General reported that, according to the Head of the EC/CSCE Monitoring Mission in the Former Yugoslavia, "the Mission sought to serve as a channel of communication between opposing forces, to assist in organizing cease-fire arrangements and certain humanitarian steps, such as exchanges of prisoners".[804]

936. In 1992, the UN Secretary-General reported that one of the main activities of ICRC delegates in Bosnia and Herzegovina was participation in the release of prisoners, while UNPROFOR was involved in "arranging and witnessing exchanges of prisoners of war".[805]

937. In 1992, in a report on UNAVEM II in Angola, the UN Secretary-General stated that:

> Under the Peace Accords, all civilians and military prisoners held by the government of Angola and UNITA have to be released. ICRC confirmed that the first phase of this process, consisting of releases based on lists of prisoners presented to the ICRC by both sides, was concluded on 2 April 1992. By that time, in the presence of the ICRC, the government had released 940 prisoners and UNITA had released 3,099 prisoners.[806]

938. In 1993, in a progress report on the situation in Somalia, the UN Secretary-General reported that, as part of an informal preparatory meeting for a conference on national reconciliation in Somalia, it was agreed on 15 January 1993 that all POWs would be freed and handed over to the ICRC and/or UNITAF.[807]

939. In its report in 1993, the UN Commission on the Truth for El Salvador noted that the ICRC had frequently negotiated for and carried out the release and exchange of detainees by the different parties.[808]

802 UN Security Council, Res. 1284, 17 December 1999, § 13.
803 UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 12.
804 UN Secretary-General, Report pursuant to § 3 of Security Council resolution 713 (1991), UN Doc. S/23169, 25 October 1991, § 14.
805 UN Secretary-General, Report pursuant to Security Council resolution 752 (1992), UN Doc. S/24000, 26 May 1992, § 9.
806 UN Secretary-General, Further report on the UN Angola Verification Mission (UNAVEM II), UN Doc. S/24145, 24 June 1992, § 25.
807 UN Secretary-General, Progress report on the situation in Somalia, UN Doc. S/25168, 26 January 1993, Annex III, § IV.
808 UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 170.

Other International Organisations

940. In a recommendation adopted in 1996 on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited member States "to support the International Committee of the Red Cross (ICRC) for the implementation of the tasks conferred on it by the Dayton Agreement, namely to organise the liberation of prisoners as early as possible".[809]

941. In 1997, in a report on the situation in Angola, the OAU Secretary-General reported that the Angolan government and UNITA had both released, under ICRC auspices, all the prisoners detained as a result of the conflict.[810]

International Conferences

942. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require "full and immediate access by the ICRC to all places where prisoners and detainees are kept, to interview and register all of them prior to their release".[811]

IV. Practice of International Judicial and Quasi-judicial Bodies

943. In a case before the IACiHR in 1992, the Commission heard that in July 1989, the government of El Salvador had released a man who had been arrested on suspicion of membership of a terrorist group and remanded him to envoys from the ICRC.[812]

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

944. In 1984, on the occasion of the release of the first three Soviet soldiers captured in Afghanistan by opposition movements and transferred to Switzerland by the ICRC on 28 May 1982 in order to serve out their internment period as agreed by the parties concerned, the ICRC issued a press release in which it made public its position regarding the victims of the Afghan conflict. The press release noted that eleven Soviet soldiers had accepted the proposal to serve their period of internment in Switzerland, stating that "the first three were transferred to Switzerland on 28 May 1982. Eight others arrived in August and October 1982, January and October 1983, and February and April 1984. One of them escaped to the Federal Republic of Germany in July 1983." The

[809] Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, § 19(viii)(d).
[810] OAU, Council of Ministers, Report of the Secretary-General on the situation in Angola, Doc. CM/2004 (LXVI)(e), 26 May 1997, § 13.
[811] Peace Implementation Conference for Bosnia and Herzegovina, London, 8–9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.
[812] IACiHR, *Case No. 10447 (El Salvador)*, Report, 14 February 1992, p. 1.

press release added that upon reaching the end of their periods of internment, "in conformity with the spirit of the provisions of international humanitarian law in this respect, the Swiss authorities, under whose responsibility the soldiers are, have taken the measures necessary to repatriate those internees still wishing to return to their country of origin".[813]

945. The ICRC's 1986 Annual Report detailed the release and repatriation of 14 Sudanese prisoners who had been detained in Chad for over two and a half years in connection with the conflict in Sudan. The report further noted that two Italian monks "who had been captured in March by the Sudanese People's Liberation Army (SPLA) were handed over to the ICRC delegation in Addis Ababa on 18 August. The ICRC subsequently entrusted them to representatives of the Holy See in Ethiopia."[814]

946. The ICRC's 1988 Annual Report documented the release and repatriation of almost 4,000 people, most of whom had been detained in Ethiopia and Somalia for nearly 11 years. The ICRC had been trying since 1984 to persuade the two governments to repatriate all prisoners of war, with priority being given to the seriously wounded and sick in accordance with Articles 109, 110 and 118 GC III. After hearing that an agreement had been signed between the two parties on 3 April 1988, the ICRC offered its services to organise the repatriation operation and this offer was accepted, with the repatriation of prisoners who wished to return being carried out in August 1988.[815]

947. The UN Secretary-General reported that between October and December 1991, the ICRC participated in a multilateral negotiating commission, meeting almost daily in Zagreb to discuss, among other issues, the release of prisoners between Croatia and the YPA.[816]

948. In a communication to the press issued in 1992 in the context of the conflict in Bosnia and Herzegovina, the ICRC confirmed that it had "evacuated on 1 October [1992] 1,560 people from Trnopolje camp ... to a reception centre ... where they were handed over to staff of the United Nations High Commissioner for Refugees (UNHCR)".[817]

949. Following the 2000 Agreement between Eritrea and Ethiopia, the ICRC repatriated 360 Ethiopian and 359 Eritrean prisoners of war on 23 and 24 December 2000. In addition, the ICRC repatriated to Ethiopia 1,414 civilian internees of Ethiopian origin.[818]

950. In a communication to the press issued in 2000 in the context of the conflict in Western Sahara, the ICRC stated that it had repatriated 201 Moroccan

[813] ICRC, Conflict in Afghanistan, *IRRC*, No. 241, 1984, pp. 239–240.
[814] ICRC, *Annual Report 1986*, Geneva, 1987, pp. 24–27.
[815] ICRC, *Annual Report 1988*, Geneva, 1989, pp. 25–26.
[816] UN Secretary-General, Report pursuant to Security Council resolution 721 (1991), UN Doc. S/23280, 11 December 1991, p. 7, § 18.
[817] ICRC, Communication to the Press No. 92/27, Bosnia Herzegovina: ICRC evacuates 1,560 people from Trnopolje camp, 2 October 1992.
[818] ICRC, Communication to the Press No. 00/50, Ethiopia/Eritrea: the ICRC has repatriated prisoners of war and civilian internees, 24 December 2000.

prisoners released by the Polisario Front on 14 December 2000. It added, however, that it remained concerned by the plight of the 1,481 Moroccans still held captive and that it viewed the repatriation as a step towards the release of all prisoners.[819]

951. In a communication to the press issued in 2002 in the context of the conflict in Western Sahara, the ICRC stated that on 7 July 2002, it had repatriated 101 Moroccan prisoners released by the Polisario Front. It added, however, that it remained concerned by "the plight of the 1,260 Moroccans still held captive and views the repatriation as a step towards the release of all prisoners".[820]

VI. Other Practice

952. In 1994, in a meeting with the ICRC, an armed opposition group stated that it would be prepared to release detained soldiers and officers through the ICRC.[821]

953. According to the Report on SPLM/A Practice, "because the Sudan Government does not recognize the SPLM/A and can't negotiate with it directly, the SPLM/A has on many occasions and through third parties including the ICRC released prisoners of war and allowed them to go to Government areas".[822]

[819] ICRC, Communication to the Press No. 00/46, Morocco/Western Sahara: 201 Moroccan prisoners released and repatriated, 14 December 2000.
[820] ICRC, Communication to the Press No. 02/38, Morocco/Western Sahara: 101 Moroccan prisoners released and repatriated, 7 July 2002.
[821] ICRC archive document.
[822] Report on SPLM/A Practice, 1998, Chapter 5.4.

CHAPTER 38

DISPLACEMENT AND DISPLACED PERSONS

A. Act of Displacement

Forced displacement

I. Treaties and Other Instruments

Treaties

1. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

. . .

(b) "War crimes:" namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, . . . deportation to slave labour or for any other purpose of civilian population of or in occupied territory . . .

(c) "Crimes against humanity:" namely . . . deportation, and other inhumane acts committed against any civilian population, before or during the war.

2. Article 45, fourth paragraph, GC IV provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".

3. Article 49, first paragraph, GC IV provides that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive".

4. Under Article 147 GC IV, "unlawful deportation or transfer . . . of a protected person" constitutes a grave breach of the Convention.

5. Article 3(1) of the 1963 Protocol 4 to the ECHR provides that "no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national".

6. Article 4 of the 1963 Protocol 4 to the ECHR provides that "collective expulsion of aliens is prohibited".

7. Article 13 of the 1966 ICCPR provides that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

8. Article 22(5) of the 1969 ACHR states that "no one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it." Article 22(9) states that "the collective expulsion of aliens is prohibited.

9. Under Article 85(4)(a) AP I, "the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.[1]

10. Article 17 AP II provides that:

> 1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
> 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

Article 17 AP II was adopted by consensus.[2]

11. Article 12(5) of the 1981 ACHPR states that "the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups".

12. Article 3 of the 1984 Convention against Torture provides that "no State party shall expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

13. Article 16 of the 1989 Indigenous and Tribal Peoples Convention states that:

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

14. Paragraph 6 of the 1992 Declaration on Humanitarian Assistance and Gradual Repatriation of Temporary Refugees and Displaced Persons from the War in Bosnia and Herzegovina and in Croatia urged States to set up safe zones and humanitarian corridors to prevent displacement.

15. Pursuant to Article 6(e) of the 1998 ICC Statute, "forcibly transferring children of the group to another group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

16. Pursuant to Article 7(1)(d) of the 1998 ICC Statute, deportation or forcible transfer of the population, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, constitutes a crime against humanity.

17. Under Article 8(2)(a)(vii) of the 1998 ICC Statute, "unlawful deportation or transfer" constitutes a war crime in international armed conflicts.

18. Under Article 8(2)(b)(viii) of the 1998 ICC Statute, "the deportation or transfer [by the Occupying Power] of all or parts of the population of the occupied territory within or outside this territory", constitutes a war crime in international armed conflicts.

19. Under Article 8(2)(e)(viii) of the 1998 ICC Statute, "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand", constitutes a war crime in non-international armed conflicts.

Other Instruments

20. Article 23 of the 1863 Lieber Code states that "private citizens are no longer . . . carried off to distant parts".

[2] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.

21. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility identified the deportation of civilians under inhuman conditions as a violation of the laws and customs of war.

22. Article II of the 1945 Allied Control Council Law No. 10 provides that:

> 1. Each of the following acts is recognized as a crime:
>
> . . .
>
> (b) War crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, . . . deportation to slave labour or for any other purpose, of civilian population from occupied territory . . .
>
> (c) Crimes against humanity. Atrocities and offenses, including but not limited to . . . deportation . . . or other inhumane acts committed against any civilian population.

23. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including "deportation, and other inhumane acts committed against any civilian population, before or during the war".

24. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" is a war crime and that "deportation and other inhuman acts done against any civilian population" is a crime against humanity.

25. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that "all forms of repression . . . of women and children, including . . . forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal".

26. Pursuant to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, the "deportation or transfer of the civilian population" is regarded as an "exceptionally serious war crime".

27. In the 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons, the parties agreed "to promote initiatives at the regional, municipal and local levels aimed at preventing . . . displacement".

28. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative reasons so demand".

29. In Article 18(1) of the 1993 Cotonou Agreement on Liberia, the parties committed themselves "to bring to an end any further external or internal displacements".

30. Under Article 2(g) of the 1993 ICTY Statute, the Tribunal is competent to prosecute unlawful deportation or transfer of civilians as a grave breach of GC IV.

31. Article 5(d) of the 1993 ICTY Statute provides that deportation, when committed against any civilian population, constitutes a crime against humanity.

32. Under Article 3(d) of the 1994 ICTR Statute, deportation, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, constitutes a crime against humanity.

33. Article 20(a)(vii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind considers "the unlawful deportation or transfer . . . of protected persons" to be a war crime.

34. The 1998 Guiding Principles on Internal Displacement provide that:

> Principle 5
> All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.
> Principle 6
> 1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
> 2. The prohibition of arbitrary displacement includes displacement:
> . . .
> (b) in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
> . . .
>
> Principle 9
> States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with a special dependency on and attachment to their land.

35. Article 3(7) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "practices that cause or allow the forcible evacuations or forcible reconcentration of civilians, unless the security of the civilians involved or imperative military reasons so demand; the emergence and increase of internally displaced families and communities" are and shall remain prohibited at any time and in any place whatsoever.

36. Paragraph 5 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in Sudan provides that

> The parties to the conflict agree and guarantee that no beneficiary [of humanitarian assistance] will be forcibly relocated from his or her legal or recognized place of residence . . . When communities may be relocated they will be consulted on an individual and community basis on alternatives to relocation. Where communities are to be relocated, they are guaranteed individual and community participation in the relocation process, particularly prior to relocation, and will be given a reasonable period of notice prior to relocation.

37. In paragraph 61 of the 2000 Cairo Declaration, African and EU heads of State and government condemned "the systematic tactic by parties to armed conflict of displacing the civilian population".

38. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vii), "unlawful deportation or transfer" constitutes a war crime in international armed conflicts. According to Section 6(1)(b)(viii), "the deportation or transfer [by the Occupying Power] of all or parts of the occupied territory within or outside this territory" constitutes a war crime in international armed conflicts. According to Section 6(1)(e)(vii), "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand", constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

39. Argentina's Law of War Manual (1969) provides that "protected persons may not be transferred to a power which is not party to GC IV . . . In no case may a protected person be transferred to a State where he or she has reason to fear persecution on account of his or her political opinions or religious beliefs."[3] It also provides that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying Power or to that of another country, occupied or not, are prohibited, regardless of their motive".[4]

40. Argentina's Law of War Manual (1989) states that "illegal deportations and transfers" constitute grave breaches.[5]

41. Australia's Commanders' Guide provides that "civilians should not be relocated".[6] It further provides that "unlawfully deporting, transferring . . . a protected person" constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".[7]

42. Australia's Defence Force Manual provides that "unlawfully deporting, transferring . . . a protected person" constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".[8]

43. Canada's LOAC Manual provides that "in no circumstances may a protected person be transferred to a state where he or she has reason to fear persecution on account of his political opinions or religious beliefs".[9] It further states that "these core provisions which continue in effect preserve the right to a . . . protection against forced transfers, evacuations and deportations".[10] The manual specifies that "the following measures of population control are

[3] Argentina, *Law of War Manual* (1969), § 4.019; see also *Law of War Manual* (1989), § 4.30(8).
[4] Argentina, *Law of War Manual* (1969), § 5.008.
[5] Argentina, *Law of War Manual* (1989), § 8.03.
[6] Australia, *Commanders' Guide* (1994), § 609.
[7] Australia, *Commanders' Guide* (1994), § 1305.
[8] Australia, *Defence Force Manual* (1994), § 1315(d).
[9] Canada, *LOAC Manual* (1999), p. 11-6, § 46.
[10] Canada, *LOAC Manual* (1999), p. 12-2, § 14.

forbidden at all times: . . . deportations".[11] With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict".[12] It also states that "in the case of civilians in the hands of the adverse party, it is also a grave breach: a. to unlawfully deport or transfer a protected person".[13] Moreover, the manual considers that the "deportation or transfer of all or parts of the population of that territory within or out of the territory" is a grave breach of AP I and that deportation is a crime against humanity.[14]

44. Under Colombia's Basic Military Manual, it is prohibited for the parties to conflict to force the displacement of the civilian population.[15] With respect to non-international armed conflicts in particular, the manual states that it is prohibited to "oblige civilian persons to move because of the conflict, except if security or imperative military reasons so demand".[16]

45. Croatia's LOAC Compendium prohibits "deportation or transfer out of or within an occupied territory".[17] It also states that "unlawful deportation" falls under "grave breaches (war crimes)".[18]

46. Ecuador's Naval Manual provides that "the following acts are representative of war crimes: . . . Offenses against civilian inhabitants of occupied territory, including . . . deportation".[19]

47. France's LOAC Summary Note provides that "deportation or illegal transfer of population" constitutes a grave breach, which is a war crime.[20]

48. France's LOAC Teaching Note provides that "illegal transfer of the population" constitutes a grave breach, which is a war crime.[21]

49. France's LOAC Manual provides that "the law of armed conflict prohibits forced displacement of populations".[22]

50. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . deportation, illegal transfer or confinement of protected civilians".[23]

51. Hungary's Military Manual prohibits "deportation or transfer out of or within an occupied territory".[24] It also states that "unlawful deportation" falls under "grave breaches (war crimes)".[25]

52. Italy's IHL Manual provides that the occupying State has the duty "not to undertake forced transfers or to deport civilian persons outside the occupied

[11] Canada, *LOAC Manual* (1999), p. 12-5, § 41.
[12] Canada, *LOAC Manual* (1999), p. 17-5, § 41.
[13] Canada, *LOAC Manual* (1999), p. 16-2, § 14.
[14] Canada, *LOAC Manual* (1999), p. 16-3, § 17 and p. 16-1, § 4.
[15] Colombia, *Basic Military Manual* (1995), p. 30, see also p. 46.
[16] Colombia, *Basic Military Manual* (1995), p. 77.
[17] Croatia, *LOAC Compendium* (1991), p. 62.
[18] Croatia, *LOAC Compendium* (1991), p. 56.
[19] Ecuador, *Naval Manual* (1989), p. 6-4, § 6.2.5.
[20] France, *LOAC Summary Note* (1992), § 3.4.
[21] France, *LOAC Teaching Note* (2000), p. 7; see also *LOAC Manual* (2001), p. 43.
[22] France, *LOAC Manual* (2001), p. 65.
[23] Germany, *Military Manual* (1992), § 1209.
[24] Hungary, *Military Manual* (1992), p. 98.
[25] Hungary, *Military Manual* (1992), p. 90.

territory".[26] The manual further states that "forced deportation of the civilian population of the occupied territory to accomplish forced labour" is one of the principal war crimes incorporated in national legislation.[27]It adds that grave breaches of the 1949 Geneva Conventions and their Additional Protocols are considered war crimes, including "transfer and deportation of the civilian population".[28]

53. According to the Military Manual of the Netherlands, "individual or mass forcible transfers and deportations are forbidden".[29] It considers that "the deportation or transfer of all or parts of the population of the occupied territory" by the occupying power is a grave breach of AP I.[30] With respect to non-international armed conflicts in particular, the manual states that "forced displacement of civilians is forbidden . . . Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."[31]

54. New Zealand's Military Manual provides that "in no circumstances may a protected person be transferred to a State where he has reasons to fear persecution on account of his political opinions or religious beliefs".[32] It states that some provisions continue in effect until the occupation is in fact terminated, such as articles preserving "protection against forced transfers, evacuations and deportations".[33] The manual specifies that "impermissible measures of population control include: . . . e. deportations".[34] It also states that "in the case of civilians in the hands of the adverse Party . . . it is also a grave breach: a. unlawfully to deport or transfer a protected civilian".[35] With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict".[36]

55. Nigeria's Manual on the Laws of War states that "grave breaches of the Geneva Conventions are considered as serious war crimes when committed against: . . . (c) persons and property protected under the Civilian Convention [GC IV]: unlawful deportation or transfer".[37]

56. The Military Instructions of the Philippines provides that emphasis should be placed on allowing the civilian population to remain in their homes, on the basis that the large-scale movement of civilians creates logistical and strategic difficulties for the military.[38]

[26] Italy, *IHL Manual* (1991), Vol. I, § 48(8).
[27] Italy, *IHL Manual* (1991), Vol. I, § 84.
[28] Italy, *IHL Manual* (1991), Vol. I, § 85.
[29] Netherlands, *Military Manual* (1993), p. VIII-5, § 5.
[30] Netherlands, *Military Manual* (1993), p. IX-6.
[31] Netherlands, *Military Manual* (1993), p. XI-7.
[32] New Zealand, *Military Manual* (1992), § 1121(2).
[33] New Zealand, *Military Manual* (1992), § 1303(3).
[34] New Zealand, *Military Manual* (1992), § 1322(3).
[35] New Zealand, *Military Manual* (1992), § 1702(3).
[36] New Zealand, *Military Manual* (1992), § 1823(1).
[37] Nigeria, *Manual on the Laws of War* (undated), § 6.
[38] Philippines, *Military Instructions* (1989), § 3(c).

57. South Africa's LOAC Manual provides that "unlawful deportation or transfer . . . of a protected person" is a grave breach.[39]
58. Spain's LOAC Manual provides that "mass or individual forced transfers, as well as deportations out of the occupied territory to the territory of the occupying Power or of another country (occupied or not), are prohibited, regardless of the motive".[40] It further states that it "is a grave breach which shall be qualified as a war crime . . . deportation or forced transfer of population".[41]
59. Sweden's Military Manual provides that "any form of deportation of civilians to the home country of the occupying power is forbidden".[42]
60. Switzerland's Basic Military Manual provides that "individual or mass forcible transfers, as well as deportations of civilian persons out of the occupied territory, are prohibited, regardless of the motive".[43] According to the manual, "deportation and illegal transfers . . . constitute a grave breach".[44]
61. The UK Military Manual provides that "in no circumstances may a protected person be transferred to a State where he has reason to fear persecution on account of his political opinions or religious beliefs".[45] It further states that "the Occupant is forbidden, regardless of motive, to carry out individual or mass forcible transfers or deportations of protected persons from occupied territory to his own territory or to that of any other country".[46] According to the manual, "unlawful deportation is a grave breach of the Convention".[47]
62. The US Field Manual provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".[48] It further states that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motives".[49] According to the manual, "unlawful deportation or transfer . . . of a protected person" constitutes a grave breach.[50]
63. The US Air Force Pamphlet refers to Article 49 GC IV.[51]

[39] South Africa, *LOAC Manual* (1996), § 40.
[40] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).
[41] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).
[42] Sweden, *Military Manual* (1976), Section 6.1.3, p. 122.
[43] Switzerland, *Basic Military Manual* (1987), Article 176, see also Article 153 and *Military Manual* (1984), p. 38 and *Teaching Manual* (1986), p. 107.
[44] Switzerland, *Basic Military Manual* (1987), Articles 192 and 193(2).
[45] UK, *Military Manual* (1958), § 53.
[46] UK, *Military Manual* (1958), § 560.
[47] UK, *Military Manual* (1958), § 560, see also § 625.
[48] US, *Field Manual* (1956), § 284.
[49] US, *Field Manual* (1956), § 382.
[50] US, *Field Manual* (1956), § 502(c).
[51] US, *Air Force Pamphlet* (1976), § 14-6(b).

64. The US Naval Handbook provides that "the following acts are representative of war crimes: . . . offenses against civilian inhabitants of occupied territory, including . . . deportation".[52]

National Legislation

65. Argentina's Draft Code of Military Justice provides that members of the armed forces who deport, forcibly transfer, take as hostage or unlawfully detain any protected person shall be liable to punishment.[53]

66. Under Armenia's Penal Code, "unlawful deportation or transfer" during an armed conflict and the transfer within or outside an occupied territory of its population constitute crimes against the peace and security of mankind.[54]

67. Under Australia's War Crimes Act as amended, "the deportation of a person to, or the internment of a person in, a death camp, a slave labour camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious [war] crime".[55]

68. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".[56]

69. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute, including "genocide by forcibly transferring children"; crimes against humanity, including "deportation or forcible transfer of population"; and war crimes, including "unlawful deportation or transfer" and "transfer of population" in international armed conflicts and "displacing civilians" in non-international armed conflicts.[57]

70. Azerbaijan's Criminal Code punishes the "driving away [of] the civilian population with other aims from the area where they legally live".[58]

71. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime. It also specifies that "war crimes: namely violation of law or custom of war include . . . deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh".[59]

[52] US, *Naval Handbook* (1995), § 6.2.5.
[53] Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(4) in the *Code of Military Justice as amended* (1951).
[54] Armenia, *Penal Code* (2003), Article 390.2(4) and Article 390.4(1), see also Article 392 (deportation as a crime against humanity) and Article 393 (forced displacement and enforced hand-over of children as parts of a genocide campaign).
[55] Australia, *War Crimes Act as amended* (1945), Section 6(4).
[56] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
[57] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.7, 268.11, 268.32, 268.45 and 268.89.
[58] Azerbaijan, *Criminal Code* (1999), Article 115.2, see also Article 107 (deportation or forcible transfer of population as a crime against humanity) and Article 103 (forcible transfer of children to another group as a part of a genocide campaign).
[59] Bangladesh, *International Crimes (Tribunal) Act* (1973), Article 3(2)(d–e).

72. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[60]

73. Under the Criminal Code of Belarus, "the transfer" of protected persons or "the deportation of the civilian population to slave labour" is identified as a "violation of the laws and customs of war".[61]

74. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended criminalises as a grave breach the "unlawful deportation [or] transfer" of protected persons.[62]

75. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever in violation of rules of international law applicable in time of war, armed conflict or occupation . . . orders displacement" of the civilian population commits a war crime.[63] The Criminal Code of the Republika Srpska contains the same provision.[64]

76. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".[65]

77. Under Bulgaria's Penal Code as amended, "unlawful deportations" are offences.[66]

78. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, deportation or illegal transfer of population constitutes a war crime.[67]

79. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".[68]

[60] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[61] Belarus, *Criminal Code* (1999), Article 135(1), see also Article 127 (forcible transfer of children to another group as a part of a genocide campaign).
[62] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(6), see also Article 1(2)(1) (forcible transfer of children to another group as a part of a genocide campaign).
[63] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1), see also Article 153 (forcible transfer of children to another group as a part of a genocide campaign).
[64] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1), see also Article 432 (forcible transfer of children to another group as a part of a genocide campaign).
[65] Botswana, *Geneva Conventions Act* (1970), Section 3(1).
[66] Bulgaria, *Penal Code as amended* (1968), Article 412, see also Article 416(c) (forcible transfer of children to another group as a part of a genocide campaign).
[67] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(g) and (D)(h), see also Article 2(e) (forcible transfer of children to another group as a part of a genocide campaign).
[68] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

80. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions or of AP I] is guilty of an indictable offence".[69]
81. Canada's Crimes against Humanity and War Crimes Act provides that genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[70]
82. China's Law Governing the Trial of War Criminals provides that "mass deportation of non-combatants" constitutes a war crime.[71]
83. According to Colombia's Law on Internally Displaced Persons, Colombians have the right not to be forcibly displaced.[72]
84. Colombia's Penal Code punishes "anyone who, during an armed conflict, without military justification, deports, expels or carries out a forced transfer or displacement of the civilian population from its own territory".[73]
85. The DRC Code of Military Justice as amended provides that "the deportation, for whatever reason, of a detained or interned individual, without a prior sentence in accordance with the laws and customs of war having been pronounced, shall be punished".[74]
86. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "forcible transfer of children" of the members of an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.[75] Moreover, "deportation or forcible transfer of population", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.[76] The Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[77]
87. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I]".[78]
88. Côte d'Ivoire's Penal Code as amended punishes "any person who, in time of war or occupation, and in violation of . . . international conventions, makes an attack on the physical integrity of civilian populations or on their intellectual or

[69] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[70] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[71] China, *Law Governing the Trial of War Criminals* (1946), Article 3(18).
[72] Colombia, *Law on Internally Displaced Persons* (1997), Articles 2(7) and 10(5).
[73] Colombia, *Penal Code* (2000), Article 159.
[74] DRC, *Code of Military Justice as amended* (1972), Article 526.
[75] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.
[76] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.
[77] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[78] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

moral rights . . . [by carrying out] their displacement or their forced dispersion, their deportation".[79]

89. Croatia's Criminal Code provides, under the heading "War crimes against civilian population", that "whoever in violation of the rules of international law, in time of war, armed conflict or occupation, . . . orders deportation or transfers [of the civilian population] . . . shall be punished".[80]

90. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".[81]

91. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".[82]

92. The Czech Republic's Criminal Code as amended punishes "whoever in wartime . . . groundlessly displaces the civil population of the occupied territory".[83]

93. Under El Salvador's Penal Code, "anyone who, during an international or a civil war, . . . deports to slave labour the civilian population in occupied territory" commits a crime.[84]

94. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in situations of international or internal armed conflict, orders the repatriation or forced displacement of the civilian population from its territory, for reasons related to the armed conflict" is punishable.[85]

95. Under Estonia's Penal Code, persons responsible for the deportation or forced displacement of civilians commit a war crime.[86]

96. Ethiopia's Penal Code punishes:

whosoever, in time of war, armed conflict or occupation, organises, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions: . . . the

[79] Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(3), see also Article 137 (3) (forcible transfer of children to another group as a part of a genocide campaign).

[80] Croatia, *Criminal Code* (1997), Article 158(1), see also Article 156 (forcible transfer of children to another group as a part of a genocide campaign).

[81] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

[82] Cyprus, *AP I Act* (1979), Section 4(1).

[83] Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(c), see also Article 259(1)(d) (forcible transfer of children to another group as a part of a genocide campaign).

[84] El Salvador, *Penal Code* (1997), Article 362, see also Article 361 (forced displacement as part of a genocide campaign).

[85] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Repatriación o desplazamiento forzado", see also Article entitled "Genocidio" (forcible transfer of children to another group as a part of a genocide campaign).

[86] Estonia, *Penal Code* (2001), § 97, see also § 89 (deportation as a crime against humanity) and § 90 (forcible transfer of children to another group as part of a genocide campaign).

compulsory movement or dispersion of the population, its systematic deportation, transfer.[87]

97. Finland's Revised Penal Code provides that when committed as a part of a genocide campaign, "forcibly moving children from one group to another" is a crime.[88]

98. France's Penal Code punishes deportation as a crime against humanity.[89]

99. Under Georgia's Criminal Code, "deportation or other unlawful transfer . . . of protected persons" in an international or non-international armed conflict is a crime.[90]

100. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law".[91]

101. Under Hungary's Criminal Code as amended, the "settlement of the civilian population of the occupying power in the occupied territories, or resettlement of the population of the occupied territory" is a war crime.[92]

102. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".[93]

103. Under India's Constitution, "all citizens shall have the right . . . (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India".[94] According to the Report on the Practice of India, this provision is reinforced during internal armed conflicts by constitutional provisions to the effect that freedom of movement may only be suspended where an emergency is proclaimed on account of an external aggression and not where an emergency is declared as the result of an internal armed rebellion.[95]

[87] Ethiopia, *Penal Code* (1957), Article 282(c), see also Article 281 (forcible transfer as a part of a genocide campaign).
[88] Finland, *Revised Penal Code* (1995), Chapter 11, Section 6.
[89] France, *Penal Code* (1994), Article 212-1, see also Article 211-1 (forcible transfer of children as a part of a genocide campaign).
[90] Georgia, *Criminal Code* (1999), Article 411(2)(f), see also Article 407 (forcible transfer of children to another group as a part of a genocide campaign) and Article 408 (deportation of the population as a crime against humanity).
[91] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(6), see also Article 1, § 6(1)(5) (forcible transfer of children to another group as a part of a genocide campaign) and Article 1, § 7(1)(4) (deportation or forcible transfer of the civilian population as a crime against humanity).
[92] Hungary, *Criminal Code as amended* (1978), Section 158(3)(a), see also Article 155(1)(e) (forcible transfer of children to another group as a part of a genocide campaign).
[93] India, *Geneva Conventions Act* (1960), Section 3(1).
[94] India, *Constitution* (1950), Article 19.
[95] Report on the Practice of India, 1997, Chapter 5.5.

104. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions and of AP I are punishable offences.[96] It adds that any "minor breach" of the Geneva Conventions, including violations of Articles 45 and 49 GC IV, as well as any "contravention" of AP II, including violations of Article 17 AP II, are also punishable offences.[97]

105. Under Israel's Nazis and Nazi Collaborators (Punishment) Law, deportation to forced labour or for any other purpose of the civilian population of or in occupied territories is regarded as a war crime.[98]

106. Italy's Law on Genocide prohibits the displacement of national, ethnic, racial or religious groups.[99]

107. Jordan's Draft Military Criminal Code considers "the displacement or transfer of the whole or part of the inhabitants of occupied territories, within as well as outside the occupied territories", as a war crime.[100]

108. Kazakhstan's Penal Code provides that the deportation of the civilian population is a crime.[101]

109. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".[102]

110. Under Latvia's Criminal Code, deportation is a violation of the provisions and customs regarding the conduct of war forbidden by international agreements and constitutes a war crime.[103]

111. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the displacement or transfer of the whole or part of the inhabitants of occupied territories, within as well as outside the occupied territories", is a war crime.[104]

112. Under Lithuania's Criminal Code as amended, "deportation, in time of war, during an international armed conflict or under the conditions of occupation or annexation, of civilians from the occupied or annexed territory to the territory of the country which effects the occupation or annexation or to a third country" is a war crime.[105]

[96] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[97] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[98] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b); deportation is also considered as a crime against humanity and the forcible transfer of children to another group as a crime against the Jewish people (same Section).
[99] Italy, *Law on Genocide* (1967), Article 2.
[100] Jordan, *Draft Military Criminal Code* (2000), Article 41(15).
[101] Kazakhstan, *Penal Code* (1997), Article 159, see also Article 160 (forcible transfer of children as a part of a genocide campaign).
[102] Kenya, *Geneva Conventions Act* (1968), Section 3(1).
[103] Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (deliver children on a compulsory basis from one group of people into another as a part of a genocide campaign).
[104] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(15).
[105] Lithuania, *Criminal Code as amended* (1961), Article 334.

113. Under Luxembourg's Law on the Repression of War Crimes, every measure which leads to the deportation or expatriation, whatever the grounds, of persons who were not lawfully detained or interned is punishable.[106]

114. Luxembourg's Law on the Punishment of Grave Breaches states that the following grave breaches constitute crimes under international law: "deportation of all persons protected by the Convention relative to the protection of civilian persons in time of war" and "the transfer of persons protected by the same Convention".[107]

115. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[108]

116. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".[109]

117. Mali's Penal Code provides that "deportation or unlawful transfer" of a population constitutes a war crime.[110]

118. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".[111]

119. Mexico's Penal Code as amended punishes the forcible transfer of children under the age of 16 years to another group, when committed as a part of a genocide campaign.[112]

120. Under Moldova's Penal Code, deportation of protected persons is an offence.[113]

121. The Definition of War Crimes Decree of the Netherlands includes "deportation of civilians" in its list of war crimes.[114]

122. Under the International Crimes Act of the Netherlands, "unlawful deportation or transfer" and "the deportation or transfer of all or part of the population of the occupied territory within or outside this territory" are crimes, when committed in an international armed conflict.[115] "Giving instructions for the

[106] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(5).
[107] Luxembourg, *Law on the Punishment of Grave breaches* (1985), Article 1(6)and (7).
[108] Malawi, *Geneva Conventions Act* (1967), Section 4(1).
[109] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[110] Mali, *Penal Code* (2001), Article 31(g) and (i)(8), see also Article 29(d) (deportation or illegal transfer of a population as a crime against humanity) and Article 30(e) (forcible transfer of children to another group as a part of a genocide campaign).
[111] Mauritius, *Geneva Conventions Act* (1970), Section 3(1).
[112] Mexico, *Penal Code as amended* (1931), Article 149 *bis*.
[113] Moldova, *Penal Code* (2002), Article 137(2)(c), see also Article 135(d) (forcible transfer of children to another group as a part of a genocide campaign).
[114] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.
[115] Netherlands, *International Crimes Act* (2003), Articles 5(1)(g), 5(2)(d)(i) and 5(5)(d), see also Article 3(1)(e) (forcible transfer of children of a group to another group as part of a genocide

transfer of the civilian population for reasons connected with the conflict, other than on account of the safety of the citizens or where imperatively demanded by the circumstances of the conflict" constitutes a crime in non-international armed conflict.[116]

123. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".[117]

124. Under New Zealand's International Crimes and ICC Act, genocide includes the crimes defined in Article 6(e) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(d) of the Statute, and war crimes include the crimes defined in Article 8(2)(a)(vii), (b)(viii) and (e)(viii) of the Statute.[118]

125. Nicaragua's Military Penal Code provides that deportation and illegal transfer is a punishable offence.[119]

126. Nicaragua's Draft Penal Code provides that displacement of children from one group to another group as a part of a genocide campaign is punishable.[120]

127. According to Niger's Penal Code as amended, "deportation, transfer or unlawful displacement" of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 constitutes a war crime.[121]

128. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, ... whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".[122]

129. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[123]

130. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".[124]

campaign) and Article 4(d) (deportation or forcible transfer of population as a crime against humanity).

116 Netherlands, *International Crimes Act* (2003), Article 6(3)(i).

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

118 New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).

119 Nicaragua, *Military Penal Code* (1996), Article 58.

120 Nicaragua, *Draft Penal Code* (1999), Article 444(1).

121 Niger, *Penal Code as amended* (1961), Article 208.3(6), see also Article 208.2 (deportation as a crime against humanity) and Article 208.1 (forcible transfer of children as part of a genocide campaign).

122 Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

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

124 Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

131. Paraguay's Penal Code punishes "anyone who, in violation of the international laws of war, armed conflict or military occupation, commits against the civilian population . . . acts of . . .. deportation".[125]

132. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, "violations of the laws or customs of war . . . [such as] deportation to slave labour or for any other purpose of civilian population of or in occupied territory" are war crimes.[126] It adds that "deportation [of] . . . civilian populations before or during the [Second World War] . . . whether or not in violation of the local laws" constitutes a war crime.[127]

133. Poland's Penal Code punishes any person who, in violation of international law, carries out transfers of persons *hors de combat*.[128]

134. Portugal's Penal Code punishes "anyone who, in violation of international law (humanitarian or common), in times of war, armed conflict or occupation, carries out . . . deportation".[129]

135. Romania's Penal Code punishes the deportation of all persons in the hands of the adverse party.[130]

136. Under Russia's Criminal Code, "deportation of the civilian population" is a crime against the peace and security of mankind.[131]

137. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who, whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".[132]

138. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".[133]

139. Slovakia's Criminal Code as amended punishes "whoever in wartime . . . groundlessly displaces the civil population of the occupied territory".[134]

140. Slovenia's Penal Code provides, under the heading "War Crimes against Civil Population", that "whoever, in time of war, armed conflict or occupation

[125] Paraguay, *Penal Code* (1997), Article 320, see also Article 319 (forcible transfer of children and adults to another group or places other than their habitual residence as a part of a genocide campaign).
[126] Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(2).
[127] Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).
[128] Poland, *Penal Code* (1997), Article 124, see also Article 118(2) (forcible transfer of children to another group as a part of a genocide campaign).
[129] Portugal, *Penal Code* (1996), Article 241.
[130] Romania, *Penal Code* (1968), Article 358(c); see also *Law on the Punishment of War Criminals* (1945), Article 1(c) (deportation of political or racial adversaries).
[131] Russia, *Criminal Code* (1996), Article 356(1), see also Article 357 (forcible transfer of children as a part of a genocide campaign).
[132] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[133] Singapore, *Geneva Conventions Act* (1973), Section 3(1).
[134] Slovakia, *Criminal Code as amended* (1961), Article 263(a)(2)(c), see also Article 259(1)(c) (forcible transfer of children to another group as a part of a genocide campaign).

and in violation of international law, orders or commits against the civil population, the following criminal offences . . . deportation or displacement" shall be punished.[135]

141. Spain's Military Criminal Code and Penal Code punish anyone who deports or forcibly transfers protected persons.[136]

142. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".[137]

143. Tajikistan's Criminal Code punishes:

> 1) Wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict . . . [such as] the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory . . .
> 2) Wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict against persons *hors de combat* or having no means of defence . . . consisting of:
> . . .
> f) deportation or unlawful transfer.[138]

144. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(e) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(d) of the Statute, and a war crime as defined in Article 8(2)(a)(vii), (b)(viii) and (e)(viii) of the Statute.[139]

145. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".[140]

146. Under Ukraine's Criminal Code, deportation of the civilian population to forced labour is an offence.[141]

147. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions or of [AP I]".[142]

[135] Slovenia, *Penal Code* (1994), Article 374(1), see also Article 373 (forcible transfer of children to another group as a part of a genocide campaign).
[136] Spain, *Military Criminal Code* (1985), Article 77(6); *Penal Code* (1995), Article 611(4), see also Article 607(4) (forcible transfer to another group as a part of a genocide campaign).
[137] Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).
[138] Tajikistan, *Criminal Code* (1998), Article 403(1) and (2), see also Article 398 (forcible transfer of children to another group as a part of a genocide campaign).
[139] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[140] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[141] Ukraine, *Criminal Code* (2001), Article 438(1), see also Article 442 (forcible transfer of children to another group as a part of a genocide campaign).
[142] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

148. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(e) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(d) of the Statute, and a war crime as defined in Article 8(2)(a)(vii), (b)(viii) and (e)(viii) of the Statute.[143]
149. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as "deportation to slave labour or for any other illegal purpose, of civilians of or in occupied territory".[144]
150. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as "deportation to slave labour or for any other purpose of civilians of or in occupied territory".[145]
151. Under the US War Crimes Act as amended, grave breaches of the 1949 Geneva Conventions are war crimes.[146]
152. Uzbekistan's Criminal Code punishes the deportation of the civilian population to forced labour or for any other purpose.[147]
153. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".[148]
154. The Penal Code of SFRY (FRY) provides, under the heading "War crimes against civilian population", that "any person who orders, in violation of the rules of international law during a war, an armed conflict or occupation, . . . unlawful transfer of people to concentration camps [of the civilian population] . . . shall be punished".[149]
155. Under the Criminal Offences against the Nation and State Act of the SFRY (FRY), "forced deportation or removal to concentration camps, or interning, or of forced labour of the population of Yugoslavia" is a war crime.[150]
156. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions or [AP I]".[151]

[143] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[144] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.
[145] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(*b*).
[146] US, *War Crimes Act as amended* (1996), Section 2441(c)(1).
[147] Uzbekistan, *Criminal Code* (1994), Article 152, see also Article 153 (forcible transfer of children to another group as a part of a genocide campaign).
[148] Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).
[149] SFRY (FRY), *Penal Code as amended* (1976), Article 142(3), see also Article 141 (forcible transfer of children to another group as a part of a genocide campaign).
[150] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[151] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

National Case-law

157. After the Second World War, a number of German industrialists were convicted of participation in the deportation to slave labour of the civilian inhabitants of occupied territories in conditions in which they were ill-treated, tortured and killed.[152] Numerous high-ranking army and administrative officials were also convicted of war crimes for their participation in such deportations.[153]

158. In the *Rudolph and Minister of Employment and Immigration case* in 1992, Canada's Federal Court of Appeal upheld an order for the removal from Canada of the accused, a German national who, during the Second World War, had requested and supervised the deportation and use of foreign civilians as slave labourers in the production of V-2 rockets, on the ground that he had committed outside Canada an act that constituted a war crime.[154]

159. In the *Takashi Sakai case* in 1946, the War Crimes Military Tribunal of the Ministry of National Defence of China found the accused guilty of war crimes and crimes against humanity inasmuch as he had incited or permitted his subordinates to commit, *inter alia*, acts of deportation of civilians.[155]

160. In analysing the constitutionality of AP II in 1995, Colombia's Constitutional Court found in relation to the rules on the protection of civilians and persons *hors de combat* that:

> According to the statistics compiled by the Colombian Episcopacy, more than half a million Colombians have been displaced from their homes as a result of the violence . . . The principal cause of displacement involves violations of international humanitarian law associated with the armed conflict.[156]

161. In its judgement in the *Eichmann case* in 1961, Israel's District Court of Jerusalem held that the following behaviour caused serious bodily or mental harm and, therefore, amounted to a violation of Israel's Nazis and Nazi Collaborators (Punishment) Law:

> the enslavement, starvation, deportation and persecution . . . and . . . [the] detention [of Jewish people] in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture.[157]

[152] France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, 30 June 1948; US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, 29 July 1948; US, Military Tribunal at Nuremberg, *Krupp case*, 30 June 1948.

[153] Poland, Supreme National Tribunal at Poznan, *Greiser case*, Judgement, 7 July 1946; US, Military Tribunal at Nuremberg, *Milch case*, Judgement, 17 April 1947; US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948; US, Military Tribunal at Nuremberg, *Von Leeb case (The High Command Trial)*, Judgement, 28 October 1948.

[154] Canada, Federal Court of Appeal, *Rudolph and Minister of Employment and Immigration case*, Judgement, 1 May 1992.

[155] China, War Crimes Military Tribunal of the Ministry of National Defence, *Takashi Sakai case*, Judgement, 29 August 1946.

[156] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Constitutional revision of Additional Protocol II and the Law 171 of 16 December 1994 implementing this protocol, Judgement, 18 May 1995.

[157] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

162. In its judgement in the *Abu Awad case* in 1979, Israel's High Court held that Article 49 GC IV was not meant to apply to the deportation of selected individuals for reasons of public order and security. It only prohibits Nazi-style mass deportations.[158]

163. In its judgement in the *Kawasme and Others case* in 1980, Israel's High Court held that "all of Article 49 [GC IV] . . . does not form part of customary international law, and therefore the deportation orders [against the mayors of Hebron and Halhul] did not contravene the domestic law of the State of Israel . . . , according to which an Israeli court reaches its decision". The Court also stated that Article 49 was not meant to apply to the deportation of selected individuals, but only to Nazi-style mass deportation. In a dissenting opinion in the same case, Justice Cohn underlined that "the beginning of Article 49 . . . contains a nucleus of the customary law of nations, which has applied all over the world from time immemorial". According to his opinion, the prohibition contained in Article 49 applies to all inhabitants of an area and is an absolute one, so that the cause for deportation – whether military or security – is irrelevant.[159]

164. In its judgement in the *Nazal and Others case* in 1985, Israel's High Court held that Article 49 GC IV did not form part of customary international law and that therefore deportation orders against individual citizens did not contravene the domestic law of Israel. President Shamgar ruled that Article 49 was not applicable to the deportation of Jordanian subjects to Jordan and that a deportation order under Regulation 112 of the Defence (Emergency) Regulations of 1945 can be issued only if the Military Commander is of the opinion that such an order is necessary or expedient for securing public peace, the protection of the region, the maintenance of public order, or the suppression of mutiny, rebellion or riot.[160]

165. In its judgement in the *Affo and Others case* in 1988, a majority of four judges of Israel's High Court stated that deportations of individuals were not incompatible with Article 49 GC IV, the provision only barring Nazi-style mass deportations. However, in a dissenting opinion in the same case, Justice Bach held that deportations of individuals from occupied territories to a location outside the boundaries of those territories violate Article 49. Nevertheless, Article 49 being only conventional and not customary international law, it does not form part of Israeli law that can be directly invoked before Israeli courts. Justice Bach stated that:

> The language of Article 49 is unequivocal and explicit. The combination of the words "Individual or mass forcible transfers as well as deportations" in conjunction with the phrase "regardless of their motive" . . . admits no room to doubt that the Article applies not only to mass deportations but to the deportation of individuals as well and that the prohibition was intended to be total, sweeping and unconditional – "regardless of their motive".[161]

[158] Israel, High Court, *Abu Awad case*, Judgement, 12 November 1979.
[159] Israel, High Court, *Kawasme and Others case*, Judgement, 4 December 1980.
[160] Israel, High Court, *Nazal and Others case*, Judgement, 29 September 1985.
[161] Israel, High Court, *Affo and Others case*, Judgement, 10 April 1988.

166. In its judgement in the *Zimmerman case* in 1949, the Special Court of Cassation of the Netherlands held that the deportation of civilians of occupied territories was a war crime and rejected the accused's defence of superior orders as "the condemnation of these practices by public opinion must be deemed of general knowledge, and the accused must be deemed to have known they were illegal".[162]

167. In its judgement in the *Situation in Chechnya case* in 1995, the Russian Constitutional Court held that several orders and decrees issued by the Russian government in 1994 which provided for the eviction of "persons posing threats to public security and to the personal safety of citizens out of the territory of the Chechen Republic" were unconstitutional.[163]

Other National Practice

168. In 1997, in a letter to the UN Secretary-General and President of the UN Security Council, Afghanistan stated that "the heinous policy of coercive eviction and mass deportation of the civilian population . . . is a crime against humanity".[164]

169. In 1995, during a debate in the UN Security Council, Botswana condemned the forced displacement in Georgia.[165]

170. The Report on the Practice of Egypt states that Egypt has taken the position that forced displacement and expulsion "*en masse*" should be prohibited in internal as well as in international armed conflicts.[166]

171. The Report on the Practice of France states that France especially censures the forcible displacement or deportation of the civilian population, when carried out in both international and non-international armed conflicts. It has even stated that it is its moral duty to react to protect displaced persons. France also clearly opposes the expulsion measures taken against the inhabitants of the territories occupied by Israel and considers them as contrary to GC IV. Representatives of France have described such measures as being of "exceptional gravity".[167]

172. In 1987, all political parties in the German parliament agreed that the deportations carried out during the conflict in Afghanistan constituted serious violations of human rights.[168]

173. In 1993, the German Chancellor stated that displacement was deeply inhumane.[169]

[162] Netherlands, Special Court of Cassation, *Zimmerman case*, Judgement, 21 November 1949.
[163] Russia, Constitutional Court, *Situation in Chechnya case*, Judgement, 31 July 1995.
[164] Afghanistan, Identical letters dated 19 January 1997 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/1997/54, 21 January 1997, Annex, p. 2.
[165] Botswana, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 9.
[166] Report on the Practice of Egypt, 1997, Chapter 5.5.
[167] Report on the Practice of France, 1999, Chapter 5.5 and 5.7.
[168] Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, FDP and the Greens, Acht Jahre Krieg in Afghanistan, *BT-Drucksache* 11/1500, 9 December 1987, p. 1.
[169] Germany, Statement by the Chancellor, Helmut Kohl, Berlin, 24 May 1993, *Bulletin*, No. 45, Presse- und Informationsamt der Bundesregierung, Bonn, 29 May 1993, p. 488.

174. According to the Report on the Practice of Iran, Iran regarded the forcible transfer of civilians of occupied areas to Iraq during the Iran–Iraq War as a war crime.[170]

175. In 1992, during a debate in the UN Security Council, Japan condemned forced displacement in Bosnia and Herzegovina.[171]

176. The Report on the Practice of Jordan states that Jordan has never ordered the forced movement of civilians nor compelled civilians to leave their own territory owing to internal armed conflict.[172]

177. In 1992, in a statement before the Commission of Foreign Affairs of the Lower House of Parliament concerning the situation in Bosnia and Herzegovina, the Minister of Foreign Affairs of the Netherlands stated that "Serbia refuses to recognise the independence and territorial integrity of the Bosnian State and carries out a pure policy of conquest, combined with the deportation of populations. The international community should strongly condemn this policy."[173]

178. In 1995, in a letter to the Lower House of Parliament, the Minister of Defence of the Netherlands stated that "the forced evacuation of the local population of Srebrenica, and now also Žepa, must be strongly condemned".[174]

179. In 1996, in a note to the Lower House of Parliament concerning the refugee problem in Africa, the Minister for Development Cooperation of the Netherlands stated that "with respect to refugees and displaced persons, the Netherlands pays as much attention as possible, to prevent, in a comprehensive fashion, that people are displaced and have to flee".[175]

180. In 1993, during a debate in the UN Security Council, New Zealand condemned the forced displacement in the former Yugoslavia.[176]

181. In 1994, during a debate in the UN Security Council, Nigeria condemned the forced displacement in Bosnia and Herzegovina.[177]

182. In practice, the forced displacement of civilians during military operations in the Philippines has been widely reported.[178]

[170] Report on the Practice of Iran, 1997, Chapter 6.5.
[171] Japan, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 21.
[172] Report on the Practice of Jordan, 1997, Chapter 5.5.
[173] Netherlands, Lower House of Parliament, Statement by the Minister of Foreign Affairs before the Commission on Foreign Affairs, 1991–1992 Session, Doc. 22 181, No. 22, p. 12.
[174] Netherlands, Letter from the Minister of Defence to the Lower House of Parliament, 1994–1995 Session, Doc. 22 181, No. 109, p. 6.
[175] Netherlands, Note by the Minister of Development Cooperation to the Lower House of Parliament concerning the refugee problem in Africa, 1995–1996 Session, Doc. 24 713, No. 1, p. 28.
[176] New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 22.
[177] Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3344, 4 March 1994, p. 6.
[178] Philippines, Presidential Human Rights Committee, Resolution 91-001 Providing for Guidelines on Evacuations, 26 March 1991, preamble; Ecumenical Movement for Justice and Peace, Fact-Finding Missions: Reflecting the Human Rights Situation in 1988, *Justice and Peace Review*, 1990, p. 9; Philippine Human Rights Information Center, The Internal Refugees in Negros: the case of "Operation Thunderbolt", published by *Human Rights Alliance in Negros* (HRAN), Bacolod City, Philippines, October 1989, pp. 12–14, 29–31 and 76–85; Philippine

183. In 1995, during a debate in the UN Security Council, Russia condemned the forced displacement in the former Yugoslavia.[179]

184. According to the Report on the Practice of Russia, Russia considers forced displacement of the civilian population to be an "international crime".[180]

185. In 1993, during a debate in the UN Security Council, Spain condemned the forced displacement in Georgia.[181]

186. In 1988, the Swiss Federal Department of Foreign Affairs issued a note concerning the lawfulness of the Israeli authorities' deportation to Lebanon of four Palestinian activists from the West Bank of Jordan. After deciding that GC IV applied to the situation in the region, the note concluded that Article 49 of the Convention:

> expressly prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, regardless of their motive . . .
>
> It would appear that by evacuating four Palestinian civilians – irrespective of whether or not they were agitators – Israel contravened the Fourth Convention. This represents a "grave breach" in the meaning of article 147 [GC IV].[182]

187. In 1992 and 1993, during debates in the UN Security Council, the UK condemned the forced displacements in Bosnia and Herzegovina and in the former Yugoslavia.[183]

188. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that it considered the individual and mass forcible deportation of Kuwaiti and third country nationals to Iraq, in violation of Articles 49 and 147 GC IV, to be a war crime.[184]

189. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV in the former Yugoslavia, the US stated that mass forcible expulsion and deportation of civilians were listed as grave breaches of GC IV. The report collated information on 12 such instances of expulsion and deportation.[185]

Alliance of Human Rights Advocates (PAHRA), Report on the Implementation by the Philippine Government of Articles 10, 11 and 12 ICESCR, 20 April 1995, pp. 1–4.

179 Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

180 Report on the Practice of Russia, 1997, Chapter 5.5.

181 Spain, Statement before the UN Security Council, UN Doc. S/PV.3325, 22 December 1993, p. 18.

182 Switzerland, Federal Department of Foreign Affairs, Directorate for Public International Law, Note on the prohibition to expel and deport the population of an occupied territory – Applicability of GC IV to the territories occupied by Israel, 20 January 1988, reprinted in *Annuaire suisse de droit international*, Vol. 46, 1989, pp. 248–249.

183 UK, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 36; Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 14; Statement before the UN Security Council, UN Doc. S/PV.3217, 5 May 1993, p. 17.

184 US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 618–619 and 634–635.

185 US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 9.

190. In 1993, during a debate in the UN Security Council, the US condemned the forced displacement in the former Yugoslavia.[186]
191. The Report on US Practice states that "Article 17 of Protocol II reflects general U.S. policy on displacement in internal armed conflicts".[187]
192. In 1989, in a meeting with the ICRC, the Minister of Defence of a State involved in an internal armed conflict expressed strong opposition to the forced displacement of the population within the country.[188]

III. Practice of International Organisations and Conferences

United Nations
193. In a resolution adopted in 1992 on political conditions in Bosnia and Herzegovina, the UN Security Council called upon "all parties and others concerned to ensure that forcible expulsions of persons from the areas where they live and any attempts to change the ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia, cease immediately".[189]
194. In a resolution adopted in 1993, the UN Security Council condemned the forced "large-scale displacement of civilians" in Bosnia and Herzegovina.[190]
195. In several resolutions adopted in 1993 concerning the conflict between Armenia and Azerbaijan over Nagorno-Karabakh, the UN Security Council expressed grave concern at "the displacement of a large number of civilians".[191]
196. In a resolution on Rwanda adopted in 1994, the UN Security Council expressed deep concern that the situation had resulted in "the internal displacement of a significant percentage of the Rwandan population".[192]
197. In a resolution adopted in 1995, the UN Security Council demanded that Croatia "respect fully the rights of the local Serb population, including their rights to remain, leave or return in safety".[193]
198. In a resolution adopted in 1995 on violations of international humanitarian law in the former Yugoslavia, the UN Security Council referred to the unlawful deportation of civilians as a "grave violation of international humanitarian law".[194]
199. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the

[186] US, Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 12.
[187] Report on US Practice, 1997, Chapter 5.5, referring to Message from the US President Transmitting AP II to the US Senate for Advice and Consent to Ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 17.
[188] ICRC archive document.
[189] UN Security Council, Res. 752, 15 May 1992, § 6.
[190] UN Security Council, Res. 819, 16 April 1993, preamble.
[191] UN Security Council, Res. 822, 30 April 1993, preamble; Res. 874, 14 October 1993, preamble; Res. 884, 12 November 1993, preamble.
[192] UN Security Council, Res. 918, 17 May 1994, preamble.
[193] UN Security Council, Res. 1009, 10 August 1995, § 2.
[194] UN Security Council, Res. 1019, 9 November 1995, preamble.

UN Security Council, after reiterating the principle of individual responsibility, condemned in particular the "consistent pattern of massive expulsions".[195]

200. In 1994, in a statement by its President on the situation in Liberia, the UN Security Council expressed its deep concern "at the increased number of people that have ... been displaced".[196] The same year, in another statement by its President on the subject, the Security Council expressed its concern at the "large-scale displacement of persons".[197]

201. In 1995, in a statement by its President, the UN Security Council expressed its concerns about the forced displacement in Bosnia and Herzegovina.[198]

202. In 1997, in a statement by its President on the situation in Afghanistan, the UN Security Council expressed its deep concern "at the worsening of the humanitarian situation, including the displacement of the civilian population".[199]

203. In 1997, in a statement by its President on the situation in Burundi, the UN Security Council expressed its deep concern "at the involuntary resettlement of rural populations".[200]

204. In Resolution 2675 (XXV), adopted in 1970, the UN General Assembly affirmed that "civilian populations, or individual members thereof, should not be the object of ... forcible transfers".[201]

205. In Resolution 3318 (XXIX), adopted in 1974, the UN General Assembly solemnly proclaimed that "forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal".[202]

206. In a resolution adopted in 1981, the UN General Assembly demanded, on the basis of Articles 1 and 49 GC IV, that:

> the Government of Israel, the occupying Power, rescind the illegal measures taken by the Israeli military occupation authorities in expelling and imprisoning the Mayors of Hebron and Halhul and in expelling the Sharia Judge of Hebron and that it facilitate the immediate return of the expelled Palestinian leaders so that they can resume the functions for which they were elected and appointed.[203]

This demand was reiterated in subsequent resolutions adopted in 1982, 1983, 1984 and 1985.[204]

[195] UN Security Council, Res. 1034, 21 December 1995, §§ 1 and 2.
[196] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/9, 25 February 1994, p. 1.
[197] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/33, 13 July 1994, p. 2.
[198] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/32, 14 July 1995, p. 1.
[199] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/20, 16 April 1997, p. 2.
[200] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/32, 30 May 1997, p. 1.
[201] UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 7.
[202] UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 5.
[203] UN General Assembly, Res. 36/147 D, 16 December 1981, § 1.
[204] UN General Assembly, Res. 37/88 D, 9 December 1982, § 1; Res. 38/79 E, 15 December 1983, § 1; Res. 39/95 E, 14 December 1984, § 1; Res. 40/161 E, 16 December 1985, § 2.

207. In a resolution adopted in 1981, the UN General Assembly strongly condemned "evacuation, deportation, expulsion, displacement and transfer of Arab inhabitants of the occupied territories and denial of their right to return".[205] This condemnation was reiterated in subsequent resolutions adopted in 1982, 1983, 1984 and 1985.[206]

208. In a resolution adopted in 1991 on the situation of human rights in Iraq, the UN General Assembly expressed deep concern at "the forced displacement of hundreds of thousands of Kurds".[207] In another resolution adopted in 1992 on the same subject, the General Assembly expressed deep concern at "the forced displacement of hundreds of thousands of Iraqi civilians".[208]

209. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly expressed "its outrage at ... the acts of violence aimed at forcing individuals from their homes".[209]

210. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly expressed its deep concern at "continuing serious violations of human rights and international humanitarian law by all parties, in particular ... forced displacement of populations".[210]

211. In a resolution adopted in 1994, the UN Commission on Human Rights condemned the practice of forced displacement in Zaire and stated that the government authorities bore primary responsibility for the situation.[211]

212. In a resolution adopted in 1995, the UN Commission on Human Rights condemned the practice of forced displacement in Sudan.[212]

213. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon all parties to the hostilities to protect all civilians from violations of human rights and IHL, including forcible displacement.[213]

214. In 1996, in a statement by its Chairman, the UN Commission on Human Rights stated that it strongly deplored the suffering inflicted on displaced persons resulting from severe destruction of Chechen towns.[214]

215. In resolutions adopted in 1988 and 1989 on the situation in the Palestinian and Arab territories occupied by Israel, the UN Sub-Commission on Human Rights, after reaffirming that GC IV was applicable, considered that the

[205] UN General Assembly, Res. 36/147 C, 16 December 1981, § 7(c).
[206] UN General Assembly, Res. 37/88 C, 9 December 1982, § 7(d); Res. 38/79 D, 15 December 1983, § 7(d); Res. 39/95 D, 14 December 1984, § 7(e); Res. 40/161 D, 16 December 1985, § 8(e).
[207] UN General Assembly, Res. 46/134, 17 December 1991, preamble.
[208] UN General Assembly, Res. 47/145, 18 December 1992, preamble.
[209] UN General Assembly, Res. 50/193, 22 December 1995, § 2.
[210] UN General Assembly, Res. 55/116, 4 December 2000, § 2(ii).
[211] UN Commission on Human Rights, Res. 1994/87, 9 March 1994, § 4.
[212] UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.
[213] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.
[214] UN Commission on Human Rights, Chairman's statement, UN Doc. E/CN.4/1996/SR.61, 29 April 1996, p. 3.

expulsion and deportation of civilians from their homeland by force was a war crime under international law.[215]

216. In 1998, in a report on MONUA in Angola, the UN Secretary-General stated that:

> Over the past few months, indiscriminate as well as summary killings . . . have been reported in the course of attacks targeting entire villages . . . At such times, principles of humanitarian law are especially important as they seek to protect the most vulnerable groups – those who are not involved in military operations – from direct or indiscriminate attack or being forced to flee.[216]

217. In a progress report submitted to the UN Sub-Commission on Human Rights in 1994, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements concluded that "forcible population transfer, save in areas when derogation or military necessity permits, are *prima facie* internationally wrongful acts".[217]

218. In his final report submitted to the UN Sub-Commission on Human Rights in 1997, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements stated that:

> 15. Specific rights which population transfers violate include the right to self-determination; the right to privacy, family life and home; the prohibition on forced labour; the right to work; the prohibition of arbitrary detention, including internment prior to expulsion; the right to nationality as well as the right of a child to a nationality; the right to property or peaceful enjoyment of possessions; the right to social security; and protection from incitement to racial hatred or religious intolerance (see the table at annex I).
> 16. The range of human rights violated by population transfers and the implantation of settlers place this phenomenon in the category of systematic or mass violations of human rights . . .
> . . .
> 64. As affirmed in the Special Rapporteur's progress report, international law prohibits the transfer of persons, including the implantation of settlers, as a general principle, and the governing principle is that any displacement of populations must have the consent of the population involved. Accordingly, the criteria governing forcible transfer rest on the absence of consent and also include the use of force, coercive measures, and inducement to flee.
> . . .
> 70. Consideration must be given by the Sub-Commission to the possibility of preparing an international instrument to set or codify international standards which are applicable to the situation of population transfer and the implantation of settlers. Such an instrument should: provide for an express

[215] UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.
[216] UN Secretary-General, Report on MONUA, UN Doc. S/1998/931, 8 October 1998, § 17.
[217] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Progress report, UN Doc. E/CN.4/Sub.2/1994/18, 30 June 1994, § 132.

> reaffirmation of the unlawfulness of population transfer and the implantation of settlers; define State responsibility in the matter of unlawful population transfer, including the implantation of settlers; provide for the criminal responsibility of individuals involved in population transfer, whether such individuals be private or officials of the State.[218]

The Special Rapporteur proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights which provided that:

Article 4

1. Every person has the right to remain in peace, security and dignity in one's home, or on one's land and in one's country.
2. No person shall be compelled to leave his place of residence.
3. The displacement of the population or parts thereof shall not be ordered, induced or carried out . . .

. . .

Article 9

The above practices of population transfer constitute internationally wrongful acts giving rise to State responsibility and to individual criminal liability.[219]

Other International Organisations

219. In a recommendation adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe considered that the expulsion of civilians was a crime against humanity and that persons responsible for such crimes should be held personally accountable.[220]

220. In 1991, in several reports concerning violations of IHL in areas of the former Yugoslavia, EU observers denounced various attacks on the civilian population aimed at forcing its displacement.[221]

221. In the Final Communiqué of its 10th Session in 1989, the GCC Supreme Council demanded an end to Israel's "oppressive measures, including the

[218] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, §§ 15, 16, 64 and 70.

[219] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Articles 4 and 9.

[220] Council of Europe, Parliamentary Assembly, Rec. 1198, 5 November 1992, § 6.

[221] Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Ilok and the surrounding villages of Bapska, Lova_ and _arengrad, 1 November 1991, pp. 3–4; Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Slunj, the surrounding villages situated in the region south of Slunj and villages in the Municipality of Korenica, 10 November 1991; Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Drnić and the villages in the Municipality of Drnić, 19 November 1991, pp. 4–5; Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Slavonska Po_ega and villages in the Municipality of Slavonska Po_ega, 26 November 1991, p. 4.

deportation of Palestinians and the demolishing of houses, which run counter to the principles of human rights and international norms and conventions".[222]

222. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that "the policy of mass expulsions . . . represent a total contravention of all the Charters, Laws and Conventions of the International Community of Nations" and strongly condemned "the arbitrary and unjust Israeli measures of expulsion as a contravention of Human Rights [and] a violation of the Fourth Geneva Convention". The Council stated that it followed with grave concern and deep regret the degradation of the situation in Bosnia and Herzegovina, including the "carrying out of the worst crimes of . . . mass expulsion".[223]

223. In a resolution adopted in 1985 on the Israeli occupation of parts of southern Lebanon and western Bekaa, the Council of the League of Arab States decided:

> to call upon the International Community to exercise pressure on the Zionist entity to stop [arbitrary and inhuman] practices immediately, in accordance with the provisions of the Fourth Geneva Convention of 1949, especially as regards displacing nationals, destroying their houses and damaging their properties and belongings in these areas.[224]

224. In a resolution adopted in 1992 on the Israeli occupation of parts of southern Lebanon and western Bekaa, the Council of the League of Arab States decided:

> to strongly condemn Israel for its deportation of Palestinian citizens from the occupied Palestinian territories to Lebanon, as this arbitrary and inhuman act is a blatant violation of Lebanon's sovereignty and a sustained aggression against the inviolability of its territories, as well as a clear violation of the Fourth Geneva Convention of 1949, so that these arbitrary and aggressive practices must be stopped immediately.[225]

225. In a resolution adopted in 1993 on the Israeli occupation of parts of southern Lebanon and western Bekaa, the Council of the League of Arab States decided "to strongly condemn Israel for . . . its inhuman practices against the peaceful people and for the deportation of a certain number of them, which are all breaches of the Fourth Geneva Convention of 1949, and to call for a stop of such arbitrary practices".[226]

[222] GCC, Supreme Council, 10th Session, Muscat, 18–21 December 1989, Final Communiqué, annexed to Letter dated 29 December 1989 from Oman to the UN Secretary-General, UN Doc. A/45/73-S/21065, 2 January 1990, p. 4.

[223] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, pp. 6 and 8.

[224] League of Arab States, Council, Res. 4430, 28 March 1985, § 2.

[225] League of Arab States, Council, Res. 5169, 29 April 1992, § 3.

[226] League of Arab States, Council, Res. 5324, 21 September 1993, § 2.

International Conferences

226. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions in which it deplored "the forceful displacement of civilian populations by occupation troops . . . in violation of the laws and customs of war".[227]

227. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared, *inter alia*, that they "refuse to accept that . . . populations [are] illegally displaced".[228]

228. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it stressed "the general prohibition on forced displacement of the civilian population, which often causes widespread famine".[229]

229. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on principles and action in international humanitarian assistance and protection in which it called upon States to "respect and ensure respect for international humanitarian law, in particular the general prohibition of forced displacement of civilians".[230]

230. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "actions provoking unwarranted population displacements are avoided".[231]

231. The Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict stated that it was "deeply concerned about the number and expansion of conflicts in Africa and alarmed by the spread of violence, in particular in the form of . . . forced displacement of persons and use of force to prevent their return . . . which seriously violate the rules of International Humanitarian Law".[232]

[227] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble.
[228] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I (1).
[229] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § E(b).
[230] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. 4, § A(1)(a).
[231] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(c).
[232] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

IV. Practice of International Judicial and Quasi-judicial Bodies

232. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber, in defining the constituent offences of crimes against humanity (other inhumane acts), held that:

Less broad parameters for the interpretation of "other inhumane acts" can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity . . . Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977) . . . In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5.[233]

233. In the *Krstić case* in 1999, the accused was charged with crimes against humanity for carrying out persecutions (deportation or forcible transfer of Bosnian Muslims from the Srebrenica enclave). The accused was also charged with "deportation" as constituting a crime against humanity or, alternatively, with "inhumane acts (forcible transfer)" also constituting a crime against humanity.[234] In its judgement in 2001, the ICTY Trial Chamber stated that:

521. Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.
522. However, this distinction has no bearing on the condemnation of such practices in international humanitarian law . . .
523. In this regard, the Trial Chamber notes that any forced displacement is by definition a traumatic experience which involves abandoning one's home, losing property and being displaced under duress to another location. As previously stated by the Trial Chamber in the Kupreškić case, forcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity. Whether, in this instance, the facts constitute forcible transfer or deportation is discussed below.[235]

The Trial Chamber found the accused guilty of "forcible transfer".[236]

234. In the case of *Akdivar and Others v. Turkey* in 1996, the ECtHR held that:

It thus finds it established that security forces were responsible for the burning of the applicants' houses on 10 November 1992 and that the loss of their homes

[233] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 566.
[234] ICTY, *Krstić case*, Amended Indictment, 27 October 1999, Counts 6, 7 and 8.
[235] ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 521–523.
[236] ICTY, *Krstić case*, Judgement, 2 August 2001, § 727.

caused them to abandon the village and move elsewhere. However, it has not been established that the applicants were forcibly expelled from Kelekçi by the security forces.[237]

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

235. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "individual or mass transfers and deportation from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive".[238] Delegates also teach that "unlawful deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" constitutes a grave breach of the law of war.[239]

236. In an appeal launched in 1983 in the context of the Iran–Iraq War, the ICRC noted that "tens of thousands of Iranian civilians have been deported to Iraq by the Iraqi armed forces, in breach of the Fourth Geneva Convention".[240]

237. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "under the [four Geneva] Conventions, . . . deportations . . . are specifically prohibited".[241]

238. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded "the authorities concerned and the armed forces under their command of their obligation to apply international humanitarian law, in particular . . . the prohibition on displacing civilians".[242]

239. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the Movement, refugees and displaced persons in which it invited "the components of the Movement, in accordance with their respective mandates: a) to call upon the parties to conflict to respect international humanitarian law and to ensure that it is respected in order to avert population movements".[243]

[237] ECtHR, *Akdivar and Others v. Turkey*, Judgement, 16 September 1996, §§ 81 and 88.
[238] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 833.
[239] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776 (f).
[240] ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.
[241] ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.
[242] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.
[243] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 7, § 1(a).

240. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated, in relation to civilians, that "forced displacements not justified by imperative reasons of security" are prohibited.[244]
241. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of the grave breaches of the Geneva Conventions and of most of the grave breaches of AP I, listed "the unlawful deportation or transfer . . . of protected persons" as war crimes to be subject to the jurisdiction of the ICC. It also considered that "ordering the displacement of the civilian population for reasons related to the conflict" is a serious violation of international law applicable in non-international armed conflicts and a war crime.[245]

VI. Other Practice

242. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "no persons shall be compelled to leave their own territory".[246]
243. In 1992, in the context of the conflict in Rwanda, the RPF stated that "on several occasions, we condemned the use of the massive displacement of the population" carried out by governmental forces.[247]

Evacuation of the civilian population

Note: *For practice concerning the removal of civilians from the vicinity of military objectives, see Chapter 6, section C. For practice concerning the establishment of hospital and safety zones, see Chapter 11, section A. For practice concerning the evacuation of children, see Chapter 39, section B.*

I. Treaties and Other Instruments

Treaties
244. Article 17 GC IV provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded, sick, infirm, and aged persons . . . and maternity cases".

[244] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.
[245] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 1(a)(vi) and 3(xiii).
[246] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(2), *IRRC*, No. 282, p. 333.
[247] RPF, Press Release, Brussels, 28 February 1992, § 4.

245. Article 49, second paragraph, GC IV provides that "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand".
246. Article 17(1) AP II provides that "the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand". Article 17 AP II was adopted by consensus.[248]
247. Pursuant to Article 8(2)(e)(viii) of the 1998 ICC Statute, "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand" constitutes a war crime in non-international armed conflicts.

Other Instruments
248. The 1998 Guiding Principles on Internal Displacement provide that:

> Principle 6
> ...
> 2. The prohibition of arbitrary displacement includes displacement:
> ...
> (b) in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
> ...
>
> Principle 7
> 1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

249. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(e)(viii), "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand", constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals
250. Argentina's Law of War Manual (1969) provides that "the belligerents shall endeavour to conclude agreements for the removal from besieged areas of wounded, sick, elderly [and] maternity cases".[249] It further states that:

[248] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.
[249] Argentina, *Law of War Manual* (1969), § 1.014.

Nevertheless, the occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Evacuations may involve the displacement of protected persons outside the bounds of the occupied territory only in case of material impossibility.[250]

251. Argentina's Law of War Manual (1989) provides that, with respect to non-international armed conflicts, "displacement of the population shall not be ordered unless their security or imperative military reasons so demand".[251]
252. Australia's Commanders' Guide provides that "belligerents shall endeavour to conclude local arrangements for the removal from besieged or encircled areas of wounded, sick, infirm and aged persons . . . and maternity cases".[252]
253. Cameroon's Instructors' Manual provides that "civilian populations must be evacuated to the non combat zones".[253]
254. Canada's LOAC Manual provides that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of wounded, sick, infirm, and aged persons . . . and maternity cases".[254] It also states that in occupied territory, "permissible measures of population control include . . . evacuation".[255] With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict unless their security or imperative military reasons so demand".[256]
255. Croatia's LOAC Compendium allows "evacuation for security reasons", but "not outside the boundaries of the occupied territory".[257]
256. The Military Manual of the Dominican Republic provides that "it is lawful to displace or resettle civilians if it is urgently required for military reasons, such as clearing a combat zone".[258]
257. France's LOAC Manual provides that "some evacuations can be imposed for reasons of security of the population or imperative military necessity. These evacuations must always be temporary and undertaken respecting the population's interests."[259]
258. Germany's Military Manual provides that "a temporary evacuation of certain areas shall be permissible if the security of the population or imperative military reasons so demand. An evacuation of persons to areas outside the bounds of the occupied territory shall be permitted only in case of emergency."[260]

[250] Argentina, *Law of War Manual* (1969), § 5.008.
[251] Argentina, *Law of War Manual* (1989), § 7.08.
[252] Australia, *Commanders' Guide* (1994), § 926; see also *Defence Force Manual* (1994), § 735.
[253] Cameroon, *Instructors' Manual* (1992), p. 67, § 242(3).
[254] Canada, *LOAC Manual* (1999), p. 6-4, § 35.
[255] Canada, *LOAC Manual* (1999), p. 12-5, § 40.
[256] Canada, *LOAC Manual* (1999), p. 17-5, § 41.
[257] Croatia, *LOAC Compendium* (1991), p. 62.
[258] Dominican Republic, *Military Manual* (1980), p. 10.
[259] France, *LOAC Manual* (2001), p. 65.
[260] Germany, *Military Manual* (1992), § 544.

259. Hungary's Military Manual allows "evacuation for security reasons", but "not outside the boundaries of the occupied territory".[261]

260. Israel's Manual on the Laws of War provides that "it is obligatory to make an effort to evacuate citizens from military objectives to get them out of harm's way".[262]

261. Italy's IHL Manual provides that it is possible to undertake "total or partial evacuation of a given area of the occupied territory if the security of the population or imperative military reasons so demand".[263]

262. Kenya's LOAC Manual provides that "a local cease-fire may be arranged for the removal from the besieged or encircled areas of the wounded and sick, ... old persons and maternity cases. Evacuation can also be ordered for military reasons or for the security of the population."[264]

263. Madagascar's Military Manual provides that "local agreements may be concluded for the removal from besieged or encircled areas of wounded, sick and shipwrecked".[265]

264. The Military Manual of the Netherlands provides that "the occupying power may undertake the evacuation of a given area if the security of the population or imperative military reasons so demand".[266] With respect to non-international armed conflicts in particular, the manual states that "forced displacement ... is only authorized if the security of the civilians involved or imperative military reasons so demand".[267]

265. New Zealand's Military Manual provides that in occupied territory, "permissible measures of population control include ... evacuation".[268] With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict, unless their security or imperative military reasons so demand".[269] The manual refers to Article 17 GC IV, which requires that "belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded, sick, infirm and aged persons ... and maternity cases".[270]

266. The Military Directive to Commanders of the Philippines provides that "emphasis should be placed on shelter or stay-put policy rather than on evacuation ... Official orders to move large groups of civilians normally will be given where serious combat action is expected to occur between troops and hostile forces."[271]

261 Hungary, *Military Manual* (1992), p. 98.
262 Israel, *Manual on the Laws of War* (1998), p. 57.
263 Italy, *IHL Manual* (1991), Vol. I, § 48(8).
264 Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.
265 Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § B.
266 Netherlands, *Military Manual* (1993), p. VIII-5, § 5.
267 Netherlands, *Military Manual* (1993), p. XI-7.
268 New Zealand, *Military Manual* (1992), § 1322(2).
269 New Zealand, *Military Manual* (1992), § 1823.
270 New Zealand, *Military Manual* (1992), § 508(3).
271 Philippines, *Military Directive to Commanders* (1988), Article 3(c).

267. Spain's LOAC Manual provides that "the occupying Power can undertake a total or partial evacuation of a given occupied area if the security of the population or imperative military reasons so demand".[272] It adds that "evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement".[273]

268. Sweden's IHL Manual provides that "the only circumstances under which the occupying power has the right to order removal of the civilian population is when evacuation is required to protect civilians from military attack, or when civilian safety otherwise requires this".[274]

269. Switzerland's Basic Military Manual provides that "belligerents shall conclude special agreements in order to evacuate the wounded, sick, infirm, elderly . . . and maternity cases . . . from besieged areas".[275] It states, however, that "a total or partial evacuation of a given occupied area may be undertaken if the security of the population or imperative military reasons so demand . . . In principle, such transfers must only take place within the occupied territory."[276]

270. The UK Military Manual provides that:

> The Occupant . . . is permitted to undertake total or partial evacuation of a given area, but only if the security of the population or imperative military reasons so require. Except when any other course is materially impossible, such evacuation must not involve the transfer of protected persons outside the limits of occupied territory".[277]

271. The UK LOAC Manual provides that "a local cease-fire may be arranged for the removal from besieged or encircled areas of the wounded and sick, . . . old persons and maternity cases. Evacuations can also be ordered for military reasons or for the security of the population."[278]

272. The US Field Manual reproduces Articles 17 and 49 GC IV.[279]

273. The US Air Force Pamphlet refers to Articles 17 and 49 GC IV.[280]

274. The US Soldier's Manual provides that "it is lawful to move or resettle civilians if it is urgently required for military reasons, such as clearing a combat zone".[281]

National Legislation

275. Argentina's Constitution, as well as a number of decrees issued between 1974 and 1977, authorise the President, in cases where a state of emergency

[272] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5), see also 2.4.a.(5).
[273] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).
[274] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[275] Switzerland, *Basic Military Manual* (1987), Article 33.
[276] Switzerland, *Basic Military Manual* (1987), Article 176.
[277] UK, *Military Manual* (1958), § 560.
[278] UK, *LOAC Manual* (1981), Section 9, p. 34, § 3.
[279] US, *Field Manual* (1956), §§ 256 and 382.
[280] US, *Air Force Pamphlet* (1976), §§ 14-3 and 14-6(b).
[281] US, *Soldier's Manual* (1984), p. 22.

has been declared, to arrest and transfer persons from one part of the territory to another, unless such persons choose instead to leave the country. In some cases, however, the option to leave the country may be suspended by invoking the need to safeguard essential State interests.[282]

276. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including ordering the "displacement of a civilian population" in non-international armed conflicts, if "the order is not justified by the security of the civilians involved or by imperative military necessity".[283]

277. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts, "urgent measures to remove all the civilian persons from the besieged zone" must be taken.[284]

278. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[285]

279. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[286]

280. Cuba's National Defence Act, which governs civil defence activities for the protection of the civilian population, provides for the evacuation of the population to zones of safety.[287]

281. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 78(1) AP I, as well as any "contravention" of AP II, including violations of Article 17(1) AP II, are punishable offences.[288]

282. The Population Evacuation Act of the Netherlands provides that in the event of war or threat of war, a Royal Decree may be issued entitling government ministers to order the evacuation of the population in order to ensure its safety, ensure the continued functioning of society or to enable the armed forces to perform their tasks.[289]

283. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(e)(viii) of the 1998 ICC Statute.[290]

[282] Argentina, *Constitution* (1994), Article 23; *Decree on the State of Emergency* (1974), Article 1; *Decree on the State of Emergency* (1975), Article 1-4; *Decree on the State of Emergency* (1976), Article 3; *Law on the State of Emergency* (1977), Article 10.
[283] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.89.
[284] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.
[285] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[286] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[287] Cuba, *National Defence Act* (1994), Article 116.
[288] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[289] Netherlands, *Population Evacuation Act* (1988), Article 2(1).
[290] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

284. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[291]
285. Peru's Constitution authorises the restriction or suspension of, *inter alia*, freedom of movement during "states of emergency" (cases of disturbance of the peace or internal order, of disasters, or serious circumstances affecting the life of the nation), but banishment remains prohibited at all times. During "states of siege" (cases of invasion, external war, civil war or imminent danger), on the other hand, fundamental rights cannot be suspended.[292]
286. The Report on the Practice of Rwanda states that Rwanda's State of Emergency Decree provides that the authorities may order the evacuation of the civilian population for security reasons and fix the modalities of their evacuation.[293]
287. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(e)(viii) of the 1998 ICC Statute.[294]
288. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(e)(viii) of the 1998 ICC Statute.[295]
289. Uruguay's Constitution as amended provides that the President of the Republic may take prompt security measures in serious and unforeseen cases of foreign attack or internal disturbance, including the transfer of persons from one point of the territory to another, unless they choose to leave the country.[296]

National Case-law
290. No practice was found.

Other National Practice
291. In June 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina appealed that the civilian population be displaced only if imperative military or security reasons so demanded.[297]
292. It has been reported that during the communist insurgency in Malaysia, squatters of Chinese origin who farmed the land on the edge of the jungle were resettled to areas called "New Villages".[298] According to the Report on the Practice of Malaysia, this was done both for security objectives and for the

[291] Norway, *Military Penal Code as amended* (1902), § 108(b).
[292] Peru, *Constitution* (1993), Article 137.
[293] Report on the Practice of Rwanda, 1997, Chapter 1.7, referring to *State of Emergency Decree* (1959), Article 4.
[294] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[295] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[296] Uruguay, *Constitution as amended* (1996), Article 168(17).
[297] Bosnia and Herzegovina, Republika Srpska, Appeal by the Presidency, 7 June 1992, § 4.
[298] See, e.g., Dato' J. J. Raj, Jr., *The War Years and After: A Personal Account of Historical Relevance*, Pelanduk Publications, Kuala Lumpur, 1995, pp. 93–99.

protection of the squatters and has been recognised by officials as a form of displacement.[299]

293. Under Turkish emergency decrees dating from 1990, the Emergency Governor can order the temporary or permanent evacuation, change of place, regrouping of villages, grazing fields and residential areas for reasons of public security.[300]

294. In 1988, in the context of a non-international armed conflict, a governmental military commander stated that the displacement of the civilian population, which was one of the tasks of its forces, was carried out with a view to gathering a maximum of civilians under governmental control and reducing the number of persons outside government-controlled areas. In the same context in 1990, a government minister countered ICRC concerns about this policy by stating that it might be necessary to temporarily displace civilians during military operations, but that they must not under any circumstance be obliged to remain displaced subsequently.[301]

III. Practice of International Organisations and Conferences

United Nations

295. In 1997, in his final report submitted to the UN Sub-Commission on Human Rights, the Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights. Article 4(3) of the draft declaration provided that "the displacement of the population or parts thereof shall not be ordered, induced or carried out unless their safety or imperative military reasons so demand".[302]

Other International Organisations

296. In a resolution adopted in 1985 in response to mass transfers of the population in Ethiopia, the European Parliament invited the Commission, the Council and member States to ask Ethiopia to put a stop to the transfers for a minimum of six months in order to assess under international supervision the degree of necessity for such actions and to establish minimum humanitarian conditions for their conduct should they prove necessary.[303]

[299] Report on the Practice of Malaysia, 1997, Interview with the Ministry of Home Affairs, Chapter 5.5.
[300] Turkey, Decrees No. 424 and 425, 10 May 1990.
[301] ICRC archive documents.
[302] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Article 4(3).
[303] European Parliament, Resolution on mass transfers of population in Ethiopia and the expulsion of Médecins sans frontières, 13 December 1985, § 1.

International Conferences

297. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

298. No practice was found.

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

299. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the occupying power may undertake total or partial evacuation of a given area if the security of the population or other imperative reasons so demand".[304]

300. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded "the authorities concerned and the armed forces under their command of their obligation to apply international humanitarian law, in particular . . . the prohibition on displacing civilians unless their security or imperative military reasons so demand".[305]

301. In 1993, in a letter to a representative of a separatist entity, the ICRC stated that "persons forcibly evacuated from a conflict zone where fighting is going on must be immediately released, once brought to safer areas."[306]

302. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of the grave breaches of the Geneva Conventions and of most of the grave breaches of AP I, considered that ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or military reasons so demanded, was a serious violation of international law applicable in non-international armed conflicts and a war crime.[307]

VI. Other Practice

303. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "the displacement of the

[304] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 834.
[305] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.
[306] ICRC archive document.
[307] ICRC, Working paper submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(a)(vi) and 3(xiii).

population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand".[308]

304. In 1993, in a meeting with the ICRC, a representative of a separatist entity stated that the forced displacement of civilians from a specific town was only carried out after timely warning of the possibility to flee and was only justified by the concern to keep the civilians away from the combat zone.[309]

Ethnic cleansing

I. Treaties and Other Instruments

305. No practice was found.

II. National Practice

Military Manuals

306. No practice was found.

National Legislation

307. No practice was found.

National Case-law

308. No practice was found.

Other National Practice

309. According to the Report on the Practice of France, the free return of refugees is a frequent preoccupation of French diplomacy. France often asks for this right be guaranteed and considers a contrary attitude to be "unacceptable" and implies a deliberate policy of "ethnic cleansing".[310]

310. In 1993, the German Chancellor stated that ethnic cleansing was deeply inhumane and fell within the notion of genocide.[311]

311. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Tunisia stated that it was essential to "put an end to the reprehensible practice of 'ethnic cleansing'".[312]

312. In 1992, during a debate in the UN General Assembly, the UK declared that "ethnic cleansing" in the former Yugoslavia was "inhuman and illegal"

[308] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.
[309] ICRC archive document.
[310] Report on the Practice of France, 1999, Chapter 5.5.
[311] Germany, Statement by the Chancellor, Helmut Kohl, Berlin, 24 May 1993, *Bulletin*, No. 45, Presse- und Informationsamt der Bundesregierung, Bonn, 29 May 1993, p. 488.
[312] Tunisia, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, p. 66.

and added that "we reject as inhuman and illegal any expulsion of civilian communities from their homes in order to alter the ethnic character of the area".[313]

313. In 1994, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, the UK stated that it was undeniable that "the abhorrent practice of 'ethnic cleansing' ... is a crime, and a most grievous one".[314]

314. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US stated that:

> The discrete incidents reported herein contain indications that they are part of a systematic campaign towards a single objective – the creation of an ethnically "pure" State. We have not identified "ethnic cleansing" ... as a separate category of violations. Nevertheless, the rubric of ethnic cleansing may unite events that appear unconnected and may therefore prove useful in identifying persons and institutions that may be responsible for violations of established international humanitarian law.[315]

315. In 1998, in reaction to the situation in Kosovo, but also referring to the conflicts in the former Yugoslavia, the US Congress adopted a resolution by unanimous consent stating that:

> Whereas "ethnic cleansing" has been carried out in the former Yugoslavia in such a consistent and systematic way that it had to be directed by the senior political leadership in Serbia, and Slobodan Milošević has held such power within Serbia that he is responsible for the conception and direction of this policy;
>
> it is the sense of Congress that ...
>
> the United States should publicly declare that it considers that there is reason to believe that Slobodan Milošević, President of the Federal Republic of Yugoslavia (Serbia and Montenegro), has committed war crimes, crimes against humanity and genocide.[316]

III. Practice of International Organisations and Conferences

United Nations

316. In various resolutions adopted between 1992 and 1994 in connection with the conflicts in the former Yugoslavia, the UN Security Council condemned the practice of "ethnic cleansing" as a violation of IHL and reaffirmed that "those

[313] UK, Statement before the UN General Assembly, UN Doc. A/46/PV.89, 24 August 1992, p. 36.
[314] UK, Statement before the UN Security Council, UN Doc. S/PV.3428, 23 September 1994, pp. 32–33.
[315] US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second Submission), annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, Annex, § 4.
[316] US, Congress, Resolution 105 on the Sense of Congress Regarding the Culpability of Slobodan Milošević, 17 July 1998, *Congressional Record (Senate)*, pp. S8456–S8458.

that commit or order the commission of such acts will be held individually responsible in respect of such acts".[317]

317. In a resolution on the former Yugoslavia adopted in 1993, the UN Security Council expressed its grave alarm at "continuing reports of widespread violations of international humanitarian law . . . including reports of mass killings and the continuance of the practice of ethnic cleansing".[318]

318. In 1994, in a statement by its President, the UN Security Council stated that it deplored "recent acts of violence and terror including ethnic cleansing particularly in Prijedor and Banja Luka" and reaffirmed that "the International Tribunal was established . . . for the purpose of investigating crimes of this sort, and trying persons accused of committing such crimes".[319]

319. In two resolutions adopted in 1992 in the context of the former Yugoslavia, the UN General Assembly stated that it considered that the practice of "ethnic cleansing" constituted a grave and serious violation of IHL and reiterated "its conviction that those who commit or order the commission of acts of 'ethnic cleansing' are individually responsible and should be brought to justice".[320]

320. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly stated that it considered that "ethnic cleansing" was a form of genocide.[321]

321. In two resolutions adopted in 1993 and 1994, the UN General Assembly addressed the issue of "ethnic cleansing" in the former Yugoslavia. It condemned violations of IHL:

> most of which are committed in connection with "ethnic cleansing" and which include killings, torture, beatings, arbitrary searches, . . . disappearances, destruction of houses and other acts or threats of violence aimed at forcing individuals to leave their homes, as well as violations of human rights in connection with detention.[322]

322. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly expressed its outrage at "ethnic cleansing".[323]

323. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights referred to the perpetrators of ethnic cleansing as "war criminals".[324]

[317] UN Security Council, Res. 771, 13 August 1992, § 2; Res. 787, 16 November 1992, § 7; Res. 819, 16 April 1993, § 7; Res. 820, 17 April 1993, § 6; Res. 941, 23 September 1994, § 2.
[318] UN Security Council, Res. 808, 22 February 1993, preamble.
[319] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/14, 6 April 1994.
[320] UN General Assembly, Res. 46/242, 25 August 1992, § 8; Res. 47/80, 16 December 1992, § 4.
[321] UN General Assembly, Res. 47/121, 18 December 1992, preamble.
[322] UN General Assembly, Res. 48/153, 20 December 1993, § 5; Res. 49/196, 23 December 1994, § 6.
[323] UN General Assembly, Res. 50/193, 22 December 1995, §§ 2 and 15.
[324] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 1.

324. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned in the strongest terms:

> all violations of human rights and international humanitarian law during the conflict . . . in particular, massive and systematic violations, including, *inter alia*, systematic ethnic cleansing . . . [and] illegal and forcible evictions and other acts of violence aimed at forcing individuals from their homes.

It reaffirmed that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable".[325]

325. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights condemned "ethnic cleansing" and stated that this practice had generated displacement on a massive scale.[326]

326. In 1993, in his comment on Article 5 of the 1993 ICTY Statute, which defines the crimes against humanity over which the Tribunal has jurisdiction, the UN Secretary-General noted that "in the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution".[327]

327. In his final report submitted to the UN Sub-Commission on Human Rights in 1997, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements stated that:

> 65. Acts such as ethnic cleansing, dispersal of minorities or ethnic populations from their homeland within or outside the State, and the implantation of settlers are unlawful, and engage State responsibility and the criminal responsibility of individuals.[328]

The Special Rapporteur proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights which provided that:

> Article 6
> Practices and policies having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful.[329]

[325] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.
[326] UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, §§ 7–8.
[327] UN Secretary-General, Report pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, § 48.
[328] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, § 65.
[329] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN

Other International Organisations

328. In 1993, in a report on the situation of refugees and displaced persons in the former Yugoslavia, the Rapporteur of the Council of Europe stated that "ethnic cleansing" was a crime against humanity and that those committing those crimes should be searched for and brought to justice.[330]

329. In a resolution adopted in 1993, the Parliamentary Assembly of the Council of Europe declared "its profound consternation at the massive and flagrant violation of human rights in the territory of the former Yugoslavia and at the perpetration of crimes against humanity such as . . . 'ethnic cleansing' and the deportation of entire populations".[331]

330. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council stated that it followed with grave concern and deep regret the degradation of the situation in Bosnia and Herzegovina, including the "carrying out of the worst crimes of racial extermination".[332]

331. In the Final Communiqué of its 14th Session in 1993, the GCC Supreme Council noted that "the international economic sanctions imposed on the Serbs have had no noticeable effect in . . . halting their systematic practices of ethnic cleansing".[333]

332. In a resolution on Bosnia and Herzegovina adopted in 1992, the Council of the League of Arab States decided "to call upon the Serbian forces to put an immediate end to all activities aimed at changing the demographic structure of the Republic of Bosnia and Herzegovina".[334]

333. In 1992, the OIC Ministers of Foreign Affairs stigmatised "with force" massive violations of IHL in Bosnia and Herzegovina and considered that the policy of "ethnic cleansing" and forced deportation of Muslims and Croats constituted a genocide and a crime against humanity.[335]

International Conferences

334. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed "its dismay at massive violations of human rights especially . . . 'ethnic cleansing' . . . creating mass exodus

Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Article 6.

330 Council of Europe, Parliamentary Assembly, Report on the situation of refugees and displaced persons in the former Yugoslavia, Doc. 6740, 19 January 1993, § 19.

331 Council of Europe, Parliamentary Assembly, Res. 994, 3 February 1993, § 1.

332 GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 8.

333 GCC, Supreme Council, 14th Session, Riyadh, 20–22 December 1993, Final Communiqué, annexed to Letter dated 29 December 1993 from the UAE to the UN Secretary-General, UN Doc. A/49/56-S/26926, 30 December 1993, p. 6.

334 League of Arab States, Council, Res. 5231, 13 September 1992, § 5.

335 OIC, Conference of Ministers of Foreign Affairs, Sixth Extraordinary Session, Res. 1/6-EX, § 5, 1–2 December 1992.

of refugees and displaced persons". It reiterated "the call that perpetrators of such crimes be punished and such practices immediately stopped".[336]

335. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared, *inter alia*, that they "refuse to accept that the civilian populations . . . are victims of the odious practise of 'ethnic cleansing'".[337]

336. The Eleventh Conference of Heads of State or Government of the Non-Aligned Countries in 1995 reiterated that those who committed or ordered to be committed practices of "ethnic cleansing" in the former Yugoslavia were personally responsible and that "the international community should make every effort to bring them to justice".[338]

IV. Practice of International Judicial and Quasi-judicial Bodies

337. No practice was found.

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

338. No practice was found.

VI. Other Practice

339. No practice was found.

B. Transfer of Own Civilian Population into Occupied Territory

Note: *For practice concerning ethnic cleansing, see section A of this chapter.*

I. Treaties and Other Instruments

Treaties

340. Article 49, sixth paragraph, GC IV provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".

341. Article 85(4)(a) AP I provides that "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.[339]

[336] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(28).
[337] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I (3).
[338] Eleventh Conference of Heads of State or Government of the Non-Aligned Countries, Cartagena, 1995, Basic Documents, p. 46.
[339] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

342. Under Article 8(2)(b)(viii) of the 1998 ICC Statute, "unlawful deportation or transfer, in particular the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies" constitutes a war crime in international armed conflicts.

Other Instruments

343. Article 22(2)(b) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind considers "the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory" as an "exceptionally serious war crime".

344. Under Article 20(c)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, the "transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" is a war crime.

345. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(viii), "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

346. Argentina's Law of War Manual (1969) provides that "the occupying power shall not evacuate or transfer a part of its own civilian population into the territory it occupies".[340]

347. Under Argentina's Law of War Manual (1989), "the transfer by the occupying power of a part of its own civilian population to the territory it occupies" is a grave breach.[341]

348. Australia's Defence Force Manual provides that "the occupying power is forbidden to move parts of its own population into the occupied territory with the intention of changing the nature of the population or annexing or colonising the area".[342]

349. Canada's LOAC Manual provides that "the occupying power is forbidden to move parts of its own population into the occupied territory, with the intention of changing the nature of the population or annexing or colonizing the area".[343] It further states that "transfer by an occupying power of parts of its own civilian population into occupied territory" is a war crime.[344]

350. Croatia's LOAC Compendium states that it is prohibited "to transfer one's own civilians into the occupied territory".[345]

[340] Argentina, *Law of War Manual* (1969), § 5.008.
[341] Argentina, *Law of War Manual* (1989), § 8.03.
[342] Australia, *Defence Force Manual* (1994), § 1217.
[343] Canada, *LOAC Manual* (1999), p. 12-4, § 33.
[344] Canada, *LOAC Manual* (1999), p. 16-3, § 17.
[345] Croatia, *LOAC Compendium* (1991), p. 62.

351. Hungary's Military Manual states that it is prohibited "to transfer one's own civilians into the occupied territory".[346]
352. Italy's IHL Manual provides that the occupying State is prohibited "to deport or transfer a part of its own population into the occupied territory".[347]
353. The Military Manual of the Netherlands considers that "the transfer by the occupying power of parts of its own civilian population into the territory it occupies" is a grave breach of AP I.[348]
354. New Zealand's Military Manual provides that "the Occupying Power is forbidden to move parts of its own population into the occupied territory with the intention of changing the nature of the population or annexing or colonizing the area".[349] The manual considers such practice to be a grave breach.[350]
355. Spain's LOAC Manual provides that "the occupying Power can neither evacuate nor transfer a part of its own civilian population into the territory it occupies".[351]
356. Sweden's IHL Manual provides that:

> The occupying power may find it in its own interests to move sections of its own civilian population into the occupied area. Such movements of population can have very far-reaching negative consequences for the occupied population. It is important to stress that, according to the GC IV (Article 49), any movement of the occupying power's own civilian population is prohibited.[352]

357. Switzerland's Basic Military Manual provides that grave breaches of AP I include "the transfer by the occupying Power of parts of its own civilian population into occupied territory".[353]
358. The UK Military Manual provides that "the Occupant is not permitted to deport or transfer parts of its own civilian population to occupied territory".[354]
359. The US Field Manual reproduces Article 49 GC IV.[355]

National Legislation
360. Argentina's Draft Code of Military Justice considers the transfer by an occupying power or authority of parts of its own civilian population into occupied territory to be an offence.[356]

[346] Hungary, *Military Manual* (1992), p. 98.
[347] Italy, *IHL Manual* (1991), Vol. I, § 48(8).
[348] Netherlands, *Military Manual* (1993), p. IX-6.
[349] New Zealand, *Military Manual* (1992), § 1319(1).
[350] New Zealand, *Military Manual* (1992), § 1703(4).
[351] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).
[352] Sweden, *IHL Manual* (1991), Section 6.1.3, pp. 122–123.
[353] Switzerland, *Basic Military Manual* (1987), Article 193(2).
[354] UK, *Military Manual* (1958), § 560.
[355] US, *Field Manual* (1956), § 382.
[356] Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(5) in the *Code of Military Justice as amended* (1951).

361. Under Armenia's Penal Code, the "transfer by the occupying power of part of its own population in the occupied territories", during an armed conflict, constitutes a crime against the peace and security of mankind. [357]

362. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".[358]

363. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "the transfer, directly or indirectly, of parts of the civilian population of the perpetrator's own country into territory that the country occupies" in international armed conflicts.[359]

364. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the following actions are prohibited to be carried out against civilian persons . . . 6) to evacuate its population to the occupied territory".[360]

365. Azerbaijan's Criminal Code provides that the "transfer of any part of one's own civilian population to the occupied territory" is a war crime.[361]

366. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[362]

367. The Criminal Code of Belarus provides that "the transfer of any part of one's own civilian population into the occupied territory" is a war crime.[363]

368. Under Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, "the transfer by the occupying power of parts of its own civilian population into the territory it occupies, in the case of an international armed conflict, or of the occupying authority, in the case of a non-international armed conflict," is criminalised as a grave breach.[364]

369. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever in violation of rules of international law applicable in time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his/her civilian population into the occupied territory" commits a war crime.[365] The Criminal Code of the Republika Srpska contains the same provision.[366]

357 Armenia, *Penal Code* (2003), Article 390.4(1).
358 Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).
359 Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.45(a)(1).
360 Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17.
361 Azerbaijan, *Criminal Code* (1999), Article 116.0.14.
362 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
363 Belarus, *Criminal Code* (1999), Article 136(14).
364 Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(17).
365 Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(3).
366 Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(3).

370. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "transfer, direct or indirect, by the occupying power of parts of its own civilian population, into the territory it occupies" constitutes a war crime in international armed conflict.[367]

371. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".[368]

372. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[369]

373. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[370]

374. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach" of AP I.[371]

375. Croatia's Criminal Code provides, under the heading "War crimes against civilian population", that "whoever, as part of an occupying power, in violation of the rules of international law, in time of war, armed conflict or occupation, orders or performs the transfer of parts of the civilian population of the occupying force to the occupied territory shall be punished".[372]

376. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".[373]

377. The Czech Republic's Criminal Code as amended punishes "a person who in war time . . . settles the occupied territory with the population of his own country".[374]

378. Under the Draft Amendments to the Penal Code of El Salvador, "repatriation or forced displacement of the civilian population of one's own territory", in both internal and international armed conflicts, is punishable.[375]

[367] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(h).
[368] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[369] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[370] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[371] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[372] Croatia, *Criminal Code* (1997), Article 158(3).
[373] Cyprus, *AP I Act* (1979), Section 4(1).
[374] Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(d).
[375] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Repatriación o desplazamiento forzado".

379. Germany's Law Introducing the International Crimes Code punishes anyone, who, in connection with an international or non-international armed conflict, "transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory".[376]
380. Under Georgia's Criminal Code, "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" in an international or non-international armed conflict is a crime.[377]
381. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.[378] In addition, any "minor breach" of the Geneva Conventions, including violations of Article 49 GC IV, is also a punishable offence.[379]
382. Jordan's Draft Military Criminal Code considers "the transfer, by the occupying Power, of a part of the civilian population to the territories occupied by this Power" as a war crime.[380]
383. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the transfer, by the occupying Power, of a part of the civilian population to the territories occupied by this Power" is a war crime.[381]
384. Mali's Penal Code provides that "the transfer, direct or indirect, by the occupying Power, of a part of its own civilian population, into the territories it occupies" constitutes a crime in international armed conflicts.[382]
385. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".[383]
386. Under the International Crimes Act of the Netherlands, it is a crime to commit, in an international armed conflict, "the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . . the transfer by the occupying Power of parts of its own civilian population into the territory it occupies".[384] Furthermore, "the transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the territory it occupies" is also a crime, when committed in an international armed conflict.[385]
387. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures

[376] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(2).
[377] Georgia, *Criminal Code* (1999), Article 411(1)(g).
[378] Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).
[379] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[380] Jordan, *Draft Military Criminal Code* (2000), Article 41(15).
[381] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(15).
[382] Mali, *Penal Code* (2001), Article 31(i)(8).
[383] Moldova, *Penal Code* (2002), Article 391.
[384] Netherlands, *International Crimes Act* (2003), Article 5(2)(d)(i).
[385] Netherlands, *International Crimes Act* (2003), Article 5(5)(d).

the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".[386]

388. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(viii) of the 1998 ICC Statute.[387]

389. Nicaragua's Draft Penal Code provides that "whoever, during an international or internal armed conflict, orders repatriation or forced displacement of the civilian population of its own territory, for reasons related to the armed conflict," commits a punishable offence.[388]

390. According to Niger's Penal Code as amended, "the transfer into occupied territories of a part of the civilian population of the occupying power, in the case of an international armed conflict, or of the occupying authority, in the case of a non-international armed conflict," constitutes a war crime.[389]

391. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[390]

392. Slovakia's Criminal Code as amended punishes "a person who in war time . . . settles the occupied territory with the population of his own country".[391]

393. Slovenia's Penal Code provides, under the heading "War Crimes against the Civil Population", that "whoever, in violation of the principles of international law, orders or implements, as occupier in time of war, armed conflict or occupation, deportation of groups of civilians to the occupied territory" shall be punished.[392]

394. Spain's Penal Code punishes anyone who transfers and settles in occupied territory any part of the population of the occupying power, in order to remain there permanently.[393]

395. Tajikistan's Criminal Code punishes "the transfer by the occupying power of parts of its own civilian population into the territory it occupies".[394]

396. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(viii) of the 1998 ICC Statute.[395]

397. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom,

[386] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[387] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[388] Nicaragua, *Draft Penal Code* (1999), Article 455.
[389] Niger, *Penal Code as amended* (1961), Article 208.3(17).
[390] Norway, *Military Penal Code as amended* (1902), § 108.
[391] Slovakia, *Criminal Code as amended* (1961), Article 263 (a)(2)(d).
[392] Slovenia, *Penal Code* (1994), Article 374(3).
[393] Spain, *Penal Code* (1995), Article 611(5).
[394] Tajikistan, *Criminal Code* (1998), Article 403(1).
[395] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".[396]

398. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(viii) of the 1998 ICC Statute.[397]

399. The Criminal Code of the SFRY (FRY) provides, under the heading "War crimes against civilian population", that "whoever in violation of the rules of international law, in time of war, armed conflict or occupation, . . . orders the transfer of a part of the civilian population into the occupied territory . . . shall be punished".[398]

400. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".[399]

National Case-law

401. No practice was found.

Other National Practice

402. The Report on the Practice of Egypt states that:

Egypt has a firm position according to which displacement and all measures designed to change the demographic composition of the occupied territories are null and void. Such measures, if occurred, must be rescinded as soon as possible, particularly after the signature of the Treaty of peace . . . It is worth remembering that the aforementioned position adopted by Egypt had also been put forward with regard to Additional Protocol II. Additionally, Egypt condemned forcible transfers practised by Israel in 1967 vis-à-vis civilians.[400]

403. The Report on the Practice of France states that:

France is clearly opposed to the policy of *fait accompli* of the settlement colonies which modify the demographic structure of the territory. It is also opposed to expulsion measures directed at the inhabitants of the occupied territories which are equally contrary to the fourth Geneva Convention. In relation to these Israeli measures, the French representatives even talk of "banishment" and "exceptional gravity".[401]

404. Following the adoption by the UN Diplomatic Conference of the 1998 ICC Statute, Israel gave the following explanation of its vote:

Israel has reluctantly cast a negative vote. It fails to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes the action of transferring population into occupied territory. The exigencies

[396] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[397] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[398] SFRY (FRY), *Penal Code as amended* (1976), Article 142(3).
[399] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).
[400] Report on the Practice of Egypt, 1997, Chapter 5.5.
[401] Report on the Practice of France, 1999, Chapter 5.7.

of lack of time and intense political and public pressure have obliged the Conference to by-pass very basic sovereign prerogatives to which we are entitled in drafting international conventions, in favour of finishing the work and achieving a Statute on a come-what-may basis. We continue to hope that the Court will indeed serve the lofty objectives for the attainment of which it is being established.[402]

405. In a series of letters to the UN Secretary-General between August and October 1990, Kuwait complained about the following actions carried out by Iraqi authorities in occupied Kuwait:

- Iraqi forces arrested Kuwaiti nationals and others, and transferred them to Bagdad.[403]
- Transportation to Kuwait of large numbers or Iraqi families for the purposes of settlement and alteration of the country's demographic structure.[404]
- In its efforts to change the demographic structure of Kuwait and erase the very identity of the country, Iraqi occupation forces have embarked on the application and execution of a novel practice of: depopulating Kuwait from its own inhabitants, confiscating identification documents, and settling Iraqi families in Kuwaiti homes.[405]
- The invading Iraqi authorities have stepped up their campaign to change the demographic character of Kuwait by expanding their operation to expel Kuwaiti nationals from their homes in various areas of Kuwait and to replace them by Iraqi families brought to Kuwait from Iraq.[406]

Kuwait qualified these acts as crimes.[407]

406. In 1980, the US Secretary of State stated that "US policy toward the establishment of Israeli settlements in the occupied territories is unequivocal and has long been a matter of public record. We consider it to be contrary to international law and an impediment to the successful conclusion of the Middle East peace process."[408] In 1991, the Secretary of State stated that Israeli settlement activity "does violate the United States policy".[409]

407. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense declared that it regarded the transfer of the Iraqi population into occupied Kuwait in violation of Article 49 GC IV as a war crime.[410]

[402] Israel, Explanation of vote, UN Press Release L/2889, 20 July 1998, § 4.
[403] Kuwait, Letter dated 7 August 1990 to the UN Secretary-General, UN Doc. S/21452, 7 August 1990.
[404] Kuwait, Letter dated 2 September 1990 to the UN Secretary-General, UN Doc. S/21694, 2 September 1990.
[405] Kuwait, Letter dated 15 September 1990 to the UN Secretary-General, UN Doc. S/21772, 15 September 1990.
[406] Kuwait, Letter dated 4 October 1990 to the UN Secretary-General, UN Doc. S/21843, 4 October 1990.
[407] Kuwait, Letter dated 4 October 1990 to the UN Secretary-General, UN Doc. S/21843, 4 October 1990.
[408] US, Statement of the Secretary of State on behalf of the Carter Administration, 21 March 1980.
[409] US, Testimony of the Secretary of State before the United States House of Representatives Committee on Appropriations, 102nd Congress, 22 May 1991.
[410] US, Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 635.

III. Practice of International Organisations and Conferences

United Nations

408. In several resolutions adopted in 1979 and 1980, the UN Security Council stated that the measures taken by Israel to alter the demographic composition of the occupied territories, and in particular the establishment of settlers, were contrary to GC IV and constituted an obstacle to peace.[411]

409. In a resolution adopted in 1980 on Israeli settlement policies in the occupied territories, the UN Security Council determined that "all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity" and that:

> Israel's policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.[412]

410. In a resolution on Iraq and Kuwait adopted in 1990, the UN Security Council condemned "the destruction of Kuwaiti demographic records, the forced departure of Kuwaitis, the relocation of population in Kuwait".[413] In another resolution a month later, the Security Council condemned "the attempts by Iraq to alter the demographic composition of the population of Kuwait".[414]

411. In a resolution adopted in 1992, the UN Security Council called upon all parties to the conflict in the former Yugoslavia "to ensure that forcible expulsions of persons from the areas where they live and any attempt to change the ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia, cease immediately".[415]

412. In 1968, the UN General Assembly established a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.[416] Following reports submitted by this Committee, the General Assembly adopted numerous resolutions expressing concern at the Israeli settlement activities in the occupied territories. For example, in a resolution adopted in 1981, the General Assembly strongly condemned the "establishment of new Israeli settlements and expansion of the existing settlements on private and public Arab lands, and transfer of an

411 UN Security Council, Res. 446, 22 March 1979, § 4; Res. 452, 20 July 1979, §§ 8–9; Res. 476, 30 June 1980, § 13.
412 UN Security Council, Res. 465, 1 March 1980, § 5.
413 UN Security Council, Res. 674, 29 October 1990, preamble.
414 UN Security Council, Res. 677, 28 November 1990, § 1.
415 UN Security Council, Res. 752, 15 May 1992, § 6.
416 UN General Assembly, Res. 2443 (XXIII), 19 December 1968, § 1.

alien population thereto".[417] This condemnation was reiterated in subsequent resolutions adopted in 1982, 1983, 1984 and 1985.[418]

413. In a resolution adopted in 2000 on Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, and the occupied Syrian Golan, the UN General Assembly stated that it:

1. reaffirms that the Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, and the Occupied Syrian Golan are illegal and an obstacle to peace and economic and social development;
2. Calls upon Israel . . . to abide scrupulously by the provisions of the fourth Geneva Convention, in particular article 49;
3. Demands complete cessation of the construction of the new settlement at Jebel Abu-Ghneim and all Israeli settlement activities in the Occupied Palestinian Territory, including Jerusalem, and the Occupied Syrian Golan.[419]

414. The UN Commission on Human Rights has adopted numerous resolutions expressing concern at the Israeli settlement activities in the occupied territories. For instance, in 2001, the Commission expressed:

its grave concern at the Israeli settlement activities in the occupied territories, including Jerusalem, such as the construction of new settlements and the expansion of existing ones, the expropriation of land, the biased administration of water resources, the construction of roads and house demolitions, all of which violate human rights and international humanitarian law, besides being major obstacles to peace.

It urged "the Government of Israel to implement the relevant United Nations resolutions as well as the recommendation of the Commission regarding the Israeli settlements".[420]

415. In his final report submitted to the UN Sub-Commission on Human Rights in 1997, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements stated that "the range of human rights violated by population transfer and the implantation of settlers place this phenomenon in the category of systematic or mass violations of human rights". He further stated that:

64. As affirmed in the Special Rapporteur's progress report, international law prohibits the transfer of persons, including the implantation of settlers, as a general principle, and the governing principle is that any displacement of populations must have the consent of the population involved. Accordingly, the criteria governing forcible transfer rest on the absence of consent and also include the use of force, coercive measures, and inducement to flee.

[417] UN General Assembly, Res. 36/147 C, 16 December 1981, § 7(b).
[418] UN General Assembly, Res. 37/88 C, 9 December 1982, § 7(c); Res. 38/79 D, 15 December 1983, § 7(c); Res. 39/95 D, 14 December 1984, § 7(d); Res. 40/161 D, 16 December 1985, § 8(d).
[419] UN General Assembly, Res. 54/78, 22 February 2000, §§ 1–3.
[420] UN Commission on Human Rights, Res. 2001/7, 18 April 2001, § 6.

65. Acts such as ethnic cleansing, dispersal of minorities or ethnic populations from their homeland within or outside the State, and the implantation of settlers are unlawful, and engage State responsibility and the criminal responsibility of individuals.[421]

The Special Rapporteur recommended that:

70. Consideration must be given by the Sub-Commission to the possibility of preparing an international instrument to set or codify international standards which are applicable to the situation of population transfer and the implantation of settlers. Such an instrument should: provide for an express reaffirmation of the unlawfulness of population transfer and the implantation of settlers; define State responsibility in the matter of unlawful population transfer, including the implantation of settlers; [and] provide for the criminal responsibility of individuals involved in population transfer, whether such individuals be private or officials of the State.[422]

The Special Rapporteur proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights which provided that:

Article 5
The settlement, by transfer or inducement, by the Occupying Power of parts of its own civilian population into the territory it occupies or by the Power exercising de facto control over a disputed territory is unlawful.
Article 6
Practices and policies having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful.
...
Article 9
The above practices of population transfer constitute internationally wrongful acts giving rise to State responsibility and to individual criminal liability.[423]

Other International Organisations

416. In the Final Communiqué of its 12th Session in 1991, the GCC Supreme Council expressed "its deep concern and indignation at the fact that the Israeli

[421] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, §§ 16, 64–65.
[422] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, § 70.
[423] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Articles 5, 6 and 9.

occupation authorities are persisting in their policies aimed at establishing illegal settlements in the occupied Arab territories".[424]

417. In the Final Communiqué its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that "the construction of settlements . . . represent a total contravention of all the Charters, Laws and Conventions of the International Community of Nations".[425]

418. In a resolution adopted in 1997 on the occupied Arab Syrian Golan Heights, the Council of the League of Arab States decided:

> to adhere to resolutions of international legitimacy which prohibit the recognition or acceptance of any situation induced by any activities related to the establishment of Israeli settlements in the occupied Arab territories as an illegal measure that does not give any right or create any obligation, and to consider the establishment of settlements and the arrival of their settlers a violation of the Geneva Conventions and the Madrid framework, and an obstacle to the Peace Process which requires the end of all Israeli colonizing activities in the occupied Syrian Golan and Arab territories.[426]

International Conferences

419. The 24th International Conference of the Red Cross in 1981 adopted a resolution in which it reaffirmed that "the settlements in the occupied territories are incompatible with articles 27 and 49 of the Fourth Geneva Convention".[427]

IV. Practice of International Judicial and Quasi-judicial Bodies

420. Count 3(J) (War Crimes) of the indictment in the *case of the Major War Criminals* before the IMT Nuremberg in 1945 provided, under the heading "Germanization of Occupied Territories", that:

> In certain territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially and economically into the German Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists.
>
> This plan included economic domination, physical conquest, installation of puppet Governments, purported *de jure* annexation and enforced conscription into the German Armed Forces.
>
> This was carried out in most of the occupied countries including: Norway, France . . . Luxembourg, the Soviet Union, Denmark, Belgium, and Holland.

[424] GCC, Supreme Council, 12th Session, Kuwait, 23–25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1992 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991, p. 5.

[425] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 6.

[426] League of Arab States, Council, Res. 5633, 31 March 1997, § 6.

[427] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. III, § 5.

...
These acts violated Articles 43, 46, 55, and 56 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and Article 6(b) of the Charter [jurisdiction over war crimes].[428]

421. In its judgement in the *case of the Major War Criminals* in 1946, the IMT Nuremberg stated that:

Hitler discussed with Rosenberg, Göring, Keitel, and others his plan for the exploitation of the Soviet population and territory, which included among other things the evacuation of the inhabitants of the Crimea and its settlement by Germans.
A somewhat similar fate was planned for Czechoslovakia by the Defendant Von Neurath, in August 1940; the intellegentsia were to be "expelled", but the rest of the population was to be Germanized rather than expelled or exterminated, since there was a shortage of Germans to replace them.

The Tribunal concluded that "the Leadership Corps [of the Nazi Party] was used for purposes which were criminal under the Charter and involved the Germanization of incorporated territory". The Tribunal held the accused Rosenberg and Von Neurath responsible for their role in the policies of "Germanization".[429]

422. In its report in 2001, the Sharm el-Sheikh Fact-Finding Committee stated, with respect to the Israeli settlements in occupied territories, that:

During the half-century of its existence, Israel has had the strong support of the United States. In international forums, the US has at times cast the only vote on Israel's behalf. Yet, even in such a close relationship there are some differences. Prominent among those differences is the US Government's long-standing opposition to the [Government of Israel's] policies and practices regarding settlements ... [This] policy ... has been, in essence, the policy of every American administration over the past quarter century.
Most other countries, including Turkey, Norway, and those of the European Union, have also been critical of Israeli settlement activity, in accordance with their views that such settlements are illegal under international law and not in compliance with previous agreements.[430]

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

423. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the occupying power may not deport or transfer part of its own civilian population into the territories it

[428] IMT Nuremberg, *Case of the Major War Criminals*, Indictment, 20 November 1945, Count 3(J), pp. 63–65.
[429] IMT Nuremberg, *Case of the Major War Criminals*, Judgement, 1 October 1946, pp. 238, 261, 295 and 335.
[430] Sharm el-Sheikh Fact-Finding Committee created pursuant to the Sharm el-Sheikh summit of 16–17 October 2000, Report, 30 April 2001, pp. 15–16.

occupies" and that such a transfer would constitute a grave breach of the law of war.[431]

424. In 1996, in a meeting with representatives of a State, the ICRC mentioned the prohibition contained in Article 49 GC IV. The representatives denied sending nationals to "these territories" and said they would "read the fourth Geneva Convention".[432]

425. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most grave breaches of AP I, listed "the transfer by an occupying power of part of its own population into the territory it occupies" as a war crime to be subject to the jurisdiction of the ICC.[433]

VI. Other Practice

426. In 2000, the Official Gazette of the Permanent Representation of the Republic of Nagorno-Karabakh in Armenia reported that following the memorandum between the governments of Armenia and the Republic of Nagorno-Karabakh, it was decided to increase the number of inhabitants in the Republic of Nagorno-Karabakh to 300,000.[434]

C. Treatment of Displaced Persons

Provision of basic necessities

I. Treaties and Other Instruments

Treaties

427. Article 49, third paragraph, GC IV provides that "the Occupying Power undertaking . . . transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health . . . and nutrition".

428. Article 17(1) AP II provides that "should . . . displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health . . . and nutrition". Article 17 AP II was adopted by consensus.[435]

[431] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 831 and 776(g).
[432] ICRC archive document.
[433] ICRC, Working paper submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(I).
[434] Nagorno-Karabakh, Permanent Representation in Armenia, *Official Gazette*, No. 16, 27 September 2000.
[435] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.

Other Instruments

429. Paragraph III of Protocol III of the 1992 General Peace Agreement for Mozambique, the government of Mozambique and RENAMO were required to cooperate in order to organise the necessary assistance to displaced persons.

430. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "should . . . displacement [of the civilian population] have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health . . . and nutrition".

431. Section A of the 1995 Agreement on Ground Rules for Operation Lifeline Sudan states that the fundamental objective of the cooperation is the provision of humanitarian assistance to populations in need throughout the territory of Sudan.

432. Principle 7(2) of the 1998 Guiding Principles on Internal Displacement provides that "the authorities undertaking . . . displacements shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons [and] that . . . displacements are effected in satisfactory conditions of . . . nutrition, health and hygiene". Principle 18 further stipulates that:

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
   (a) essential food and potable water;
   (b) basic shelter and housing;
   (c) appropriate clothing; and
   (d) essential medical services and sanitation.

433. Principle 25 of the 1998 Guiding Principles on Internal Displacement specifies that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction. IDPs, therefore, have a corresponding right to request and receive protection and humanitarian assistance from State authorities.

434. Paragraph 5 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in Sudan provides that "where communities are to be relocated . . . [they] will be relocated to suitable sites with basic services and proper accommodation in place prior to relocation. Communities will only be relocated in a manner that preserves the right to life, dignity, liberty and security."

435. In paragraph 70 of the 2000 Cairo Plan of Action, African and EU heads of State and government agreed "to continue to provide assistance to refugees and displaced persons".

II. National Practice

Military Manuals

436. Argentina's Law of War Manual (1969) reproduces Article 49 GC IV.[436]

437. Argentina's Law of War Manual (1989) provides that, with respect to non-international armed conflicts, where civilians have been displaced for reasons of security or military necessity, "all possible measures are to be taken in order that [the displacement] is effected in satisfactory conditions".[437]

438. Canada's LOAC Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their shelter, hygiene, health . . . and nutrition".[438]

439. Croatia's LOAC Compendium provides that civilian persons evacuated for security reasons shall receive "proper accommodation and proper conditions of health, hygiene . . . and nutrition".[439]

440. The Military Manual of the Dominican Republic provides that:

> Whenever the military situation necessitates moving or evacuating civilians, remember to use common sense. Treat civilian refugees as you would want your family to be treated under similar circumstances. Unless emergency conditions exist, as an unexpected attack, give them enough time to collect and move their goods and property.[440]

441. Germany's Military Manual provides that "if an evacuation is necessary, the occupying power shall provide for sufficient accommodation and supply".[441]

442. Hungary's Military Manual provides that civilian persons evacuated for security reasons shall receive "proper accommodation and proper conditions of health, hygiene . . . and nutrition".[442]

443. New Zealand's Military Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their shelter, hygiene, health . . . and nutrition".[443]

444. Spain's LOAC Manual reproduces Article 49 GC IV.[444]

445. Switzerland's Basic Military Manual provides that the parties "shall ensure that proper accommodation is provided to receive the transferred persons and that displacements are effected in satisfactory conditions of hygiene, health . . . and nutrition".[445]

[436] Argentina, *Law of War Manual* (1969), § 5.008.
[437] Argentina, *Law of War Manual* (1989), § 7.08.
[438] Canada, *LOAC Manual* (1999), p. 17-5, § 41.
[439] Croatia, *LOAC Compendium* (1991), p. 62.
[440] Dominican Republic, *Military Manual* (1980), p. 10.
[441] Germany, *Military Manual* (1992), § 545.
[442] Hungary, *Military Manual* (1992), p. 98.
[443] New Zealand, *Military Manual* (1992), § 1823.
[444] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).
[445] Switzerland, *Basic Military Manual* (1987), Article 176(2).

446. The UK Military Manual provides that "to the greatest practicable extent, removals of civil inhabitants must take place under satisfactory conditions of hygiene, health . . . and nutrition . . . and the transferred or evacuated protected persons must be provided with proper accommodation".[446]
447. The US Field Manual reproduces Article 49 GC IV.[447]

National Legislation
448. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[448]
449. Colombia's Law on Internally Displaced Persons provides that once the displacement has occurred, the government shall take immediate action to guarantee emergency humanitarian aid with the aim of rescuing, assisting and protecting the displaced population and providing for its nutritional needs, personal hygiene, kitchen tools, medical and psychological care, emergency transport and temporary accommodation in humane conditions.[449]
450. Croatia's Law on Displaced Persons and Directive on Displaced Persons provide that Croatia should ensure that displaced persons have the necessary accommodation, food, medical and financial assistance and assistance in social integration, as well as any other assistance necessary to satisfy their basic needs.[450]
451. Georgia's Law on Displaced Persons provides a certain number of legal, economic and social guarantees for persons forced to leave their homes and displaced following threats to their lives, health or freedom on account of an aggression by another country, an internal conflict or massive violations of human rights. These guarantees include the right to free medical assistance and free provision of medicines.[451]
452. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 49 GC IV, as well as any "contravention" of AP II, including violations of Article 17(1) AP II, are punishable offences.[452]
453. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[453]

[446] UK, *Military Manual* (1958), § 560. [447] US, *Field Manual* (1956), § 382.
[448] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[449] Colombia, *Law on Internally Displaced Persons* (1997), Article 15.
[450] Croatia, *Law on Displaced Persons* (1993), Article 2; *Directive on Displaced Persons* (1991), Articles 2 and 13.
[451] Georgia, *Law on Displaced Persons* (1996), Article 5.
[452] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[453] Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

454. In 1996, in a case concerning the constitutionality of a decree which had ordered measures for the protection of the civilian population in military operations (Decree 2027 of 21 November 1995), Colombia's Constitutional Court held that displaced persons had the right to receive humanitarian assistance and to be accorded protection by the State.[454]

455. In the *Krupp case* in 1948, the US Military Tribunal at Nuremberg adopted the statement by Judge Phillips in his concurring opinion of 1947 in the *Milch case* according to which:

> The third . . . condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation is criminal whenever there is no title in the deporting authority or whenever the purpose of the deportation is illegal or whenever the deportation is characterized by inhumane or illegal methods.[455]

Other National Practice

456. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal "to give . . . all possible aid to displaced persons".[456]

457. According to the Report on the Practice of Colombia, displaced persons have the right to receive humanitarian assistance, and the State's duty to protect the displaced population is permanent and cannot be renounced in normal times or in states of exception, in accordance with Article 17 AP II.[457]

458. In a set of guidelines for soldiers issued in 1996, the Chief of Staff of the Lebanese Army stated that it was the role of the army to protect displaced persons and to ensure that they were fed, housed and provided with medical care.[458]

459. In 1996, during a debate in the UN Commission on Human Rights, Mexico stated that internally displaced persons "must always be provided with the basic necessities". It also stated that "the primary responsibility for dealing with the problem [of displaced persons] rested . . . with the State concerned, and that the international community should simply assist and intervene only in cases of massive and systematic violations of human rights".[459]

[454] Colombia, Constitutional Court, *Constitutional Case No. C-092*, Judgement, 7 March 1996.
[455] US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948, adopting the concurring opinion by Judge Phillips in the *Milch case*, Judgement, 17 April 1947.
[456] Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.
[457] Report on the Practice of Colombia, 1998, Chapter 5.5.
[458] Lebanon, Chief of Staff of the Lebanese Army, Note d'orientation pour les militaires, *Al Anwar*, 26 February 1996.
[459] Mexico, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.39, 15 April 1996, § 21.

460. In May 1994, during a debate on Rwanda in the UN Security Council, Oman stated that the most urgent measure in response to mass displacement was to immediately extend humanitarian assistance to IDPs.[460]

461. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that "the government shall provide free transportation facilities to the evacuees during evacuation" and that "medicine and relief goods, whether coming from the government or non-government organisations, shall be given to the evacuees without delay".[461]

462. According to the Report on the Practice of Russia, "unfortunately, the party to a conflict that causes the displacement of persons [through its methods of warfare] does not bear any responsibility [for their care]. The material burden of providing assistance to these persons thus rests on the other party."[462]

463. In 1991, during a debate in the UN Security Council on the repression of the Iraqi civilian population, including Kurds in Iraq, the US stated that its air force would drop food, blankets, clothing, tents and other relief-related items into northern Iraq. The US military would continue to help IDPs in southern Iraq and were willing to send a military medical unit to the border area to assist. The US expressed profound concern about the plight of displaced persons and noted that it had contributed generously to the care and maintenance of the displaced.[463]

III. Practice of International Organisations and Conferences

United Nations

464. In a resolution adopted in 1974 on emergency UN humanitarian assistance to Cyprus, the UN Security Council expressed grave concern at the plight of IDPs and urged parties to take appropriate measures to provide for their relief and welfare.[464]

465. In a resolution adopted in 1991 on repression of the Iraqi civilian population, including Kurds in Iraq, the UN Security Council requested that the UN Secretary-General "use all the resources at his disposal . . . to address urgently the critical needs of refugees and displaced Iraqi population".[465]

466. In a resolution adopted in 1992 on political conditions in Bosnia and Herzegovina, the UN Security Council emphasised "the urgent need for humanitarian assistance, material and financial . . . [for] displaced persons".[466]

[460] Oman, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 7.
[461] Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, §§ 3 and 6.
[462] Report on the Practice of Russia, 1997, Chapter 5.5.
[463] US, Statement before the UN Security Council, UN Doc. S/PV.2982, 5 April 1991, pp. 58–60.
[464] UN Security Council, Res. 361, 30 August 1974, § 4.
[465] UN Security Council, Res. 688, 5 April 1991, § 5.
[466] UN Security Council, Res. 752, 15 May 1992, § 7.

467. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council expressed grave concern "at the very serious situation which confronts . . . a great number of displaced persons within the safe area at Potocari, especially the lack of essential food supplies and medical care".[467]

468. In three separate resolutions adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Security Council condemned the failure of the Bosnian Serb party to comply with its commitments in respect of giving humanitarian agencies access to displaced persons.[468]

469. In a resolution adopted in 1996, the UN Security Council underlined the responsibility of the authorities in Burundi for the security of refugees and displaced persons in Burundi.[469]

470. In a resolution adopted in 1996 concerning the Great Lakes region, the UN Security Council requested:

> the Secretary-General, in consultation with his Special Envoy and the coordinator of humanitarian affairs, with the United Nations High Commissioner for Refugees, with the OAU, with the Special Envoy of the European Union and with the States concerned:
>
> (a) to draw up a concept of operations . . . with the objectives of:
>
> – Delivering short-term humanitarian assistance . . . to refugees and displaced persons in eastern Zaire;
> – Assisting United Nations High Commissioner for Refugees with the protection . . .
> – Establishing humanitarian corridors for the delivery of humanitarian assistance.[470]

471. In a resolution adopted in 1997 concerning eastern Zaire, the UN Security Council endorsed a plan for the "facilitation of access for humanitarian assistance" to refugees and displaced persons.[471]

472. In 1997, in a statement by its President concerning the DRC, the UN Security Council called for the facilitation of access to humanitarian assistance and for the rights of refugees and displaced persons to be fully respected.[472]

473. In 1994, the UNHCR Executive Committee emphasised that since IDPs remained within the territorial jurisdiction of their own countries, the primary responsibility for their welfare and protection lay with the State concerned.[473]

[467] UN Security Council, Res. 1004, 12 July 1995, preamble.
[468] UN Security Council, Res. 1010, 10 August 1995, preamble and § 1; Res. 1019, 9 November 1995, preamble and § 2; Res. 1034, 21 December 1995, preamble and §§ 4–5.
[469] UN Security Council, Res. 1040, 29 January 1996, preamble.
[470] UN Security Council, Res. 1078, 9 November 1996, § 10.
[471] UN Security Council, Res. 1097, 18 February 1997, § 1.
[472] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.
[473] UNHCR, Executive Committee, Conclusion No. 75 (XLV): Internally Displaced Persons, 20 October 1994, § d.

474. In 1994, in a report on Rwanda, the UN Secretary-General stated that the immediate priorities with regard to the displaced population were to relieve suffering through the provision of adequate humanitarian assistance.[474]

475. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General noted that the Croatian government was caring for a large number of IDPs and that the government had stated that it was spending 17 million dollars per month on displaced persons.[475]

476. In 1997, in a report on Sierra Leone, the UN Secretary-General noted that the government of Sierra Leone and the RUF had made efforts to defuse tensions in certain areas by seeking ways to provide food to displaced persons.[476]

477. In 1997, in a report on his mission to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons noted that "in the absence of health centres, an extended health-care network was set up in the form of 'flying brigades', which would provide medicines and carry out vaccination campaigns". He also reported that "in collaboration with programme partners, IOM provided the internally displaced persons with food, seeds, tools, medical assistance and transport of household belongings".[477]

478. In 1996, in a special report on minorities in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that "the Montenegrin authorities have . . . recognized the villagers in Plejvlja as displaced persons and distributed assistance covering their basic needs".[478]

Other International Organisations

479. In a resolution adopted in 1985 in response to mass transfers of the population in Ethiopia, the European Parliament invited the European Commission, the Council and member States to ask Ethiopia to put a stop to forced displacement for a minimum of six months. The resolution stated that the suspension of the displacement of the civilian population during this period was necessary in order for the Ethiopian government to assess, under international supervision, the necessity of the transfers, and to establish minimum humanitarian conditions for their conduct should they have proved necessary.[479]

[474] UN Secretary-General, Report on the situation in Rwanda, UN Doc. S/1994/640, 31 May 1994, § 40.

[475] UN Secretary-General, Further report on the situation of human rights in Croatia, UN Doc. S/1996/456, 21 June 1996, p. 9.

[476] UN Secretary-General, Report on Sierra Leone, UN Doc. S/1997/80, 26 January 1997, § 20.

[477] Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 24 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, §§ 48–49 and 67.

[478] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, §§ 81–83.

[479] European Parliament, Resolution on mass transfers of populations in Ethiopia and the expulsion of Médecins sans frontières, 13 December 1985, § 1.

International Conferences

480. The 24th International Conference of the Red Cross in 1981 adopted a Statement of Policy on International Red Cross Aid to Refugees, which provided that:

> 1. The Red Cross should at all times be ready to assist and protect refugees, displaced persons and returnees, when such victims are considered as protected persons under the Fourth Geneva Convention of 1949, or when they are considered as refugees under Article 73 of the 1977 Protocol I additional to the Geneva Conventions of 1949, or in conformity with the Statutes of the International Red Cross, especially when they cannot, in fact, benefit from any other protection or assistance, as in some cases of internally displaced persons.
> ...
> 8. As a neutral and independent humanitarian institution, the ICRC offers its services whenever refugees and displaced persons are in need of the specific protection which the ICRC may afford them.[480]

481. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the Movement and refugees in which it urged National Societies to "spare no effort to ensure that refugees and asylum-seekers receive humane treatment and decent material conditions in host countries".[481]

482. The Comprehensive Plan of Action adopted by consensus at the International Conference on Indo-Chinese Refugees in 1989 provided that persons determined not to be refugees should be provided with care and assistance pending their repatriation.[482]

483. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on principles and action in international humanitarian assistance and protection in which it called upon States "to provide humanitarian assistance to internally displaced persons and to assist States having accepted refugees".[483]

484. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "if displacement occurs, ... appropriate assistance is provided" to displaced persons.[484]

[480] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XXI, Annex, Statement of Policy on International Red Cross Aid to Refugees, §§ 1 and 8.

[481] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XVII, § 4.

[482] International Conference on Indo-Chinese Refugees, Geneva, 13–14 June 1989, Comprehensive Plan of Action, UN Doc. A/CONF.148/2, 26 April 1989, §§ 12, 14 and 15.

[483] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, § A(1)(c).

[484] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(c).

IV. Practice of International Judicial and Quasi-judicial Bodies

485. In *Akdivar and Others v. Turkey* before the ECtHR in 1996, the Turkish government stated that under Turkish emergency legislation, persons who have had to leave their place of residence may be rehoused inside or outside the region covered by the state of emergency. It also stated that special funds were provided to assist those who needed to leave their homes.[485]

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

486. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the Occupying Power undertaking evacuation shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the evacuated persons, that the removals are effected in satisfactory conditions of hygiene, health . . . and nutrition".[486]

487. In 1985, the ICRC refused to provide the government of a State with assistance in relation to meeting the needs of persons who had been forcibly displaced to areas where no infrastructure existed to support them.[487]

488. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the International Red Cross and Red Crescent Movement and refugees in which it requested the components of the Movement:

> b) to pursue their efforts in disseminating international humanitarian law, human rights law, of which refugee law is part, and the Fundamental Principles of the Movement in order to enhance protection and humane treatment of refugees, asylum-seekers, displaced persons and returnees.
>
> . . .
>
> h) to actively seek the support of governments with a view:
>
> . . .
>
> iii) to ensure that, in all circumstances, refugees, asylum-seekers and displaced persons receive . . . decent material conditions.[488]

489. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded the authorities concerned and the armed forces under their command of their obligation to apply IHL, in particular the rule that "should such displacements have to be carried out, the stipulation that all possible measures be taken to ensure that the civilians are

[485] ECtHR, *Akdivar and Others v. Turkey*, Government Memorial, 11 April 1996, §§ 43 and 58.
[486] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 836.
[487] ICRC archive document.
[488] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 9, §§ b and h(iii).

received under satisfactory conditions of shelter, hygiene, health, safety and nutrition".[489]

VI. Other Practice

490. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "should . . . displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health . . . and nutrition".[490]

491. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that "the SPLM/SPLA considers relief assistance to innocent civilians caught up in the war situation and natural disasters as a human right, and the Movement shall facilitate passage of relief assistance to the areas of need in both SPLM/SPLA and Government administered areas".[491]

Security of displaced persons

I. Treaties and Other Instruments

Treaties

492. Article 49, third paragraph, GC IV provides that "the Occupying Power undertaking . . . transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of . . . safety".

493. Article 17(1) AP II provides that "should . . . displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of . . . safety". Article 17 AP II was adopted by consensus.[492]

Other Instruments

494. Paragraph 3 of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provides that the security of the civilians who leave temporarily a territory shall be guaranteed by each party on the territory it controls.

[489] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

[490] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.

[491] SPLM/A, PMHC Resolution No. 10: Relief Assistance, 9 September 1991, § 10.1, Report on SPLM/A Practice, 1998, Chapter 5.5.

[492] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.

II. National Practice

Military Manuals

495. Argentina's Law of War Manual reproduces Article 49 GC IV.[493]

496. Canada's LOAC Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their . . . safety".[494]

497. Croatia's LOAC Compendium provides that civilian persons evacuated for security reasons shall receive "proper conditions of . . . safety".[495]

498. The Military Manual of the Dominican Republic states that when civilians are moved or resettled, soldiers "should take action to ensure their safety".[496]

499. Hungary's Military Manual provides that civilian persons evacuated for security reasons shall receive "proper conditions of . . . safety".[497]

500. New Zealand's Military Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their . . . safety".[498]

501. Spain's LOAC Manual reproduces Article 49 GC IV.[499]

502. Switzerland's Basic Military Manual provides that "displacements are effected in satisfactory conditions of . . . safety".[500]

503. The UK Military Manual provides that "to the greatest practicable extent, removals of civil inhabitants must take place under satisfactory conditions of . . . safety".[501]

504. The US Field Manual reproduces Article 49 GC IV.[502]

505. The US Soldier's Manual provides that, when civilians are moved or resettled, soldiers "should take action to ensure their safety".[503]

National Legislation

506. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[504]

507. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 49 GC IV,

[493] Argentina, *Law of War Manual* (1969), § 5.008.
[494] Canada, *LOAC Manual* (1999), p. 17-5, § 41.
[495] Croatia, *LOAC Compendium* (1991), p. 62.
[496] Dominican Republic, *Military Manual* (1980), p. 10.
[497] Hungary, *Military Manual* (1992), p. 98.
[498] New Zealand, *Military Manual* (1992), § 1823.
[499] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).
[500] Switzerland, *Basic Military Manual* (1987), Article 176(2).
[501] UK, *Military Manual* (1958), § 560.
[502] US, *Field Manual* (1956), § 382.
[503] US, *Soldier's Manual* (1984), p. 22.
[504] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

as well as any "contravention" of AP II, including violations of Article 17 AP II, are punishable offences.[505]

508. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[506]

National Case-law

509. No practice was found.

Other National Practice

510. In 1992, the Presidency of the Republika Srpska of Bosnia Herzegovina made an urgent appeal "to give protection ... to displaced persons".[507]

511. In 1994, during a debate in the UN Security Council on Rwanda, Brazil emphasised that part of the UNAMIR mandate was "to contribute to provid[e] security and protection for displaced persons, refugees and civilians at risk".[508]

512. The Report on the Practice of France notes that France has stated that it would arrest and punish those responsible for attempts on the security of displaced persons in both international and non-international conflicts.[509]

513. The Report on the Practice of India notes that, in the context of the conflict in Jammu and Kashmir, the government of India has taken a number of steps to protect persons displaced by the conflict. Policy directives have reiterated that where persons are displaced, appropriate care should be taken to protect them.[510]

514. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provides that "acts or threats of violence and various forms of inhuman treatment committed by the government forces, including para-military groups and other agents of authority, for the purpose of spreading terror among the evacuees are prohibited (Protocol II, Art. 13)".[511]

515. In 1994, during a debate in the UN Security Council, Russia stated that a central element of the peacekeeping operation in Rwanda had to be the establishment of secure humanitarian areas for the protection of IDPs.[512]

[505] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[506] Norway, *Military Penal Code as amended* (1902), § 108.
[507] Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.
[508] Brazil, Statement before the UN Security Council, UN Doc. S/PV.3388, 1 January 1994, pp. 4–8.
[509] Report on the Practice of France, 1999, Chapter 5.5.
[510] Report on the Practice of India, 1997, Chapter 5.4 and 5.5.
[511] Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 4.
[512] Russia, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 10.

516. A declaration by the government of Rwanda in February 1993 on the restoration of the cease-fire specified that "those displaced by the war will be installed in the demilitarized neutral zone and will receive the protection of the international force for maintaining the cease-fire".[513]

517. In 1991, the UK put forward the idea of creating safe areas for displaced persons in Iraq, especially Kurds, in the aftermath of the Gulf War. The UK assisted in the establishment of these safe areas and supplied troops in order to ensure the security of the sites.[514]

III. Practice of International Organisations and Conferences

United Nations

518. In a resolution adopted in 1994, the UN Security Council decided to expand UNAMIR's mandate "to contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance . . . of secure humanitarian areas".[515]

519. In a resolution adopted in 1994, the UN Security Council reaffirmed that UNAMIR would "contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance . . . of secure humanitarian areas".[516]

520. In a resolution on Burundi adopted in 1996, the UN Security Council underlined "the responsibility of the authorities in Burundi for the security . . . of displaced persons".[517]

521. In a resolution adopted in 1997 concerning eastern Zaire, the UN Security Council endorsed a protection plan to ensure the security of all refugees and displaced persons.[518]

522. In 1993, in a statement by its President concerning the conflict in Liberia, the UN Security Council strongly condemned the "massacre of innocent displaced persons" and urged all parties to the conflict "to respect the rights of the civilian population and take all necessary measures to secure their safety".[519]

523. In 1995, in a statement by its President, the UN Security Council stressed that the Rwandan government bore the primary responsibility for the security and safety of IDPs.[520]

[513] Rwanda, Declaration by the government on the restoration of the cease-fire, annexed to Letter dated 4 March 1993 to the President of the UN Security Council, UN Doc. S/25363, 4 March 1993, Annex III, p. 8, § 5.

[514] UK, Statement by the Prime Minister: A Safe Haven for the Kurds, FCO Press Office, 8 April 1991, p. 714.

[515] UN Security Council, Res. 918, 17 May 1994, § 3.

[516] UN Security Council, Res. 925, 8 June 1994, § 4.

[517] UN Security Council, Res. 1040, 29 January 1996, preamble.

[518] UN Security Council, Res. 1097, 18 February 1997, § 1.

[519] UN Security Council, Statement by the President, UN Doc. S/25918, 9 June 1993, §§ 2–3.

[520] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/22, 27 April 1995, pp. 1–2.

524. In January 1996, in a statement by its President on Burundi, the UN Security Council expressed grave concern at "attacks on personnel of international humanitarian organizations, which have led to the suspension of essential assistance to refugees and displaced persons" and stressed that "the authorities in Burundi are responsible for the security" of both.[521]

525. In 1996 and 1997, in several statements by its President on the Great Lakes region/Zaire, the UN Security Council called on all parties to guarantee the safety of refugees and displaced persons.[522]

526. In 1997, in a statement by its President on the DRC, the UN Security Council called for attention to be paid to the protection and security needs of all refugees and displaced persons.[523]

527. In a resolution adopted in 1993 concerning refugees and displaced persons, the UN General Assembly expressed deep concern regarding serious threats to the security or well-being of refugees, including incidents of refoulement, unlawful expulsion, physical attacks and detention under unacceptable conditions. It called upon States to take all measures necessary to ensure respect for the principles of refugee protection.[524]

528. In a resolution adopted in 1994 on the situation of human rights in the Sudan, the UN General Assembly expressed alarm at the repeated instances of violence against displaced persons and other civilians.[525]

529. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed alarm at the repeated instances of violence against displaced persons and other civilians.[526]

530. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN Commission on Human Rights condemned "all attacks against persons in the refugee camps near the borders of Rwanda" and called upon States "to take appropriate steps to prevent such attacks".[527]

531. In 1993, in its Conclusion on Personal Security of Refugees, the Executive Committee of UNHCR deplored "all violations of the right to personal security of refugees", urged States "to take all measures necessary to prevent or remove threats to personal security of refugees" and called upon States "to provide effective physical protection to . . . refugees".[528]

[521] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/1, 5 January 1996, pp. 1–2.
[522] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996; Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1; Statement by the President, UN Doc. S/PRST/1997/11, 7 March 1997, p. 1.
[523] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.
[524] UN General Assembly, Res. 48/116, 20 December 1993, § 5.
[525] UN General Assembly, Res. 49/198, 23 December 1994, preamble and § 10.
[526] UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.
[527] UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 12.
[528] UNHCR, Executive Committee, Conclusion No. 72 (XLIV): Personal Security of Refugees, 8 October 1993, § 20(a)–(d).

532. In May 1994, in a report on the situation in Rwanda, the UN Secretary-General stated that "it is very urgent that . . . 'secure humanitarian areas' be established where the estimated 2 million . . . unfortunate displaced persons can be provided both security and assistance".[529]

533. In 1996, in a report on extra-judicial, arbitrary or summary executions, the Special Rapporteur of the UN Commission on Human Rights recommended that the authorities in Burundi establish a national police force, stating that "one of the priority tasks of the national police force would be to ensure the security and the protection of people in . . . refugee camps".[530]

534. In 1996, the Special Rapporteur of the UN Commission on Human Rights on Extra-judicial, Summary or Arbitrary Executions intervened on behalf of displaced persons on several occasions, including one case in which a group of internally displaced persons was "to be transported . . . [to] an area of active armed conflict in Tajikistan, where their lives could have been at risk, especially because of the presence of landmines".[531]

Other International Organisations

535. No practice was found.

International Conferences

536. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the Movement and refugees in which it called on governments "to continue their efforts to find in the near future a solution to the problem of military or armed attacks on refugee camps and settlements".[532]

537. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made to spare the life, protect and respect the civilian population, with particular protective measures for . . . groups with special vulnerabilities such as . . . displaced persons".[533]

IV. Practice of International Judicial and Quasi-judicial Bodies

538. No practice was found.

[529] UN Secretary-General, Report on the situation in Rwanda, UN Doc. S/1994/640, 31 May 1994, § 16.

[530] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the Special Rapporteur's mission to Burundi, 19–29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 93.

[531] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60, 24 December 1996, § 61.

[532] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XVII, § 7.

[533] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

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

539. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the occupying power undertaking evacuation shall ensure, to the greatest practicable extent, ... that the removal is effected in satisfactory conditions of ... safety".[534]

VI. Other Practice

540. No practice was found.

Respect for family unity

Note: *For practice concerning family rights, see Chapter 32, section Q.*

I. Treaties and Other Instruments

Treaties

541. Article 49, third paragraph, GC IV provides that "the Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, ... that members of the same family are not separated".

542. Article 9 of the 1989 Convention on the Rights of the Child provides that:

1. States Parties shall ensure that a child shall not be separated from his or her parents aginst their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

[534] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 836.

543. Article 22 of the 1989 Convention on the Rights of the Child requires States parties "to protect and assist . . . [refugee children] and to trace the parents or other members of the family of any refugee children in order to obtain information necessary for reunification with his or her family".

544. In the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

> In accordance with the fundamental principle of preserving family unity, where it is not possible for families to repatriate as units, a mechanism shall be established for their reunification in Abkhazia. Measures shall also be taken for the identification and extra care/assistance for unaccompanied minors and other vulnerable persons during the repatriation process.

545. According to Article 1 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, "the principle of the unity of the family shall be preserved".

Other Instruments

546. Principle 17(3) of the 1998 Guiding Principles on Internal Displacement provides that:

> Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.

II. National Practice

Military Manuals

547. Argentina's Law of War Manual (1969) reproduces Article 49 GC IV.[535]

548. Argentina's Law of War Manual (1989) provides that "when there is an evacuation, measures shall be taken to facilitate the return of children to their families".[536]

549. Canada's LOAC Manual provides, with respect to non-international armed conflicts in particular, that "children are to receive such aid and protection as required including: . . . b. steps to reunite them with their families".[537]

550. Colombia's Basic Military Manual provides that in order to guarantee the rights of the civilian population, soldiers shall "facilitate the reuniting of families that have been dispersed by the conflict and permit the exchange of information".[538] It further states that it is a duty of the parties to "permit the

[535] Argentina, *Law of War Manual* (1969), § 5.008.
[536] Argentina, *Law of War Manual* (1989), § 4.12.
[537] Canada, *LOAC Manual* (1999), p. 17-3, § 22.
[538] Colombia, *Basic Military Manual* (1995), p. 22.

exchange of information within families".[539] The manual specifies, regarding respect for the civilian population, that it is a duty "to facilitate the contact and reuniting of families".[540] In addition, the manual provides that, when the conflict is over, parties shall "strengthen mechanisms dedicated to reuniting dispersed families".[541]

551. Croatia's LOAC Compendium provides that in case of an evacuation of civilian persons, there shall be "no forced separation of families".[542]

552. Germany's Military Manual provides that in case of an evacuation, "members of the same family shall not be separated".[543]

553. Hungary's Military Manual provides that in case of an evacuation of civilian persons, there shall be "no forced separation of families".[544]

554. Spain's LOAC Manual reproduces Article 49 GC IV.[545]

555. Switzerland's Basic Military Manual provides that "displacements are effected in satisfactory conditions . . . and the members of the same family are not separated".[546]

556. The UK Military Manual provides that in case of transfer or evacuation, "members of the same family must not be separated".[547]

557. The US Field Manual reproduces Article 49 GC IV.[548]

National Legislation

558. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

> It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:
>
> . . .
>
> h) To take appropriate measures to ensure family reunification.[549]

559. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[550]

560. According to Colombia's Law on Internally Displaced Persons, the family of forcibly displaced persons must benefit from the right to family reunification.[551]

[539] Colombia, *Basic Military Manual* (1995), p. 28.
[540] Colombia, *Basic Military Manual* (1995), p. 29.
[541] Colombia, *Basic Military Manual* (1995), p. 31.
[542] Croatia, *LOAC Compendium* (1991), p. 62.
[543] Germany, *Military Manual* (1992), § 545.
[544] Hungary, *Military Manual* (1992), p. 98.
[545] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).
[546] Switzerland, *Basic Military Manual* (1987), Article 176(2).
[547] UK, *Military Manual* (1958), § 560.
[548] US, *Field Manual* (1956), § 382.
[549] Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(h).
[550] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[551] Colombia, *Law on Internally Displaced Persons* (1997), Article 2(4).

561. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 49 GC IV, as well as any "contravention" of AP II, including violations of Article 4(3)(b) AP II, are punishable offences.[552]

562. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[553]

563. The Act on Child Protection of the Philippines provides that:

> All appropriate steps shall be taken to facilitate the reunion of families temporarily separated due to armed conflict ...
>
> Whenever possible, members of the same family shall be housed in the same premises and given separate accommodation from other evacuees and be provided with facilities to lead a normal family life.[554]

National Case-law

564. No practice was found.

Other National Practice

565. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provides that "in case of evacuations members of the same family must not be separated from each other".[555]

III. Practice of International Organisations and Conferences

United Nations

566. In several resolutions on the rights of the child, the UN General Assembly has called upon all States and UN bodies and agencies "to ensure the early identification and registration of unaccompanied refugee and internally displaced children [and] to give priority to programmes for family tracing and reunification".[556]

567. In two resolutions adopted in 1997 and 1998 on the rights of the child, the UN Commission on Human Rights called upon all States "to give priority to programmes for family tracing and reunification, and to continue monitoring the care arrangements for unaccompanied refugee and internally displaced children".[557]

[552] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[553] Norway, *Military Penal Code as amended* (1902), § 108.
[554] Philippines, *Act on Child Protection* (1992), Sections 22(f) and 23.
[555] Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 1.
[556] UN General Assembly, Res. 51/77, 12 December 1996, Section III, § 42; Res. 52/107, 12 December 1997, Section V, § 3; Res. 53/128, 9 December 1998, Section V, § 3.
[557] UN Commission on Human Rights, Res. 1997/78, 18 April 1997, § 16; Res. 1998/76, 22 April 1998, § 17(b).

568. In 1981, in its Conclusion on Family Reunification, the UNHCR Executive Committee stressed that every effort should be made to ensure the reunification of separated families.[558]

569. In 1997, in its Conclusion on Refugee Children and Adolescents, the UNHCR Executive Committee urged "States and concerned parties to take all possible measures to protect child and adolescent refugees, *inter alia*, by: (i) preventing separation of children and adolescent refugees from their families and promoting . . . family reunification".[559]

570. In 1998, in his report on unaccompanied refugee minors, which included a discussion on internally displaced children, the UN Secretary-General concluded that:

> On a daily basis, in crisis settings such as those currently in Sierra Leone, Guinea-Bissau and Kosovo, children trapped in and fleeing from war zones were involuntarily separated from their families . . . Member States are urged to adhere to and promote the Convention on the Rights of the Child and to support measures that will avoid involuntary family separation.[560]

571. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that the Croatian Office for Displaced Persons and Refugees had advised the Office of the High Commissioner for Human Rights "that emphasis in the immediate future will be placed on applications for return from relatives of elderly Serbs remaining in the former sectors, who required the assistance of younger family members to lead a normal life". The Special Rapporteur also noted that "some 12,000 Croatian Serb refugees have received the permission to return . . . mostly on the basis of family reunification or proof of citizenship".[561]

572. In 1992, in two joint statements on the evacuation of children from the former Yugoslavia, UNHCR and UNICEF highlighted the needs of families during emergency evacuations, in particular the need to respect family unity as a guiding principle in all evacuation operations. They also stated that where families were separated during the process, "evacuations, reception and care should be planned with a view to the earliest possible reunification between parents and children".[562]

[558] UNHCR, Executive Committee, Conclusion No. 24 (XXXII): Family Reunification, UN Doc. A/AC.96/60, 22 October 1981, § 1.

[559] UNHCR, Executive Committee, Conclusion No. 84 (XLVIII): Refugee Children and Adolescents, UN Doc. A/AC.96/895, 20 October 1997, § b(i).

[560] UN Secretary-General, Report on unaccompanied refugee minors, UN Doc. A/53/325, 26 August 1998, § 27.

[561] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, §§ 50–51; see also Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 128.

[562] UNHCR and UNICEF, Joint statement on the evacuation of children from former Yugoslavia, 13 August 1992, § 5; Joint statement No. 2 supported by the ICRC and the Federation of Red Cross and Red Crescent Societies, 16 December 1992, § 2.

Other International Organisations

573. In a recommendation adopted in 1992 concerning displaced populations in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe called upon member States to take urgent measures "to assist unaccompanied children, victims of the crisis, to withstand the distress and reunite with their families".[563]

574. In 1994, in a report on Rwanda, the Rapporteur of the Parliamentary Assembly of the Council of Europe emphasised that particular attention should be paid to the problems experienced by unaccompanied children during internal displacement. He recommended that schemes to register such children and to help them reunite with their families, such as the "Radio-Link BBC-Rwanda" established by the ICRC, be encouraged.[564]

International Conferences

575. The 24th International Conference of the Red Cross in 1981 adopted a Statement of Policy on International Red Cross Aid to Refugees, which provided that:

> The Central Tracing Agency of the ICRC is also always ready in co-operation with National Societies to act in aid of refugees and displaced persons, for instance by facilitating the reuniting of dispersed families, by organizing the exchange of family news and by tracing missing persons. Where necessary, it offers its cooperation to the UNHCR, as well as its technical assistance to National Societies to enable them to set up and develop their own tracing and mailing services.[565]

576. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the protection of children in armed conflicts in which it referred to the Geneva Conventions and the two Additional Protocols and recommended that "all necessary measures be taken to preserve the unity of the family and to facilitate the reuniting of families".[566]

577. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it demanded that all parties to armed conflict avoid any action aimed at, or having the effect of, causing the separation of families in a manner contrary to international humanitarian law. In the same resolution, it also appealed to States to "do their utmost to solve the serious humanitarian issue of dispersed families without delay" and emphasised that "family reunification must begin with the tracing of separated family members at the request of one of them and end with their coming together as a family".[567]

[563] Council of Europe, Parliamentary Assembly, Rec. 1176, 5 February 1992, § iii.
[564] Council of Europe, Parliamentary Assembly, Report on Rwanda, Doc. 7191, 4 November 1994, § 11.
[565] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XXI, Annex, Statement of Policy on International Red Cross Aid to Refugees, § 9.
[566] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 5.
[567] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(a), (b) and (c).

IV. Practice of International Judicial and Quasi-judicial Bodies

578. In 1997, in its concluding observations on the report of Myanmar, the CRC recommended that Myanmar "reinforce its central tracing agency to favour family reunification.[568]

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

579. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the occupying power undertaking evacuation shall ensure, to the greatest practicable extent, . . . that members of the same family are not separated".[569]

VI. Other Practice

580. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members wish to remain together must be allowed to do so."[570]

Specific needs of displaced women, children and elderly persons

Note: *For practice concerning the specific needs of women in general, see Chapter 39, section A. For practice concerning the specific needs of children in general, including education for displaced children, see Chapter 39, section B. For practice concerning the specific needs of the elderly in general, see Chapter 39, section E.*

I. Treaties and Other Instruments

Treaties

581. Article 78 AP I provides that:

No party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of health or medical treatment of the children or, except in occupied territory, their safety so require. Where the parents or the legal guardians can be found, their written consent to such evacuation is required . . . In each case,

[568] CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add. 69, 24 January 1997, § 40.

[569] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 836.

[570] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.

all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation. Whenever an evacuation occurs . . . each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest continuity . . . [An identification card providing full details] shall be established for each child.

Article 78 AP I was adopted by consensus.[571]

582. Article 22 of the 1989 Convention on the Rights of the Child provides that:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

583. Article 23 of the 1990 African Charter on the Rights and Welfare of the Child provides that:

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family . . .
3. The provisions of this Article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

584. Article 9 of the 1994 Inter-American Convention on Violence against Women provides that "States parties shall take special account of the vulnerability of women to violence by reason of . . . their status as . . . refugees or displaced persons . . . [and by reason of being] affected by armed conflict".

Other Instruments

585. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 78 AP I.

[571] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 254.

586. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons made specific reference to women, children and the elderly as forming particularly vulnerable segments of the displaced population.
587. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 78 AP I.
588. The preamble to the 1993 UN Declaration on the Elimination of Violence against Women expressed the UN General Assembly's concern that "some groups of women, such as . . . refugee women, elderly women and women in situations of armed conflict are especially vulnerable to violence".
589. Principle 4(2) of the 1998 Guiding Principles on Internal Displacement provides that:

> Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of households, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition, and to treatment which takes into account their special needs.

590. Principle 19(2) of the 1998 Guiding Principles on Internal Displacement provides that "special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual abuse and other abuses".

II. National Practice

Military Manuals

591. Argentina's Law of War Manual provides that "no party to the conflict shall undertake the evacuation of children to a foreign country. If an evacuation has been undertaken, all the necessary measures shall be taken to facilitate the return of the children to their families and their country."[572]
592. Australia's Defence Force Manual provides that "children who are not nationals of the state may not be evacuated by that state to a foreign country unless the evacuation is temporary and accords to certain conditions set out in AP I".[573]
593. Indonesia's Military Manual states that parties to the conflict should ensure the protection of unaccompanied children under 15 years old. Such children should be educated and provided with adequate food. In hostile situations, children should be evacuated to neutral States, and children under 12 years old should wear an identity disc.[574]

[572] Argentina, *Law of War Manual* (1989), § 4.12.
[573] Australia, *Defence Force Manual* (1994), § 947(e).
[574] Indonesia, *Military Manual* (1982), § 68.

National Legislation

594. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

> It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:
>
> . . .
>
> c) To identify the displaced persons who wish to be resettled or return to their areas of origin, giving particular attention to the most vulnerable (widows, children, elderly, disabled) who may require special assistance.[575]

595. The Law on the Rights of the Child of Belarus states that children of refugees must be protected and provided with material and medical assistance by the public authorities.[576]

596. Colombia's Law on Internally Displaced Persons has established a National Plan in order to, *inter alia*, pay special attention to women and children.[577]

597. Croatia's Law on Displaced Persons and Directive on Displaced Persons provide that Croatia shall ensure that displaced children are educated and that their basic needs in terms of accommodation, food, health care and social integration are met.[578]

598. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 78 AP I, is a punishable offence.[579]

599. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[580]

600. The Act on Child Protection of the Philippines provides that:

> Children should be given priority during evacuation as a result of armed conflict. Existing community organizations shall be tapped to look after the safety and well-being of children during evacuation operations. Measures shall be taken to ensure that children evacuated are accompanied by persons responsible for their safety and well-being . . .
>
> In places of temporary shelter, expectant and nursing mothers and children shall be given additional food in proportion to their physiological needs. Whenever possible, children shall be given opportunities for physical exercise, sports and outdoor games.[581]

[575] Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(c), see also Article 8 (social assistance).
[576] Belarus, *Law on the Rights of the Child* (1993), Article 30.
[577] Colombia, *Law on Internally Displaced Persons* (1997), Article 10(7); see also *Criminal Code* (1999), Article 127 (for forcible transfer of children to another group as a part of a genocide campaign).
[578] Croatia, *Law on Displaced Persons* (1993), Article 13; *Directive on Displaced Persons* (1991), Articles 2 and 13.
[579] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[580] Norway, *Military Penal Code as amended* (1902), § 108(b).
[581] Philippines, *Act on Child Protection* (1992), Sections 23–24.

National Case-law

601. No practice was found.

Other National Practice

602. In 1996, during a debate in the UN Commission on Human Rights concerning the conflict in Burundi, El Salvador identified the necessity of taking into account the needs of the "most vulnerable groups of displaced persons and, in particular, disabled persons, including those disabled by mine blasts as a result of the conflict".[582]

603. In 1995, in its initial report to the CRC, Ghana stated that "the sole government agency responsible for abandoned and orphaned children, worked with the Save the Children Fund to provide care for the children affected by the conflict [in the northern part of the country]". Family tracing and reunification assistance services were also established and unaccompanied displaced children were either placed in camps, in orphanages or with relatives.[583]

604. The Report on the Practice of Jordan states that special care is provided to children who have been orphaned or separated from their families, the elderly and the disabled.[584]

605. In May 1994, during a debate in the UN Security Council on the situation in Rwanda, Oman made specific reference to the special needs of internally displaced women, children and elderly people.[585]

606. In 1996, during a debate in the UN Commission on Human Rights, Peru reported that in response to the CRC's concern about the displacement of almost 400,000 children, "the Government had established food aid programmes for displaced children, in particular orphans".[586]

607. In 1993, in its report to the CRC, the Philippines stated that:

> 202. [The Special Protection Act of the Philippines provides that] during any evacuation resulting from armed conflict, children are to be given priority . . . Measures shall be taken to ensure that children who are evacuated are accompanied by persons responsible for their safety and well-being. Whenever possible, members of the same family are to be housed in the same premises.
>
> . . .
>
> 206. Children who are lost, abandoned or orphaned as a result of an armed conflict are referred to the local Council for the Protection of Children or to the Department of Social Welfare and Development. All efforts are undertaken to locate the child's parents and relatives. Arrangements are made for the temporary care of the child by a licensed foster family or a child-caring agency.[587]

[582] El Salvador, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.15, 30 May 1996, § 37.
[583] Ghana, Initial report to the CRC, UN Doc. CRC/C/3/Add.39, 19 December 1995, § 126.
[584] Report on the Practice of Jordan, 1997, Chapter 5.3.
[585] Oman, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 7.
[586] Peru, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.55, 21 May 1996, p. 12, §§ 45–46.
[587] Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, §§ 202 and 206.

608. In 1994, in its initial report to the CRC, Sri Lanka noted that:

A special effort is being made to meet the needs of children in varying situations . . . These include health and nutritional needs of infants and pre-school children, education for children of school age, care and rehabilitation for children traumatized by violence and deprivation of parents, and restoration to homes and families in the case of children who have been separated from parents or who have lost them . . . The government has been working closely with NGOs to provide the basic needs of households including the special needs of children. Several programmes have been initiated to deal with problems of traumatized children and children separated from parents.[588]

609. In 1994, in its initial report to the CRC, the FRY stated that:

A refugee child is entitled to full health care, which covers prevention, emergency medical care, specialist check-ups, dental care, as well as medicaments, hospitalization, and check-ups in health care institutions, etc. . . .

Disabled children and youth – refugees up to the age of 18 and university students up to 26 – are entitled to specialized and rehabilitation care in institutions for rehabilitation and to orthopaedic and prosthetic appliances and aids.[589]

III. Practice of International Organisations and Conferences

United Nations

610. In a resolution adopted in 1993 concerning Bosnia and Herzegovina, the UN Security Council noted the particular vulnerability of women, children and the elderly in the large-scale forced displacement of civilians.[590]

611. In a resolution adopted in 1999, the UN Security Council strongly condemned the targeting of children in situations of armed conflict, including forced displacement.[591]

612. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council urged member States and parties to armed conflict "to provide protection and assistance to refugees and internally displaced persons, as appropriate, the vast majority of whom are women and children".[592]

613. In a resolution adopted in 2000 on women and peace and security, the UN Security Council called upon all parties to armed conflict "to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls".[593]

[588] Sri Lanka, Initial report to the CRC, UN Doc. CRC/C/8/Add.13, 5 May 1994, § 146.
[589] FRY, Initial report to the CRC, UN Doc. CRC/C/8/Add.16, 17 November 1994, §§ 354–355.
[590] UN Security Council, Res. 819, 16 April 1993, preamble.
[591] UN Security Council, Res. 1261, 25 August 1999, § 2.
[592] UN Security Council, Res. 1314, 11 August 2000, § 6.
[593] UN Security Council, Res. 1325, 31 October 2000, § 12.

614. In June 1998, in a statement by its President on children and armed conflict, the UN Security Council strongly condemned the forced displacement of children.[594]

615. In a resolution adopted in 1993 on the Office of the United Nations High Commissioner for Refugees, the UN General Assembly welcomed:

> the High Commissioner's policy on refugee children and the activities undertaken to ensure its implementation, aimed at ensuring that the specific needs of refugee children, including in particular unaccompanied minors, are fully met within the overall protection and assistance activities of the Office, in cooperation with governments and other relevant organizations.[595]

616. In a resolution adopted in 1994, the UN General Assembly expressed alarm at the large number of displaced persons in Sudan and made specific reference to the vulnerable situation of displaced women, children and members of minorities.[596]

617. In a resolution adopted in 1982 on women and children refugees, ECOSOC "considered the special problems of refugees [and IDPs], particularly with regard to their physical safety" and expressed "grave concern at the plight of Kampuchean children and women".[597]

618. In a resolution adopted in 1991 on refugee and displaced women and children, ECOSOC stated that it:

> *Recalling* that the majority of refugees and displaced persons are women and children and that a significant number of families are headed by women,
>
> *Expressing its deep concern* about the widespread violations of the rights of refugee and displaced women and children and their specific needs regarding protection and assistance,
>
> . . .
>
> *Recognizing* that ensuring equal treatment of refugee and displaced women and men may require specific action in favour of the former,
>
> . . .
>
> 2. *Calls upon* the international community to give priority to extending international protection to refugee women and children by implementing measures to ensure greater protection from physical violence, sexual abuse, abduction and circumstances that could force them into illegal activities;
>
> . . .
>
> 5. *Encourages* Member States and relevant organizations to provide access to individual identification and registration documents, on a non-discriminatory basis, to all refugee women and, wherever possible, children, irrespective of whether the women and children were accompanied by male family members.[598] [emphasis in original]

[594] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, § 2.
[595] UN General Assembly, Res. 48/116, 20 December 1993, § 7.
[596] UN General Assembly, Res. 49/198, 23 December 1994, preamble and § 10.
[597] ECOSOC, Res. 1982/25, 4 May 1982, preamble and § l.
[598] ECOSOC, Res. 1991/23, 30 May 1991, preamble and §§ 2 and 5.

619. In a resolution adopted in 1995, the UN Commission on Human Rights expressed alarm at the large number of displaced persons in Sudan and made specific reference to the vulnerable situation of displaced women, children and members of minorities.[599]

620. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights called upon all States "to ensure the early identification and registration of unaccompanied refugee and internally displaced children". It also stressed "the importance of special attention for children in situations of armed conflict, in particular in the areas of health and nutrition, education and social reintegration".[600]

621. In a resolution adopted in 2001 on international protection for refugees and displaced persons, the UN Sub-Commission on Human Rights noted with alarm that "the situation of women and girl refugees has been grossly exacerbated, to the extent that it requires the urgent attention of the international community".[601]

622. In 1985, in its Conclusion on Refugee Women and International Protection, the UNHCR Executive Committee noted that "refugee women and girls constitute the majority of the world refugee population and that many of them are exposed to special problems in the international protection field" and recommended that States take the specificity of refugee women into account and pay special attention to their needs.[602]

623. In 1990, in its Conclusion on Refugee Women and International Protection, UNHCR Executive Committee urged States to adopt a series of practical measures in order to take into account the specificity of refugee women.[603]

624. In 1997, in its Conclusion on Refugee Children and Adolescents, the UNHCR Executive Committee called upon States and relevant parties:

> to respect and observe rights and principles that are in accordance with international human rights and humanitarian law . . . including:
>
> i) the principle of the best interests of the child;
> . . .
> iii) the right of children and adolescents to education, adequate food, and the highest attainable standard of health.[604]

[599] UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.
[600] UN Commission on Human Rights, Res. 1998/76, 22 April 1998, §§ 13(d) and 17(b).
[601] UN Sub-Commission on Human Rights, Res. 2001/16, 16 August 2001, § 3.
[602] UNHCR, Executive Committee, Conclusion No. 39 (XXXVI): Refugee Women and International Protection, 18 October 1985, §§ c and h.
[603] UNHCR, Executive Committee, Conclusion No. 64 (XLI): Refugee Women and International Protection, 5 October 1990, § a.
[604] UNHCR, Executive Committee, Conclusion No. 84 (XLVIII): Refugee Children and Adolescents, 17 October 1997, § (a)(i) and (iii); see also Conclusion No. 47 (XXXVIII): Refugee Children, 12 October 1987, § (c) and Conclusion No. 59 (XL): Refugee Children, 13 October 1989, § d.

625. In 1996, in a report on human rights and mass exoduses, the UN Secretary-General stated that "particular attention should be paid to vulnerable groups, including women, children and the elderly, in the areas of prevention, protection and assistance".[605]

626. In 1997, in a report on his mission to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons identified "female-headed households, unaccompanied children and the disabled [as] particularly vulnerable groups" requiring special attention during return.[606]

627. In a report in 1996, the UN Expert on the Impact of Armed Conflict on Children emphasised that "practical protection measures to prevent sexual violence [and] discrimination in delivery of relief materials . . . must be a priority in all assistance programmes in refugee and displaced camps".[607]

628. In 1997, in a report on human rights and mass exoduses, the UN High Commissioner for Human Rights stated that "UNICEF noted that its activities focused on the protection and care of refugee and displaced women and children who were likely to become victims of gender-based discrimination, violence and exploitation".[608]

629. In 1996, in a report on a mission to Burundi, the Special Rapporteur of the UN High Commission for Human Rights on Extrajudicial, Summary or Arbitrary Executions highlighted several of the special problems faced by internally displaced children, including separation from family members and the fact that "like their mothers, children are a vulnerable group subject to malnutrition, diseases and various forms of physical violence, including sexual abuse and rape".[609]

630. In 1996, in a report on a mission to Rwanda, the Special Rapporteur of the UN High Commission on Human Rights for Zaire recommended that "the government must establish resettlement programmes for [IDPs] . . . covering housing, education, health and, above all, security for all, especially women and children".[610]

631. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of

[605] UN Secretary-General, Report on human rights and mass exoduses, UN Doc. E/CN.4/1996/42, 8 February 1996, § 119.

[606] Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 87.

[607] UN Expert on the Impact of Armed Conflict on Children, Report, UN Doc. A/51/306, 26 August 1996, Annex, §§ 90, 110, 165 and 203.

[608] UN High Commissioner for Human Rights, Report on human rights and mass exoduses, UN Doc. E/CN.4/1997/42, 14 January 1997, p. 17, § 55.

[609] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the Special Rapporteur's mission to Burundi from 19 to 29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1996, § 82.

[610] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the Special Rapporteur's visit to Rwanda from 6 to 14 July 1996, concerning ethnic conflict in the Northern Kivu region, UN Doc. E/CN.4/1997/6/Add.l, 16 September 1996, § 126(j).

UN Commission on Human Rights on Violence against Women, Its Causes and Consequences stated that:

> Women and children face rape and other gender-based violence and abduction, not only during armed conflict but in flight, as well as once they have fled the conflict area. In her 1998 report, the Special Rapporteur discussed in detail the particular concerns of refugee women and the factors that impact their security differently from that of men. However, since 1997, the Special Rapporteur has become increasingly concerned with the problem of women who are internally displaced. With the epidemic of internal conflicts around the world, it has become abundantly clear that internally displaced persons (IDPs) – the majority of whom are women and children – are particularly vulnerable to violence and abuse. Unlike refugees, IDPs do not have access to legally binding international standards that are specifically designed for their protection and assistance, nor is there an international monitoring agency specifically mandated to provide protection and assistance to IDPs in the same way that UNHCR does for refugees.[611]

632. In 1998, in a report on regional development in the FRY, the UNHCR Executive Committee identified vulnerable groups such as internally displaced women, children and the elderly as policy priorities in determining the distribution of humanitarian assistance.[612]

Other International Organisations

633. In a resolution adopted in 1998 on the situation of refugees, returnees, and internally displaced persons in the Americas, the OAS General Assembly emphasised the urgency of specifically addressing the needs of women, elderly persons and children.[613]

634. In resolutions adopted in 1993 and 1995, the OAU Council of Ministers identified women, children, the elderly and the disabled as particularly vulnerable groups of displaced persons.[614]

International Conferences

635. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the Movement and refugees in which it asked governments, UNHCR, National Societies and NGOs "to give special attention to the problems of refugees, returnees and displaced persons, particularly the most vulnerable groups".[615]

[611] UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, § 54.

[612] UNHCR, Executive Committee, Standing Committee update on regional development in the former Yugoslavia, UN Doc. EC/48/SC/CRP.10, 2 April 1998, §§ 68–69.

[613] OAS, General Assembly, Res. 1602 (XXVIII-O/98), 3 June 1998, § 4.

[614] OAU, Council of Ministers, Res. 1448 (LVIII), 21–26 June 1993, preamble; Res. 1588 (LXII), 21–23 June 1995, preamble.

[615] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XVII, § 8.

IV. Practice of International Judicial and Quasi-judicial Bodies

636. In 1998, in its consideration of the report of Peru, CEDAW expressed concern at the situation of displaced women in Peru and recommended that these women benefit from "programmes to promote their participation in the labour force together with access for them and their families to education, health care, housing, drinking water and other essential services".[616]

637. In 1999, CEDAW stated that "States parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as . . . women refugees". The Committee noted with concern "the persistence of widespread violence as a result of the armed conflict" in Colombia and that "women are the principal victims and that they . . . lack the resources needed for their survival in a situation in which they are called upon to assume greater responsibilities".[617]

638. In 1993, in its preliminary observations on the report of Sudan, the CRC expressed concern at the situation of internally displaced children.[618] In its concluding observations, the CRC expressed alarm at the problems faced by homeless and displaced children.[619]

639. In 1997, in its concluding observations on the report of Uganda, the CRC recommended that Uganda direct special attention "to refugee and internally displaced children to ensure that they have equal access to basic facilities". The Committee also recommended that, in accordance with IHL, "the State party take measures to stop the killing and abduction of children".[620]

640. In 1997, in its concluding observations on the report of Myanmar, the CRC suggested that the government be proactive in preventing any type of involuntary population movement affecting the rights of children.[621]

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

641. No practice was found.

VI. Other practice

642. The Bangkok NGO Declaration on Human Rights adopted in 1993 states that:

[616] CEDAW, Consideration of the report of Peru, UN Doc. CEDAW/C/1998/II/L.1/Add.7, 8 July 1998, §§ 23.

[617] CEDAW, Report of the Committee, 20th Session, 19 January–5 February 1999, UN Doc. A/54/38(Part I), 20 August 1999, §§ 16 and 358.

[618] CRC, Preliminary observations on the report of Sudan, UN Doc. CRC/C/15/Add.6, 18 February 1993, §§ 9–10.

[619] CRC, Concluding observations on the report of Sudan, UN Doc. CRC/C/15/Add.10, 18 October 1993, § 14.

[620] CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 34 and 37.

[621] CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, §§ 40–42.

Crimes against women, including rape, sexual slavery and trafficking, and domestic violence, are rampant . . . In crisis situations – ethnic violence, communal riots, armed conflicts, military conflicts, military occupation and displacement – women's rights are specifically violated.[622]

643. In 1995, with regard to the Declaration of Minimum Humanitarian Standards, the IIHL commented that:

Concerning categories of persons deserving special protection, we draw attention to the practice of forced displacement . . . of children into another territory, without leaving any trace, so that the identity of these children, when separated from their families, is not preserved. We propose:

In the case of the evacuation of children without their parents to a foreign country, such children should be registered with the appropriate impartial organization.[623]

International assistance to displaced persons

Note: *For practice concerning access for humanitarian relief to civilians in need, see Chapter 17, section C.*

I. Treaties and Other Instruments

Treaties

644. Article 8(b) of the 1950 Statute of the UNHCR provides that the High Commissioner shall promote the execution of any measures calculated to improve the situation of refugees.

645. Article 1(1)(b) of the 1953 Constitution of the IOM states that the purpose and functions of the IOM shall be "to concern itself with the organised transfer of refugees, displaced persons and other individuals in need of international migration services for whom arrangement may be made between the Organization and the States concerned, including those States undertaking to receive them".

Other Instruments

646. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons expressed gratitude and firm support for the role of UNHCR in assisting and protecting the displaced and called for cooperation with UNHCR and other international humanitarian organisations.

647. Paragraph 5 of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provided that "persons temporarily transferred to areas other than their areas of origin should benefit, as vulnerable groups,

[622] World Conference on Human Rights, Regional Preparatory Meeting for Asia–Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 3.

[623] IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, 28 November 1995, p 10.

from international assistance, *inter alia*, in conformity with its mandate, by the ICRC".

648. In the 1992 General Peace Agreement for Mozambique, in order to organise necessary assistance for IDPs, the parties agreed "to seek the involvement of competent United Nations agencies . . . [as well as] the International Red Cross and other organisations".

649. Principle 25 of the 1998 Guiding Principles on Internal Displacement states that:

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced . . . Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

II. National Practice

Military Manuals

650. No practice was found.

National Legislation

651. According to Colombia's Law on Internally Displaced Persons, forcibly displaced persons have the right to ask for and receive international aid, the corollary of which is the right of the international community to provide humanitarian assistance.[624]

National Case-law

652. No practice was found.

Other National Practice

653. The Report on the Practice of France states that France considers humanitarian assistance to displaced persons to be a duty that goes beyond political structures and that humanitarian intervention is becoming an international duty, as long as it is non-discriminatory and focuses on the protection of life and health.[625]

654. In 1990, a number of government departments and NGOs in the Philippines signed a Memorandum of Agreement providing that an NGO medical

[624] Colombia, *Law on Internally Displaced Persons* (1997), Article 2(1).
[625] Report on the Practice of France, 1999, Chapter 5.4.

team would be given access in order to ensure the delivery of health services to IDPs located in evacuation centres or in other areas where health resources were inadequate.[626]

655. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that "non-Government health workers (e.g. doctors, nurses, dentists, trained community health workers and volunteer relief workers) shall be permitted to go to evacuation centres to render medical/relief assistance to evacuees".[627]

656. In 1996, during a debate in the UN Commission on Human Rights, the representative of Sudan noted that:

> his country was grappling with the problem of internally displaced persons and said that the authorities were making every effort to solve it, in particular by establishing specialized agencies and coordinating action by international humanitarian organizations.
>
> As part of its search for solutions at the domestic level, the Government had concluded an agreement with two rebel movements in the southern part of the country, which would help to solve part of the problem . . .
>
> Sudan would continue to cooperate with the International Committee of the Red Cross and voluntary organizations, including the regions to which displaced persons were returning.[628]

657. In 1994, during a debate in the UN Security Council on Rwanda, the UK welcomed the efforts being made by various UN agencies and NGOs to alleviate the suffering of IDPs. It noted that the UK government had made a "substantial commitment" to the work of these organisations.[629]

658. In 1991, during a debate in the UN Security Council, the US expressed profound concern about the plight of displaced persons and noted that the US had contributed generously to the care and maintenance of the displaced in Iraq.[630]

659. In a Joint Communiqué issued in 1992, the President and the Prime Minister of the FRY expressed strong support for "the efforts of all agencies, local and international, to relieve the plight of displaced persons in all territories of the former Yugoslavia".[631]

[626] Philippines, Memorandum of Agreement, 10 December 1990, § 1, Report on the Practice of the Philippines, 1997, Chapter 5.5.

[627] Philippines, Presidential Human Rights Committee, Res. No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 5.

[628] Sudan, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.40, 20 May 1996, §§ 43–46.

[629] UK, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 8.

[630] US, Statement before the UN Security Council, UN Doc. S/PV.2982, 5 April 1991, pp. 58–60.

[631] FRY, Joint Communiqué by the President and the Prime Minister, Belgrade, 11 September 1992, annexed to Report of the UN Secretary-General on the International Conference on the Former Yugoslavia, UN Doc. S/24795, 11 November 1992, p. 35, § 3(e).

III. Practice of International Organisations and Conferences

United Nations

660. In a resolution adopted in 1991 on repression of the Iraqi civilian population, including Kurds in Iraq, the UN Security Council asked the Secretary-General "to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population".[632]

661. In a resolution on Tajikistan adopted in 1995, the UN Security Council noted the request "addressed to international organizations and States to provide substantial financial and material support to the refugees and internally displaced persons".[633]

662. In three resolutions adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Security Council reiterated its demand that immediate and unimpeded access to displaced people be given to representatives of UNHCR, the ICRC and other international agencies.[634]

663. In a resolution adopted in 1996 concerning the Great Lakes region, the UN Security Council requested:

> the Secretary-General, in consultation with . . . the United Nations High Commissioner for Refugees, with the OAU, with the Special Envoy of the European Union . . .
>
> (a) to draw up a concept of operations . . . with the objectives of:
>
> – Delivering short-term humanitarian assistance and shelter to refugees and displaced persons in eastern Zaire;
> – Assisting the United Nations High Commissioner for Refugees with the protection . . .
> – Establishing humanitarian corridors for the delivery of humanitarian assistance.[635]

664. In a resolution adopted in 1997 concerning eastern Zaire, the UN Security Council endorsed a plan for the "facilitation of access to humanitarian assistance" for all refugees and displaced persons.[636]

665. In a resolution on Croatia adopted in 1997, the UN Security Council welcomed "the renewed mandate of the Organization for Security and Cooperation in Europe, in particular [its] focus on . . . return of all refugees and displaced persons [and] protection of their rights".[637]

666. In 1995, in a statement by its President on Croatia, the UN Security Council called on all the parties "to cooperate fully with UNCRO, UNHCR

[632] UN Security Council, Res. 688, 5 April 1991, § 5.
[633] UN Security Council, Res. 999, 16 June 1995, § 14.
[634] UN Security Council, Res. 1010, 10 August 1995, preamble and § 1; Res. 1019, 9 November 1995, preamble and § 2; Res. 1034, 21 December 1995, preamble and §§ 4–5.
[635] UN Security Council, Res. 1078, 9 November 1996, § 10.
[636] UN Security Council, Res. 1097, 18 February 1997, § 1.
[637] UN Security Council, Res. 1120, 14 July 1997, § 17.

and the ICRC in protecting and assisting the local civilians and any displaced persons".[638]

667. In 1997, in a statement by its President on the Great Lakes region/Zaire, the UN Security Council called upon all parties "to allow access by United Nations High Commissioner for Refugees and humanitarian agencies to refugees and displaced persons".[639] In further statements by its President the same year, the UN Security Council called upon the ADFL to ensure safe and unrestricted access by humanitarian relief agencies so as to guarantee humanitarian aid and the safety of displaced persons in the areas under its control.[640]

668. In 1997, in a statement by its President on Georgia, the UN Security Council "welcomed the continued efforts by United Nations agencies and humanitarian organizations to address the urgent needs of . . . internally displaced persons" and encouraged "further contributions to that end".[641]

669. In 1997, in a statement by its President on the DRC, the UN Security Council called for access for humanitarian assistance to be facilitated and for the rights of refugees and displaced persons to be fully respected.[642]

670. In 1991, in a report to the UN Security Council concerning the situation in the former Yugoslavia, the UN Secretary-General reported that the ICRC had opened offices in affected areas and had been able "to provide assistance to about 60,000 displaced persons through its family parcels programme".[643]

671. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly requested the Secretary-General:

> to pursue his humanitarian efforts in the Federal Republic of Yugoslavia (Serbia and Montenegro), working through the Office of the United Nations High Commissioner for Refugees, the World Food Programme, the United Nations Children's Fund, other appropriate humanitarian organizations and the Office of the United Nations High Commissioner for Human Rights, with a view to assist in the voluntary return of the displaced persons to their homes in conditions of safety and dignity.[644]

672. In 1994, in its Conclusion on Internally Displaced Persons, the Executive Committee of the UNHCR:

> Calls upon the international community, in appropriate circumstances, to provide timely and speedy humanitarian assistance and support to countries affected by internal displacement to help them fulfil their responsibility towards the displaced . . .

[638] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/26, 4 May 1995.
[639] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/11, 7 March 1997, p. 1.
[640] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/19, 4 April 1997, p. 1; Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.
[641] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/25, 8 May 1997, p. 2.
[642] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.
[643] UN Secretary-General, Report pursuant to paragraph 3 of Security Council resolution 713 (1991), UN Doc. S/23169, 25 October 1991, Annex IV, § 2.
[644] UN General Assembly, Res. 53/164, 9 December 1998, § 26.

Recognizes that actions by the international community, in consultation and coordination with the concerned State, on behalf of the internally displaced may contribute to the easing of tensions and the resolution of problems resulting in displacement, and constitute important components of a comprehensive approach to the prevention and solution of refugee problems.[645]

673. In 1997, in a report on his visit to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons stated that "realizing its limited capacity to deliver the necessary humanitarian assistance, the Government requested support from the international community, and several United Nations organizations became involved in the mid-1980s".[646]

674. In 1996, during a debate in the UN Commission on Human Rights, the Special Rapporteur on the Situation of Human Rights in Afghanistan stated that:

The international community was duty-bound to provide emergency assistance to the victims of the Afghan conflict . . . Minimum food, shelter and sanitation requirements must be provided immediately to those living in refugee camps and villages, and to returnees. The international community should continue to provide, and indeed increase, humanitarian assistance in the form of mine-clearance, support for voluntary repatriation, food, health, sanitation projects and other rehabilitation programmes.[647]

675. In 1996, the High Representative for the Implementation of the Peace Agreement in Bosnia and Herzegovina stated that "the leading role for implementation of [the Agreement] belongs to the Office of the United Nations High Commissioner for Refugees (UNHCR)", with the active support of the Office of the High Commissioner for Human Rights.[648]

Other International Organisations

676. In several resolutions adopted in 1996, the OAU called upon the international community to provide refugees and displaced persons with humanitarian assistance.[649]

International Conferences

677. No practice was found.

[645] UNHCR, Executive Committee, Conclusion No. 75 (XLV): Internally Displaced Persons, 11 October 1994, §§ f and h.

[646] Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 49.

[647] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Statement before the UN Commission on Human Rights, 16 April 1996, UN Doc. E/CN.4/1996/SR.42, 22 April 1996, § 19 .

[648] High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, § 69.

[649] OAU, Council of Ministers, Res. 1649 (LXIV), 1–5 July 1996, § 12; Res. 1650 (LXIV), 1–5 July 1996, § 11; Res. 1653 (LXIV), 1–5 July 1996, § 7.

IV. Practice of International Judicial and Quasi-judicial Bodies

678. No practice was found.

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

679. No practice was found.

VI. Other Practice

680. No practice was found.

D. Return of Displaced Persons

Conditions for return

I. Treaties and Other Instruments

Treaties

681. Article 45 GC IV provides that "protected persons shall not be transferred to a Power which is not party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities."

682. Article 49, second paragraph, GC IV provides that "persons . . . evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased".

683. Article III(59)(a) of the 1953 Panmunjon Armistice Agreement provides that:

> All civilians who, at the time this Armistice Agreement becomes effective, are in territory under the military control of the Commander-in-Chief, United Nations Command, and who, on 24 June 1950, resided north of the Military Demarcation Line established in this Armistice Agreement shall, if they desire to return home, be permitted and assisted by the Commander-in-Chief, United Nations Command, to return to the area north of the Military Demarcation Line; and all civilians who, at the time this Armistice Agreement becomes effective, are in territory under military control of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, and who, on 24 June 1950, resided south of the Military Demarcation Line established in this Armistice Agreement shall, if they desire to return home, be permitted and assisted by the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers to return to the area south of the Military Demarcation Line.

Article III(59)(b) contains similar provisions for civilians of foreign nationality.

684. Article 3 of the 1963 Protocol 4 to the ECHR provides that "no one shall be deprived of the right to enter the territory of the State of which he is a national".

685. Article 12(4) of the 1966 ICCPR provides that "no one shall be arbitrarily deprived of the right to enter his own country".

686. Article 5(1) of the 1969 Convention Governing Refugee Problems in Africa (which expressly applies in situations of armed conflict) provides that "the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will".
687. Article 22(5) of the 1969 ACHR provides that "no one shall be deprived of the right to enter the territory of the State of which he is a national".
688. Article 12(2) of the 1981 ACHPR provides that "every individual shall have the right . . . to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."
689. Article 3 of the 1984 Convention against Torture provides that "no State Party shall expel or return . . . a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".
690. Article 16 of the 1989 Indigenous and Tribal Peoples Convention states that "whenever possible, [displaced] peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist".
691. Article 1 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

> All refugees and displaced persons have the right to freely return to their homes of origin . . . The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina . . . Choice of destination shall be up to the individual or family . . . The parties shall not interfere with the returnees' choice of destination nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking the basic infrastructure necessary to resume a normal life.

Other Instruments
692. Article 13(2) of the 1948 UDHR states that "everybody has the right . . . to return to his country".
693. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons affirms that "voluntary return with full guarantees of security and non-discrimination is the basic right of the displaced and the best means to achieve a lasting solution to their plight".
694. Paragraph 4(b) of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provides that "each party to the conflict guarantees to those who leave temporarily the territory it controls . . . that they have the right to return home at a later stage if they wish so".
695. In Paragraph 1 of the 1997 Protocol on Tajik Refugees, it was agreed "to step up mutual efforts to ensure the voluntary return, in safety and dignity, of all refugees and displaced persons to their homes". The parties also called upon:

> the United Nations, the Organization for Security and Cooperation in Europe (OSCE) and the Office of the United Nations High Commissioner for Refugees (UNHCR) to provide assistance in order to ensure the safety of returning refugees

and displaced persons and to establish and expand their presence at places where such persons are living.

696. Paragraph 3(a) of Chapter 4 of the 1997 Sudan Peace Agreement created several administrative structures designed, *inter alia*, "to assist, repatriate, resettle and rehabilitate the displaced and the returnees". Under Paragraph 2 of Chapter 5 of the agreement, one of the functions of the proposed Coordinating Council for the Southern States was the "voluntary repatriation of the returnees and the displaced".
697. Principle 6(3) of the 1998 Guiding Principles on Internal Displacement states that "displacement shall last no longer than required by the circumstances".
698. Principle 15(d) of the 1998 Guiding Principles on Internal Displacement states that IDPs have "the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk".

II. National Practice

Military Manuals

699. Argentina's Law of War Manual reproduces Article 49 GC IV.[650]
700. Croatia's LOAC Compendium provides that the evacuation of civilian persons should be "limited in time", i.e. the return should be rapid.[651]
701. Hungary's Military Manual provides that the evacuation of civilian persons should be "limited in time", i.e. the return should be rapid.[652]
702. Kenya's LOAC Manual provides that "temporarily removed persons . . . must be allowed to return or be brought back to their previous location".[653]
703. Madagascar's Military Manual provides that "temporarily displaced persons . . . should be allowed to return to their previous location".[654]
704. The Military Directive to Commanders of the Philippines provides that "displaced persons and evacuees shall be allowed and/or persuaded to return to their homes as quickly as tactical considerations permit".[655]
705. Spain's LOAC Manual reproduces Article 49 GC IV.[656]
706. The UK Military Manual provides that if the occupant does transfer protected persons outside the limits of occupied territories, then "as soon as hostilities in the area in question have ceased, they must be transferred back to their homes".[657]
707. The US Field Manual reproduces Articles 45 and 49 GC IV.[658]

[650] Argentina, *Law of War Manual* (1969), § 5.008.
[651] Croatia, *LOAC Compendium* (1991), p. 62. [652] Hungary, *Military Manual* (1992), p. 98.
[653] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 13.
[654] Madagascar, *Military Manual* (1994), Fiche No. 8-SO, § A.
[655] Philippines, *Military Directive to Commanders* (1988), § 3(e).
[656] Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).
[657] UK, *Military Manual* (1958), § 560.
[658] US, *Field Manual* (1956), §§ 284 and 382.

National Legislation

708. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

> It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:
>
> ...
>
> f) To verify the voluntary nature of resettlement and return and the presence of the State Administration;
>
> ...
>
> h) To take appropriate measures to ensure ... the safety and dignity of populations during movements to return and resettlement sites.[659]

709. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[660]

710. According to Colombia's Law on Internally Displaced Persons, forcibly displaced persons have the right to return to their places of origin.[661]

711. Ethiopia's Transitional Period Charter provided that priority should be given to the rehabilitation of those sections of the population who had been forcibly uprooted by the previous regime's policy of villagisation and resettlement and that the rehabilitation would be carried out in accordance with their wishes.[662]

712. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 45 and 49 GC IV, is a punishable offence.[663]

713. Lithuania's Criminal Code as amended punishes anyone who, in situations of armed conflict, prevents civilians from returning to the territory of the State if they so wish after the termination of hostilities.[664]

714. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[665]

National Case-law

715. No practice was found.

[659] Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(f) and (h), see also Article 4 (security of site) and Article 5 (voluntary resettlement and return).
[660] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[661] Colombia, *Law on Internally Displaced Persons* (1997), Articles 2(6) and 10(6).
[662] Ethiopia, *Transitional Period Charter* (1991), Article 14, p. 4.
[663] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[664] Lithuania, *Criminal Code as amended* (1961), Article 343.
[665] Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

716. In 1996, during a debate in the UN Commission on Human Rights in relation to Cyprus, Angola stated that "all restrictions preventing refugees and displaced persons from returning home should be lifted".[666]

717. In 1994, during a debate in the UN Security Council on the situation in Abkhazia, Brazil stated that "the displaced persons and refugees have a right to return to their homes in conditions of safety".[667]

718. In 1994, during a debate in the UN Security Council on the situation in the former Yugoslavia, Croatia welcomed "the pilot projects for the return of displaced persons to their homes in the occupied areas".[668]

719. In 1994, during a debate in the UN Security Council on the situation in Abkhazia, the Czech Republic stated that "the right of refugees to return to their homes is a crucial right".[669]

720. In 1996, during a debate in to the UN Commission on Human Rights in relation to Bosnia and Herzegovina, Egypt stated that "refugees and displaced persons must be allowed to return to their homes".[670]

721. In 1993 and 1995, during debates in the UN Security Council on the situation in Georgia and in the former Yugoslavia respectively, France supported the right to return of refugees and displaced persons.[671]

722. According to the Report on the Practice of France, the free return of refugees is a frequent preoccupation of French diplomacy. France often asks for this right to be guaranteed and considers a contrary attitude to be "unacceptable".[672]

723. In 1995, during a debate in the UN Security Council on the situation in Abkhazia, Georgia supported the right of refugees and displaced persons to return in safety and emphasised that "nothing can change [its] resolve to achieve the unconditional and timely return of the refugees to their homes".[673]

724. In 1995, during a debate in the UN Security Council on the situation in Tajikistan, the representative of Honduras stated that his government was "pleased to see that the Government of Tajikistan has committed itself to

[666] Angola, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.46, 22 May 1996, § 6.
[667] Brazil, Statement before the UN Security Council, UN Doc. S/PV.3354, 25 March 1994, p. 5.
[668] Croatia, Statement before the UN Security Council, UN Doc. S/PV.3434, 30 September 1994, p. 3.
[669] Czech Republic, Statement before the UN Security Council, UN Doc. S/PV.3354, 25 March 1994, p. 4.
[670] Egypt, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.47, 17 April 1996, § 35.
[671] France, Statement before the UN Security Council, UN Doc. S/PV.3295, 19 October 1993, p. 4; Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 10.
[672] Report on the Practice of France, 1999, Chapter 5.5.
[673] Georgia, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 3.

assisting the return and reintegration of refugees and displaced persons in dignity and safety".[674]

725. In 1995, during a debate in the UN Security Council on the situation in Tajikistan, Indonesia called upon the parties to intensify their efforts "to ensure the voluntary return, in dignity and safety, of all refugees and displaced persons to their homes".[675]

726. In 1995, during a debate in the UN Security Council on the situation in Abkhazia, Italy stressed "the need to guarantee the safe return of refugees".[676]

727. In 1994, in statements before the UN Security Council on the situation in Abkhazia, New Zealand stated that it understood "the concern of the Government of Georgia for the problems associated with the return of . . . refugees to their homes. Displaced persons must be able to resume their ordinary lives without fear of violence or intimidation."[677]

728. In 1994 and 1995, in statements before the UN Security Council on the situation in Abkhazia, Nigeria stated that:

> The issue of the return of the refugees and displaced persons is crucial to the settlement of the Georgian-Abkhaz conflict. The current situation, in which both the Government of Georgia and the Abkhaz authorities are unable to guarantee the safety of the displaced persons and protection of the repatriated . . . is unfortunate and should be reversed.[678]

729. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provides that "evacuees shall be returned to their houses at government expense as soon as the reason for evacuation ceases".[679]

730. In 1995, during a debate in the UN Security Council on the situation in Croatia, Russia stated that "the Serbian inhabitants of Krajina must have the right to return in conditions of safety".[680]

731. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Tunisia stated that it was essential to "enable all the displaced and deported persons to return to their homes".[681]

[674] Honduras, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, pp. 4–5.
[675] Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, pp. 4–5.
[676] Italy, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 5.
[677] New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3332, 31 January 1994, p. 13.
[678] Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 8.
[679] Philippines, Presidential Human Rights Committee, Res. No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 8.
[680] Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.
[681] Tunisia, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, p. 66.

732. In 1994, during a debate in the UN Security Council on the situation in Abkhazia, the UK stated that the "safe return [of displaced persons] will be a vital ingredient in restoring peace and stability in Georgia".[682]
733. In 1995, during a debate in the UN Security Council on the situation in Abkhazia, the US supported the extension of UNOMIG's mandate, which included the contribution "to conditions conducive to the safe and orderly return of refugees and displaced persons".[683]

III. Practice of International Organisations and Conferences

United Nations
734. In a resolution adopted in 1974 on emergency UN humanitarian assistance to Cyprus, the UN Security Council urged the parties concerned to take measures "to permit persons who wish to do so to return to their homes in safety".[684]
735. In a resolution adopted in 1992, the UN Security Council, strongly condemning the deportation of 12 Palestinian civilians from the occupied territories, requested that Israel refrain from deporting any more Palestinian civilians from the occupied territories and that it "ensure the safe and immediate return to the occupied territories of all those deported".[685]
736. In a resolution adopted in 1992 in the context of the conflict in the former Yugoslavia, the UN Security Council endorsed the principles agreed by the Presidents of Croatia and the SFRY on 30 September 1992 that "all displaced persons have the right to return in peace to their former homes".[686] These principles were reaffirmed in a resolution adopted in 1993.[687]
737. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council affirmed the continuing relevance of "the recognition and the right of all displaced persons to return to their homes in safety and honour".[688]
738. In a resolution adopted in 1993 on the settlement of the conflict in and around Nagorno-Karabakh, the UN Security Council requested the Secretary-General and the relevant international agencies "to assist refugees and displaced persons to return to their homes in security and dignity".[689]
739. In numerous resolutions adopted between 1994 and 1999 on the situation in Georgia, the UN Security Council affirmed "the right of all refugees and

[682] UK, Statement before the UN Security Council, UN Doc. S/PV.3332, 31 January 1994, p. 9.
[683] US, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 13.
[684] UN Security Council, Res. 361, 30 August 1974, § 4.
[685] UN Security Council, Res. 726, 6 January 1992, §§ 1, 3 and 4.
[686] UN Security Council, Res. 779, 6 October 1992, § 5.
[687] UN Security Council, Res. 820 A, 17 April 1993, § 7.
[688] UN Security Council, Res. 859, 24 August 1993, § 6(d).
[689] UN Security Council, Res. 874, 14 October 1993, § 11.

displaced persons affected by the conflict to return to their homes in secure conditions".[690]

740. In a resolution on the former Yugoslavia adopted in 1994, the UN Security Council affirmed "the right of all displaced persons to return voluntarily to their homes of origin in safety and dignity with the assistance of the international community".[691]

741. In a resolution adopted in 1995, the UN Security Council welcomed:

> the obligation assumed by the Government of the Republic of Tajikistan to assist the return and the reintegration of refugees as well as the obligations by the parties to cooperate in ensuring the voluntary return, in dignity and safety, of all refugees and displaced persons to their homes.[692]

742. In a resolution adopted in 1996 concerning the situation in the Great Lakes region, the UN Security Council underlined "the urgent need for the orderly and voluntary repatriation and resettlement of refugees, and the return of internally displaced persons, which are crucial elements for the stability of the region".[693]

743. In a resolution adopted in 1998 concerning the situation in Abkhazia, Georgia, the UN Security Council demanded in particular that the Abkhaz authorities "allow the unconditional and immediate return of all persons displaced since the resumption of hostilities in May 1998".[694]

744. In several resolutions on Kosovo adopted in 1998 and 1999, the UN Security Council reaffirmed the right of all refugees and displaced persons to return to their homes in safety.[695]

745. In a resolution adopted in 1999, the UN Security Council stressed that it was the responsibility of the Indonesian authorities "to take immediate and effective measures to ensure the safe return of refugees to East Timor".[696]

746. In 1994, in a statement by its President on Rwanda, the UN Security Council stated that "the rapid return of the refugees and displaced persons to their homes is essential for the normalization of the situation in Rwanda" and strongly condemned "attempts to intimidate refugees carried out by those who are seeking to prevent them from returning to Rwanda".[697]

747. In several statements by its President on the situation in Georgia between 1994 and 1996, the UN Security Council expressed its deep concerns "at the

[690] UN Security Council, Res. 896, 31 January 1994, § 11; Res. 906, 25 March 1994, § 3; Res. 993, 12 May 1995, preamble; Res. 1036, 12 January 1996, preamble; Res. 1096, 30 January 1997, § 8; Res. 1124, 31 July 1997, § 11; Res. 1225, 28 January 1999, § 7.
[691] UN Security Council, Res. 947, 30 September 1994, § 7.
[692] UN Security Council, Res. 999, 16 June 1995, §§ 8 and 14.
[693] UN Security Council, Res. 1078, 9 November 1996, preamble.
[694] UN Security Council, Res. 1187, 30 July 1998, § 3.
[695] UN Security Council, Res. 1199, 23 September 1998, preamble; Res. 1203, 24 October 1998, § 12; Res. 1239, 14 May 1999, § 4; Res. 1244, 10 June 1999, preamble.
[696] UN Security Council, Res. 1272, 25 October 1999, § 12.
[697] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/42, 10 August 1994, pp. 1–2.

continued obstruction to the return of the refugees and displaced persons by the Abkhaz authorities" and reiterated its call to the Abkhaz authorities "to guarantee the safety of all returnees and to regularize the status of spontaneous returnees".[698]

748. In 1996, in a statement by its President, the UN Security Council urged the government of Croatia "to expand its programme to accelerate the return of [the displaced] persons without preconditions or delay".[699]

749. In 1996, in a statement by is President on the Great Lakes region/Zaire, the UN Security Council underlined "the urgent need for the orderly voluntary repatriation and resettlement of refugees, and the return of displaced persons".[700]

750. In 1997, in a statement by its President, the UN Security Council called upon "the Government of Burundi to allow the people to return to their homes without any hindrance".[701]

751. In a resolution adopted in 1993 on the Office of the United Nations High Commissioner for Refugees, the UN General Assembly urged all States and relevant organizations "to support the High Commissioner's search for durable solutions to refugee problems, including voluntary repatriation, integration in the country of asylum and resettlement in a third country, as appropriate," and welcomed "in particular the ongoing efforts of her Office to pursue wherever possible opportunities to promote conditions conducive to the preferred solution of voluntary repatriation".[702]

752. In resolutions adopted in 1994 and 1995, the UN General Assembly reaffirmed the right of refugees and displaced persons from the areas of conflict in the territory of the former Yugoslavia "to return voluntarily to their homes in safety and dignity".[703]

753. In two resolutions adopted in 1998 and 1999 on the situation of human rights in Kosovo, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro) and ethnic Albanian leaders "to allow for and facilitate the free and unhindered return to their homes, in safety and with dignity, of all internally displaced persons and refugees".[704]

754. In a resolution adopted in 1994 on assistance to Georgia in the field of human rights, the UN Commission on Human Rights appealed to those in

[698] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/78, 2 December 1994; Statement by the President, UN Doc. S/PRST/1995/39, 18 August 1995; Statement by the President, UN Doc. S/PRST/1996/43, 22 October 1996, p. 2.

[699] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/39, 20 September 1996.

[700] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996.

[701] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/32, 30 May 1997.

[702] UN General Assembly, Res. 48/116, 20 December 1993, § 10.

[703] UN General Assembly, Res. 49/10, 3 November 1994, § 9; Res. 50/193, 22 December 1995, § 12.

[704] UN General Assembly, Res. 53/164, 9 December 1998, § 23; Res. 54/183, 17 December 1999, § 11.

control of the territory of Abkhazia "to implement and ensure law and order, to . . . ensure the right of displaced persons to return to Abkhazia".[705]

755. In a resolution adopted in 1997 on human rights in the occupied Syrian Golan, the UN Commission on Human Rights emphasised that "the displaced persons of the population of the occupied Syrian Golan must be allowed to return to their homes".[706]

756. In a resolution adopted in 1998 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights called upon the government of Croatia to facilitate "the expeditious return, in safety and dignity, of all refugees and displaced persons to their homes". It also insisted that the government of the FRY "allow the return in safety and dignity of ethnic Albanian refugees to Kosovo".[707] In a number of other resolutions adopted in the context of the conflict in the former Yugoslavia, the Commission stressed the right of IDPs to return to their homes.[708]

757. In a resolution adopted in 1999 on the situation of human rights in East Timor, the UN Commission on Human Rights called upon the government of Indonesia "to guarantee the voluntary return of all refugees and displaced persons, including those who have been forcibly displaced to camps in West Timor".[709]

758. In a decision adopted in 1992 on the situation of human rights in Yugoslavia, the UN Sub-Commission on Human Rights demanded that "displaced people be given the opportunity to return to their homes".[710]

759. In a resolution adopted in 1995 on the situation in the territory of the former Yugoslavia, the UN Sub-Commission on Human Rights recommended that "the United Nations and all Governments take measures to enable all refugees, deportees and displaced persons to return safely to their homes".[711]

760. In a resolution adopted in 1998 on housing and property restitution in the context of the return of refugees and internally displaced persons, the UN Sub-Commission on Human Rights reaffirmed "the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish".[712]

761. In 1980, in its Conclusion on Voluntary Repatriation, the Executive Committee of the UNHCR recognized that "voluntary repatriation constitutes generally . . . the most appropriate solution for refugee problems" and stressed

[705] UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 5.
[706] UN Commission on Human Rights, Res. 1997/2, 26 March 1997, § 2.
[707] UN Commission on Human Rights, Res. 1998/79, 22 April 1998, §§ 10(b), 14(a) and 25(c).
[708] UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 4; Res. 1994/75, 9 March 1994, § 5; Res. 1995/89, 8 March 1995, § 8; Res. 1996/71, 23 April 1996, § 21.
[709] UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 5(d).
[710] UN Sub-Commission on Human Rights, Decision 1992/103, UN Doc. E/CN.4/Sub.2/1992/58, 14 October 1992, § (c).
[711] UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 5.
[712] UN Sub-Commission on Human Rights, Res. 1998/26, 22 August 1998, § 1.

that "the essentially voluntary character of repatriation should always be respected". It also called upon governments of countries of origin "to provide formal guarantees for the safety of returning refugees".[713] The Committee completed these findings in other conclusions on voluntary repatriation in 1985 and further reaffirmed the necessity of removing the causes of refugee movements and to tackle this problem internationally.[714]

762. In 1995, in its Conclusion on Voluntary Repatriation to Afghanistan, the Executive Committee of UNHCR urged the parties to the conflict in Afghanistan to come to a political settlement, "thus allowing for the return of Afghan refugees and displaced persons to their homes in safety and dignity".[715]

763. In 1994, in a report on the situation in Abkhazia, Georgia, the UN Secretary-General reported that "regarding the refugees and displaced persons, UNHCR seeks to maintain internationally accepted principles and practices for their voluntary repatriation and return, which do not allow screening mechanisms".[716]

764. In January 1995, in a report on the situation in Abkhazia, Georgia, the UN Secretary-General reported that "the Abkhaz side had refused to sign a declaration that would have allowed for a speedier return and in larger numbers [of refugees and IDPs]. It did, however, agree to reduce the review period for the consideration of application [for return] from four to two weeks."[717] In a further report in May, the Secretary-General noted that a proposal by Abkhazia to register spontaneous returnees and to consider UNHCR-sponsored returnees at the rate of 200 per week was rejected by UNHCR as not meeting the requirements of the return timetable agreed to by all parties – except the Abkhaz side – during talks in February 1995.[718]

765. In several reports between 1994 and 1997 on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stressed the right to voluntary return of IDPs.[719]

766. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human

[713] UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, §§ (a), (b) and (f).

[714] UNHCR, Executive Committee, Conclusion No. 40 (XXXVI): Voluntary Repatriation, 18 October 1985, §§ (c), (d) and (k).

[715] UNHCR, Executive Committee, Conclusion on Voluntary Repatriation to Afghanistan, UN Doc. A/50/12/Add.1, 1 November 1995, § 29(d).

[716] UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1994/312, 18 March 1994, § 8.

[717] UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1995/10, 6 January 1995, § 3.

[718] UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1995/342, 1 May 1995, pp. 2–3.

[719] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, § 23; Special report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 83; Periodic report, UN Doc. E/CN.4/1997/56, 29 January 1997, §§ 14–19.

Rights stated that the authorities should not make the return of refugees and IDPs conditional upon reciprocal returns being allowed in other areas.[720]

767. In 1996, in a special periodic report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that in discussions with the authorities in the former Yugoslavia, she had stressed that the different government agencies had the responsibility of assisting displaced persons to return to their homes in safety and dignity.[721]

768. In 1997, in his final report submitted to the UN Sub-Commission on Human Rights, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights. Article 4(3) of the draft declaration provided that "all persons thus displaced shall be allowed to return to their homes, lands, or places of origin immediately upon cessation of the conditions which made their displacement imperative". Article 8 provided that "every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice".[722]

769. In a report in 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina reiterated that "enabling refugees to return is important for a large number of reasons, including the creation of the conditions that will make the holding of free and fair elections possible".[723]

Other International Organisations

770. The Parliamentary Assembly of the Council of Europe has adopted several resolutions and recommendations emphasising the right of displaced persons to return voluntarily and in safety to their homes in Bosnia and Herzegovina, the Transcaucasian region, Serbia and Montenegro, the Former Yugoslav Republic of Macedonia, and Georgia.[724] For example, in a recommendation adopted in 1996 in the context of the former Yugoslavia, the Assembly stated that "all

[720] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Eighth periodic report, UN Doc. E/CN.4/1995/10, 4 August 1994, § 10; Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Tenth periodic report, UN Doc. E/CN.4/1995/57, 16 January 1995, § 22.

[721] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, §§ 81–83.

[722] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Articles 4(3) and 8.

[723] High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, §§ 68-73.

[724] Council of Europe, Parliamentary Assembly, Res. 1010, 28 September 1993, § 12(i)(c) and (vii); Res. 1047, 10 November 1994, § 6; Res. 1066, 27 September 1995, § 9; Rec. 1305, 24 September 1996, § 8(iii)(a); Res. 1119, 22 April 1997, §§ 5(iv) and 10.

displaced persons have the right to return to their original homes" and stressed that "such returns are an essential element of reconstruction, but that they must be voluntary".[725]

771. In a resolution adopted in 1996 on the situation in Abkhazia, the European Parliament stressed the importance of the right of all IDPs to return voluntarily to their places of origin or residence, irrespective of their ethnic, social or political affiliation, under conditions of complete safety and dignity.[726]

772. In 1996, during a debate in the UN Commission on Human Rights, Italy, speaking on behalf of the EU, called for "a peaceful settlement to the conflicts in Abkhazia and South Ossetia in order, *inter alia*, to allow the return of refugees and displaced persons".[727]

773. In 1995, during a debate in the OSCE Permanent Council on the situation in Chechnya, France stated, on behalf of the EU, that "civilians must have the choice to leave this hell if they wish, being understood that the right to return to their homes of these refugees and displaced persons shall not be later limited".[728]

774. In a declaration on Kosovo adopted in 1998, the European Council called upon the FRY President "to facilitate the full return to their homes of refugees and displaced persons".[729]

775. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council registered:

> its appreciation for Resolution 799 adopted by the UN Security Council which strongly condemned the mass expulsion by the Israeli Occupation Forces of hundreds of Palestinian civilians . . . and called on the Israeli Authorities to ensure an immediate and safe return of all those expelled to the occupied territories.

It called on the UN Security Council "to do all that it deems necessary . . . to ensure a speedy return of the expelled civilians to their Homeland".[730]

776. In a resolution on Bosnia and Herzegovina adopted in 1992, the Council of the League of Arab States decided to call upon the Serb forces to make "all necessary arrangements to allow for the repatriation of the refugees to their homes".[731]

777. In a decision on Georgia adopted in 1998, the OSCE Ministerial Council stated that, amongst others, "monitoring of the smooth and safe return of

[725] Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, §§ 2–3.
[726] European Parliament, Resolution on the situation in Abkhazia, 20 November 1996, § 5.
[727] EU, Statement by Italy on behalf of the EU before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.45, 17 April 1996, § 10.
[728] EU, Statement by France on behalf of the EU before the Permanent Council of the OSCE, Vienna, 2 February 1995, *Politique étrangère de la France*, February 1995, p. 154.
[729] European Council, Declaration on Kosovo, 15 June 1998.
[730] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, pp. 6–7.
[731] League of Arab States, Council, Res. 5231, 13 September 1992, § 5.

refugees" can contribute to a peaceful settlement of the conflict in Abkhazia, Georgia.[732]

International Conferences

778. The Comprehensive Plan of Action adopted by consensus by the International Conference on Indo-Chinese Refugees in 1989 provided that:

> Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States towards their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.[733]

779. The governments represented at the International Conference on Central American Refugees in 1989 reaffirmed "their commitment to encourage the voluntary return of refugees and other persons displaced by the crisis, under conditions of personal security and dignity that would allow them to resume a normal life".[734]

780. The Chairman's Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 stated that "the right of return home of people who have been either displaced or have fled the country is a basic principle of the Peace Agreement which cannot be abridged". The Conclusions further stated that "the creation of conditions for free and safe return, permitting the lifting of temporary protection, is now an urgent matter affecting political and economical viability of the country" and recommended urgent action with regard to "removal of legal and administrative obstacles to the return of refugees and displaced persons".[735]

IV. Practice of International Judicial and Quasi-judicial Bodies

781. In a general recommendation adopted in 1996, CERD emphasised that "States parties are obliged to ensure that the return of . . . refugees and displaced persons is voluntary".[736]

782. In a decision on the FRY adopted in 1998, CERD reaffirmed that "all people who have been displaced or have become refugees have the right to return safely to their homes".[737]

[732] OSCE, Ministerial Council, Seventh Meeting, Oslo, December 1998, Decision on Georgia, Doc. MC(7).DEC/1, fifth paragraph.

[733] International Conference on Indo-Chinese Refugees, Geneva, 13–14 June 1989, Comprehensive Plan of Action, § 12, see also §§ 14–15.

[734] International Conference on Central American Refugees (CIREFCA), Guatemala City, 29–31 May 1989, Declaration and Concerted Plan of Action, UN Doc. CIREFCA/89/14, 31 May 1989, § I(3), see also § II(10), (21), (28) and (30).

[735] Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman's Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, §§ 11 and 13.

[736] CERD, General Recommendation XXII (Article 5 of the Convention and refugees and displaced persons), 1996, § 2.

[737] CERD, Decision 3(53) on the FRY, UN Doc. A/53/18 p. 19, 17 August 1998, § 3.

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

783. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "persons . . . evacuated must be transferred back to their homes as soon as hostilities in the concerned area have ceased" and that "temporarily removed persons must be allowed to return".[738]

VI. Other Practice

784. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "persons or groups . . . displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased".[739]

785. In 1995, with respect to the Declaration of Minimum Humanitarian Standards, the IIHL commented that "in no case shall [refugees and displaced persons] be expelled or return, in any manner whatsoever, to the frontiers where their lives or freedom would be threatened on account of their race, nationality, membership of a particular social group or political opinion".[740]

Measures to facilitate return and reintegration

I. Treaties and Other Instruments

Treaties

786. Article III(59)(d)(1) of the 1953 Panmunjon Armistice Agreement provides that:

[The Committee for Assisting the Return of Displaced Civilians] shall, under the general supervision and direction of the Military Armistice Commission, be responsible for coordinating the specific plans of both sides for assistance to the return of the above-mentioned civilians, and for supervising the execution by both sides of all of the provisions of this Armistice Agreement relating to all the return of the above-mentioned civilians. It shall be the duty of this Committee to make necessary arrangements, including those of transportation, for expediting and coordinating the movement of the above-mentioned civilians; to select the crossing point(s) through which the above-mentioned civilians will cross the Military Demarcation Line; to arrange for security at the crossing point(s); and to carry out such other functions as are required to accomplish the return of the above-mentioned civilians.

[738] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 835(2) and 546.

[739] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.

[740] IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General pursuant to UN Commission on Human Rights resolution 1995/29, 28 November 1995, p 10.

787. Article V of the 1969 Convention Governing Refugee Problems in Africa provides that:

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.

788. In paragraph 5 of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties decided that:

The principal tasks of the [Quadripartite] Commission shall be to formulate, discuss and approve plans to implement programmes for safe, orderly and voluntary repatriation of the refugees and displaced persons . . . and for their successful reintegration. Such plans should include registration, transport, basic material assistance for a period of up to six months and rehabilitation assistance.

789. The 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

Article I. Rights of Refugees and Displaced Persons

. . .

2. The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination . . .
3. The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons . . .

Article II. Creation of Suitable Conditions for Return

1. The Parties undertake to create in their territories the political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons. The Parties shall provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, orderly and phased manner.

790. Article 7 of the 1996 Agreement on the Normalisation of Relations between Croatia and the FRY specifies that "the Contracting Parties shall ensure

conditions for a free and safe return of . . . displaced persons to their places of residence or other places that they freely choose".

791. The 1997 Agreement of the Joint Working Group on Operational Procedures of Return, concluded between Croatia, UNTAES and UNHCR, provided that until conditions were created for the safe return of Croatian citizens to their places of origin, displaced persons could remain in the houses they were occupying. Under the agreement, all Croatian citizens wishing to return to their homes were first required to register with the Office of Displaced Persons and Refugees (ODPR). The agreement contained a number of detailed conditions that had to be fulfilled by returnees in cooperation with the ODPR, UNTAES and the UNHCR. The agreement made provision for expediting the process of return in principle and stipulated that the confirmation of arrangements for return would be issued within 15 calendar days of registration with the ODPR and that the return should take place as soon as possible thereafter.

Other Instruments

792. Article 9 of the 1950 Statute of the UNHCR provides that "the High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the UN General Assembly may determine".

793. In paragraphs 2 and 3 of the 1991 Memorandum of Understanding between Iraq and the UN, Iraq welcomed the efforts of the UN to promote the voluntary return home of Iraqi displaced persons and agreed that measures to be taken for the benefit of displaced persons should be based primarily on their personal safety and the provision of humanitarian assistance and relief for their return and normalisation of their lives in their places of origin.

794. Paragraph 2 of the Joint Declaration by the Presidents of the FRY and Croatia (September 1992) states that:

> Authorities of the Republic of Croatia and the Federal Republic of Yugoslavia, in close collaboration with the United Nations Protection Force (UNPROFOR), will undertake urgent, joint measures to ensure the peaceful return to their homes in the United Nations protected areas of all persons displaced therefrom who so wish. To that end, they propose the prompt establishment of a quadripartite mechanism – consisting of authorities of the Government of Croatia, local Serb representatives, representatives of UNPROFOR and the Office of the United Nations High Commissioner for Refugees (UNHCR) – to ensure that this process moves forwards.

795. Paragraph 3 of the Joint Declaration by the Presidents of the FRY and Croatia (October 1992) reaffirmed that the priority task of the quadripartite mechanism established in Paragraph 2 of their Joint Declaration (September 1992) "should be to organize and facilitate the return and the resettlement, under humane conditions, of displaced persons and groups".

796. In Article 18(1) of the 1993 Cotonou Agreement on Liberia, the parties committed themselves "to create the conditions that will allow all refugees and displaced persons to, respectively, voluntarily repatriate and return to Liberia

to their places of origin or habitual residence under conditions of safety and dignity".

797. Article 23(D) of the 1993 Arusha Peace Accords and Articles 36 and 42 of the 1993 Arusha Protocol on Displaced Persons provide that displaced persons have a right to humanitarian assistance in order to facilitate their resettlement.

798. Paragraph 6 of the 1993 Afghan Peace Accord provides that "effective steps shall be taken to facilitate the return of displaced persons to their respective homes and locations".

799. Paragraph 6(iii)(1) of Chapter 4 of the 1997 Sudan Peace Agreement created several administrative structures designed, *inter alia*, "to assist, repatriate, resettle and rehabilitate the displaced and the returnees".

800. Principle 28 of the 1998 Guiding Principles on Internal Displacement states that:

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

801. In paragraph 70 of the 2000 Cairo Plan of Action, African and EU heads of State and government, in order to address the problem of refugees and displaced persons, agreed "to continue to provide assistance to refugees and displaced persons and to participate in their reintegration in conformity with international law and relevant UN Conventions".

II. National Practice

Military Manuals

802. Colombia's Basic Military Manual provides that at the end of the conflict, the parties have a duty to "facilitate the return of the displaced population and to provide them with protection and humanitarian assistance".[741]

National Legislation

803. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:

[741] Colombia, *Basic Military Manual* (1995), p. 31.

a) To plan, organize and ensure the implementation of all resettlement and return processes for displaced persons;
b) To receive new internally displaced persons and returnees and direct them to the reception centres;
...
d) To identify resettlement and return sites;
e) To monitor the overall resettlement and return process, ensuring the implementation of the norms on the resettlement of internally displaced populations;
...
g) To guarantee adequate transportation to assist populations returning to their points of origin.[742]

804. Under Colombia's Law on Internally Displaced Persons, a National System of Integral Care for the Displaced Population on Account of Violence was created in order to facilitate the integration of displaced persons in Colombian society. A National Plan was also established in order to, *inter alia*, adopt means to facilitate the voluntary return of displaced persons.[743]

805. Ethiopia's Transitional Period Charter provided that priority should be given to the rehabilitation of those sections of the population that had been forcibly uprooted.[744]

National Case-law

806. No practice was found.

Other National Practice

807. In 1997, in identical letters to the UN Secretary-General and to President of the UN Security Council, Afghanistan called upon the UN "to immediately intervene to prepare the circumstances allowing all civilians who have been deported and forcibly displaced to return to their homes".[745]

808. In 1996, during a debate in the UN Commission on Human Rights in relation to Cyprus, Angola stated that "all restrictions preventing displaced persons and refugees from returning home should be lifted".[746]

809. In 1996, during a debate in the UN Commission on Human Rights on the issue of internal displacement, Peru reported that "the government [of Peru] was conducting a major resettlement programme, including specific projects

[742] Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(a), (b), (d), (e) and (g), see also Article 3 (identification of land), Article 4 (security of site), Article 6 (state administration), Article 7 (rehabilitation of infrastructure), Article 8 (social assistance), Article 9 (water and sanitation), Article 10 (resettlement kits) and Article 11 (food).
[743] Colombia, *Law on Internally Displaced Persons* (1997), Articles 2(6) and 10(6).
[744] Ethiopia, *Transitional Period Charter* (1991), Article 14.
[745] Afghanistan, Identical letters dated 19 January 1997 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/1997/54, 21 January 1997, Annex, pp. 2–3.
[746] Angola, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.46, 22 May 1996, p. 3.

in the areas of health, education, communications and emergency assistance".[747]

810. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that "both the Government and Non-Government Organisations shall help in the rehabilitation of evacuees through socio-economic projects, skills formation and education".[748]

811. In a declaration in 1995, the Rwandan government stated that displaced persons had a right to humanitarian assistance in order to facilitate their resettlement.[749]

812. In its pleadings before the ECtHR in *Akdivar and Others v. Turkey* in 1996, the Turkish government submitted that it had introduced a programme in south-eastern Turkey to facilitate the return of displaced persons to their villages by providing the necessary infrastructure in rural areas.[750]

813. In 1992, in a meeting with the ICRC, two States recognised the right of displaced persons to return to their homes, insisting that certain minimum conditions had to be established to prompt people to return home, including meeting basic material needs, ensuring that villages had sanitary and water supply facilities, providing basic public services, establishing agreements on pension rights and education and settling employment issues.[751]

III. Practice of International Organisations and Conferences

United Nations

814. In a resolution adopted in 1993 on the situation in Georgia, the UN Security Council affirmed "the right of refugees and displaced persons to return to their homes" and called on the parties "to facilitate this".[752]

815. In two resolutions adopted in 1993 and 1994, the UN Security Council called on all parties "to cooperate with the United Nations High Commissioner for Refugees (UNHCR) and other humanitarian agencies operating in Mozambique to facilitate the speedy repatriation and resettlement of refugees and displaced persons".[753]

816. In a resolution adopted in 1995, the UN Security Council demanded that the government of Croatia "create conditions conducive to the return of those persons who had left their homes".[754]

[747] Peru, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.39, 15 April 1996, § 19.
[748] Philippines, Presidential Human Rights Committee, Res. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 10.
[749] Rwanda, Declaration of the Government of Rwanda on the decision to close the displaced camps of Gikongoro, 24 April 1995, p. 2.
[750] Turkey, Pleadings before the ECtHR, *Akdivar and Others v. Turkey*, 16 September 1996, p. 20.
[751] ICRC archive document.
[752] UN Security Council, Res. 876, 19 October 1993, § 5.
[753] UN Security Council, Res. 882, 5 November 1993, § 17; Res. 898, 23 February 1994, § 18.
[754] UN Security Council, Res. 1009, 10 August 1995, § 2.

817. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the UN Security Council urged all the parties "to fully cooperate with . . . efforts [to assist displaced persons], with a view to create conditions conducive to the repatriation and return of refugees and displaced persons in safety and dignity".[755]
818. In a resolution on Angola adopted in 1996, the UN Security Council urged the international community "to fulfil expeditiously its pledges to provide assistance to facilitate . . . the resettlement of displaced persons".[756]
819. In a resolution on Bosnia and Herzegovina adopted in 1996, the UN Security Council stressed "the importance of facilitating the return or resettlement of refugees and displaced persons" which it said "should be gradual and orderly and carried out through progressive, coordinated programmes that address the need for local security, housing and jobs".[757]
820. In a resolution on Croatia adopted in 1997, the UN Security Council noted with concern that "the lack of conditions necessary for the return of displaced persons . . . prevents the return in any substantial number of those displaced seeking to return". The Council urged the government of Croatia:

> to create the necessary conditions of security, safety and social and economic opportunity for those returning to their homes in Croatia, including the prompt payment of pensions; and to foster the successful implementation of the Agreement on Operational Procedures of Return.[758]

821. In a resolution on Georgia adopted in 1997, the UN Security Council demanded that the Abkhaz side "guarantee the safety of spontaneous returnees already in the area and regularize their status in cooperation with UNHCR and in accordance with the 1994 Quadripartite Agreement".[759]
822. In a resolution on Kosovo adopted in 1998, the UN Security Council underlined the responsibility of the FRY for creating the conditions which allow "refugees and displaced persons to return to their homes".[760] In another resolution adopted the same year, the Council demanded that the FRY "facilitate, in agreement with UNHCR and the International Committee of the Red Cross (ICRC), the safe return of refugees and displaced persons to their homes".[761]
823. In a resolution adopted in 1999, the UN Security Council expressed its deep concern about "the large-scale displacement and relocation of East Timorese civilians, including large numbers of women and children" and stressed that it was the responsibility of the Indonesian authorities "to take immediate

[755] UN Security Council, Res. 1034, 21 December 1995, §§ 17–18.
[756] UN Security Council, Res. 1075, 11 October 1996, § 22.
[757] UN Security Council, Res. 1088, 12 December 1996, § 11.
[758] UN Security Council, Res. 1120, 14 July 1997, preamble.
[759] UN Security Council, Res. 1124, 31 July 1997, preamble, §§ 11–12.
[760] UN Security Council, Res. 1199, 23 September 1998, § 4(c).
[761] UN Security Council, Res. 1203, 24 October 1998, § 12.

and effective measures to ensure the safe return of refugees in West Timor and other parts of Indonesia to East Timor".[762]

824. In 1994 and 1995, in statements by its President on the conflict in Georgia, the UN Security Council called upon the Abkhaz party "to take all necessary measures, in cooperation with UNHCR, to ensure a speedy and organized voluntary return of refugees and displaced persons".[763]

825. In 1995, in a statement by its President on Abkhazia, Georgia, the UN Security Council urged "the Abkhaz authorities to accelerate the return process significantly, to guarantee the safety of all returnees and to regularize the status of spontaneous returnees".[764]

826. In 1995, in a statement by its President, the UN Security Council called on the government of Rwanda and the international community to intensify efforts "to bring about a climate of trust and confidence which would assist in the early and safe return of refugees".[765]

827. In 1997, in a statement by its President on Georgia, the UN Security Council encouraged the UN Secretary-General "to take such steps as are necessary, in cooperation with the parties, in order to ensure a prompt and safe return of the refugees and displaced persons to their homes".[766]

828. In a resolution adopted in 1991, the UN General Assembly appealed to all parties to the conflict in Afghanistan "to cooperate fully especially on the subject of mine detection and clearance, in order to facilitate the return of refugees and displaced persons to their homes in safety and dignity, in conformity with the Agreements on the Settlement of the Situation Relating to Afghanistan".[767]

829. In a resolution adopted in 1993 on the Office of the United Nations High Commissioner for Refugees, the UN General Assembly urged all States and relevant organizations "to support the High Commissioner's search for durable solutions to refugee problems, including voluntary repatriation, integration in the country of asylum and resettlement in a third country, as appropriate," and welcomed "in particular the ongoing efforts of her Office to pursue wherever possible opportunities to promote conditions conducive to the preferred solution of voluntary repatriation".[768]

830. In a resolution adopted in 1994 on the situation of human rights in Rwanda, the UN General Assembly stressed "the need to create an environment conducive to the realization of civil, political, economic, social and cultural rights and to the return by refugees and displaced persons to their homes".[769]

[762] UN Security Council, Res. 1272, 25 October 1999, preamble and § 12.
[763] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/78, 2 December 1994, p. 1; Statement by the President, UN Doc. S/PRST/1995/12, 17 March 1995, p. 2.
[764] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/39, 18 August 1995.
[765] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/22, 27 April 1995, pp. 1–2.
[766] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/25, 8 May 1997, p. 2.
[767] UN General Assembly, Res. 46/136, 17 December 1991, § 16.
[768] UN General Assembly, Res. 48/116, 20 December 1993, § 10.
[769] UN General Assembly, Res. 49/206, 23 December 1994, § 8.

831. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly called upon the government of Croatia "to remove all legal and administrative hurdles which are preventing the return of refugees and displaced persons".[770]

832. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon the authorities of the FRY and ethnic Albanian leaders "to allow for and facilitate the free and unhindered return to their homes, in safety and dignity, of all internally displaced persons and refugees" and expressed "its concern about reports of continuing harassment or other impediments in this regard".[771]

833. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly stressed "the importance of and the responsibility of all parties to create a secure environment in Kosovo that will allow refugees and displaced persons to return".[772]

834. In a resolution adopted in 2000, the UN General Assembly urged all parties to the continuing conflict in Sudan "to respect and protect human rights and fundamental freedoms and to respect fully international humanitarian law, thereby facilitating the voluntary return, repatriation and reintegration of refugees and internally displaced persons to their homes".[773]

835. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights expressed its concern over continuing human rights violations in Bosnia and Herzegovina, including "actions that undermine the principle of the right to return, including . . . resettlement of displaced persons in homes which, under the agreement reached in Geneva on 18 March 1996, should remain vacant for six months".[774]

836. In a resolution adopted in 1999 on the situation of human rights in Burundi, the UN Commission on Human Rights encouraged "continued efforts to dismantle the regroupment camps and the return of displaced persons to their villages as and when security conditions permit".[775]

837. In a resolution adopted in 2001, the UN Commission on Human Rights urged all parties to the continuing conflict in the Sudan "to respect and protect human rights and fundamental freedoms, to respect fully international humanitarian law, thereby facilitating the voluntary return, repatriation and reintegration of refugees and internally displaced persons to their homes".[776]

838. In a resolution adopted in 1992, the UN Sub-Commission on Human Rights exhorted the government of Guatemala "to adopt measures to facilitate the return to their places of origin of refugees and displaced persons within the

[770] UN General Assembly, Res. 50/193, 22 December 1995, § 128(b).
[771] UN General Assembly, Res. 53/164, 9 December 1998, § 23.
[772] UN General Assembly, Res. 54/183, 17 December 1999, § 13.
[773] UN General Assembly, Res. 55/116, 4 December 2000, § 3(b).
[774] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 3(b).
[775] UN Commission on Human Rights, Res. 1999/10, 23 April 1999, § 6.
[776] UN Commission on Human Rights, Res. 2001/18, 20 April 2001, § 3(a).

country who wish to do so while at the same time extending all guarantees of security and full respect for human rights".[777]

839. In a resolution adopted in 1993, the UN Sub-Commission on Human Rights exhorted the government of Guatemala "to continue its constructive dialogue with refugees and internally displaced persons in order to resolve satisfactorily the question of their resettlement in Guatemala in conditions of dignity and security".[778]

840. In 1980, in its Conclusion on Voluntary Repatriation, the Executive Committee of the UNHCR "recognized the importance of refugees being provided with the necessary information regarding conditions in their country of origin in order to facilitate their decision to repatriate".[779]

841. In 1996, in its Conclusion on Humanitarian Issues in the Territory of the Former Yugoslavia, the Executive Committee of UNHCR called upon the governments of the countries of origin "to create conditions for and to ensure the organized return of refugees and displaced persons in safety and dignity in a phased and coordinated manner, in cooperation with and with the assistance of UNHCR, the host countries and the international community as a whole".[780]

842. In 1992, in a report on Cambodia, the UN Secretary-General reported that among the objectives set for repatriation and resettlement were the identification and provision of agricultural and settlement land, installation assistance, and food for an average of one year for up to 360,000 returnees, as well as the provision of limited reintegration assistance and infrastructural improvements. He noted that there was a need to identify and allocate land for resettlement and that this process would require detailed mine verification. Resettlement packages for returnees would include basic housing materials, sawn timber, poles, bamboo, plastic tarpaulin sheeting, construction tools, as well as household items and agricultural tools, and an allowance for local purchases. It was foreseen in the repatriation component of the report that food assistance would be provided for an average period of 12 months at distribution points close to the final destination of returning displaced persons.[781]

843. In 1995, in a report on the situation in Tajikistan, the UN Secretary-General reported that "as a result of the fourth round of inter-Tajik talks . . . the parties agreed to step up their efforts to ensure the voluntary, safe and dignified return of all refugees and internally displaced persons to their places of permanent residence and adopted concrete measures to that end".[782]

[777] UN Sub-Commission on Human Rights, Res. 1992/18, 27 August 1992, preamble and § 7.
[778] UN Sub-Commission on Human Rights, Res. 1993/16, 20 August 1993, § 5.
[779] UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, § e.
[780] UNHCR, Conclusion on Humanitarian Issues in the Territory of the Former Yugoslavia, UN Doc. A/50/12/Add.1, 1 January 1996, § 31(e).
[781] UN Secretary-General, Report on Cambodia, UN Doc. S/23613, 19 February 1992, pp. 33–35, §§ 132–146.
[782] UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1995/472, 10 June 1995, § 8(c).

844. In 1996, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that:

The Office of the United Nations High Commissioner for Refugees (UNHCR), in close cooperation with non-governmental organizations, initiated . . . three major projects . . . to support the reintegration of those persons who have returned to their places of residence. The first project consists of the rehabilitation of 23 schools in the security zone, including the supply of school furniture. The second project supports the Gali hospital by providing medical equipment. The third project is intended to increase the corn harvest by distributing seeds, fertilizer and diesel oil.[783]

845. In 1997, in a report on his visit to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons reported that:

A major rehabilitation programme was launched in 1993 in order to promote and support the return and reintegration process. It was considered that durable reintegration could only be effected if minimum conditions were put in place to reduce the vulnerability of the rural population to new displacements.[784]

846. In 1997, in a report on UNAVEM in Angola, the UN Secretary-General highlighted the need to coordinate the voluntary return of groups of internally displaced persons and to develop resettlement plans.[785]

847. In 1996, in a report on a mission to Burundi, the Special Rapporteur of the UN Commission on Human Rights on Extra-judicial, Arbitrary or Summary Executions stated that "the government of Burundi should elaborate and implement, without delay, a policy to improve security, which would enable the displaced . . . population . . . to return to their communes and would facilitate their reintegration and reinstallation".[786]

848. In 1996, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights suggested that:

Food, shelter and the minimum requirements for basic living should be provided [to returnees]. Priority should be given to ensuring access to food and a safe environment, free from physical dangers. This will require continued implementing of the land-mines-clearance programmes, providing medical treatment, and locating safe sources of water.[787]

[783] UN Secretary-General, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/1996/507, 1 July 1996, § 16.

[784] Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 64.

[785] UN Secretary-General, Progress report on the UNAVEM, UN Doc. S/1997/438, 5 June 1997, p. 6, § 21.

[786] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the Special Rapporteur's mission to Burundi, 19–29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 98.

[787] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1996/64, 27 February 1996, § 110.

849. In 1996, in a report on a visit to Rwanda, the Special Rapporteur of the UN Commission on Human Rights for Zaire recommended that "the government establish resettlement programmes" to facilitate the return of internally displaced persons and that these programmes should cover "housing, education, health and, above all, security for all, especially women and children".[788]
850. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that, in spite of the provisions contained in the 1995 Dayton Accords, the authorities in the Republika Srpska had actively prevented displaced Bosniacs from returning to their villages.[789]
851. In 1998, in a report on developments in the former Yugoslavia, the UNHCR Standing Committee welcomed the "Open Cities" initiative, whereby municipalities agreed to facilitate the return of minorities in combination with assistance from the international community.[790]
852. In a report in 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina stated that "a significant proportion of displaced persons and refugees will return voluntarily if, in practice, a secure and safe environment exists, and if adequate shelter and essential services are available or likely to become so soon".[791]

Other International Organisations
853. In several recommendations on Kosovo adopted in 1998, the Parliamentary Assembly of the Council of Europe emphasised that the authorities of the FRY and Serbia must create the material and security conditions necessary to enable IDPs and refugees to return voluntarily in safety and dignity to their own homes.[792]
854. In several resolutions and decisions adopted between 1995 and 1997, the OAU Council of Ministers urged member States to create conditions conducive to the voluntary return of displaced persons to their places of habitual residence and to facilitate this process.[793]

[788] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the Special Rapporteur's visit to Rwanda, 6–14 July 1996, concerning ethnic conflict in the Northern Kivu region, UN Doc. E/CN.4/1997/6/Add.1, 16 September 1996, § 126 (j).
[789] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, § 13.
[790] UNHCR, Standing Committee Report: Update on Regional Developments in the Former Yugoslavia, UN Doc. EC/48/SC/CRP.10, 2 April 1998, §§ 5, 21 and 22.
[791] High Representative for the implementation of the Bosnian peace agreement, Report, UN Doc. S/1996/190, 14 March 1996, § 70.
[792] Council of Europe, Parliamentary Assembly, Rec. 1376, 24 June 1998, § 12(iv); Rec. 1384, 24 September 1998, § 2; Rec. 1385, 24 September 1998, § 2.
[793] OAU, Council of Ministers, Res. 1589 (LXII), 21–23 June 1995, § 9; Res. 1653 (LXIV), 1–5 July 1996, § 4; Doc. CM/Draft/Dec. (LXV) Rev.1, 24–28 February 1997, p. 14; Decision 362 (LXVI), 28–31 May 1997, § e.

855. In the Final Declaration of the Kosovo International Human Rights Conference in 1999, the OSCE stated that "conditions have to be created to allow for the safe return of refugees and internally displaced persons across Kosovo".[794]

International Conferences

856. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the implementation of GC IV, particularly in the occupied territories in the Middle East, in which it requested the authorities concerned "to fulfil their humanitarian obligations by facilitating the return of the people to their homes and their reintegration into their communities".[795]

857. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC IV in the Middle East in which it requested the authorities concerned "to fulfil their humanitarian obligations in facilitating the return of people to their homes and their reintegration into their communities".[796]

858. The Concerted Plan of Action adopted at the International Conference on Central American Refugees in 1989 stressed the necessity of according humanitarian treatment to internally and externally displaced persons, which presumed, in principle, facilitating the return to their homes and the reconstruction of their communities.[797]

859. In a resolution adopted in 1992 on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, the 88th Inter-Parliamentary Conference called on parties "to ensure conditions for the safe return to their homes of all refugees and displaced persons".[798]

860. In a resolution adopted in 1993 on the need for urgent action in the former Yugoslavia, particularly as regards the protection of minorities and the prevention of further loss of life in order that peaceful co-existence and respect for human rights can be restored for all peoples, the 89th Inter-Parliamentary Conference urged "the creation of the necessary conditions for the safe repatriation of all displaced civilians and refugees to their homes as soon as possible".[799]

[794] OSCE, Kosovo International Human Rights Conference, Pristina, 10–11 December 1999, Final Declaration, § 4.

[795] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. X, § 3.

[796] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. III.

[797] International Conference on Central American Refugees (CIREFCA), Guatemala City, 29–31 May 1989, Declaration and Concerted Plan of Action, UN Doc. CIREFCA/89/14, 31 May 1989, § I(28–30).

[798] 88th Inter-Parliamentary Conference, Stockholm, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, 12 September 1992, § 3.

[799] 89th Inter-Parliamentary Conference, New Delhi, Resolution on the need for urgent action in the former Yugoslavia, particularly as regards the protection of minorities and the prevention of further loss of life in order that peaceful co-existence and respect for human rights can be restored for all peoples, 17 April 1993, § 11.

861. The Chairman's Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 reiterated the importance of the "free and safe return" of IDPs and refugees and laid out detailed provisions designed to facilitate such return.[800]

862. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that displaced persons "are able to return voluntarily, in peaceful conditions and in safety to their homes or to resettle voluntarily elsewhere".[801]

IV. Practice of International Judicial and Quasi-judicial Bodies

863. In 1995, in its consideration of the report of Russia, the HRC urged that "appropriate and effective measures be adopted to enable all persons displaced as a consequence of the events that occurred in North Ossetia in 1992 to return to their homeland" and that "adequate measures be adopted to alleviate the conditions of all displaced persons following the fighting in Chechnya, including measures aimed at facilitating their return to their towns and villages".[802]

864. In 1994, in its concluding observations on the report of Sudan, CERD recommended that "concrete steps be taken to encourage the voluntary return of all refugees and persons displaced in the conflict".[803]

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

865. No practice was found.

VI. Other Practice

866. The Report on SPLM/A Practice notes that the SPLM/A supported an appeal by the House of Bishops of Sudan in February 1998, which called upon donors, NGOs and other international organisations "to assist in the repatriation of 14,000 displaced citizens of Bor who are desperately waiting to go home".[804]

[800] Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman's Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, §§ 11–15.

[801] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(c).

[802] HRC, Consideration of the report of the Russian Federation, UN Doc. CCPR/C/79/Add.54, 26 July 1995, §§ 41 and 45.

[803] CERD, Concluding observations on the report of Sudan, UN Doc. A/49/18, 19 September 1994, p. 72, § 476.

[804] Report on SPLM/A Practice, 1998, Chapter 5.5, referring to Appeal for repatriation of Bor displaced people by the House of Bishops meeting in Nairobi, 6 February 1998.

Assessment visits prior to return

I. Treaties and Other Instruments

Treaties

867. In Paragraph 10 of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that "representatives of refugees and displaced persons will be provided with facilities to visit the areas of return and to see for themselves arrangements made for their return".

Other Instruments

868. Principle 28(1) of the 1998 Guiding Principles on Internal Displacement stipulates that:

> Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

II. National Practice

869. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

870. In 1980, in a Conclusion on Voluntary Repatriation, the Executive Committee of the UNHCR recognized that "visits by individual refugees or refugee representatives to their country of origin to inform themselves of the situation there . . . could also be of assistance" in facilitating the decision of repatriation.[805]

871. In September 1992, in a report concerning the former Yugoslavia, the UN Secretary-General reported "an encouraging development . . . involving daytime visits by refugees from one side of the Sector to the other to start work on the rehabilitation of their houses".[806] In a further report in November, the Secretary-General noted that a "programme for displaced persons to visit their villages and former homes has been accelerated with the cooperation of the two sets of local authorities".[807]

[805] UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, § e.

[806] UN Secretary-General, Further report pursuant to Security Council resolutions 743 (1992) and 762 (1992), UN Doc. S/24600, 28 September 1992, § 21.

[807] UN Secretary-General, Further report pursuant to Security Council resolution 743 (1992), UN Doc. S/24848, 24 November 1992, § 18.

872. In 1996, in a report concerning Bosnia and Herzegovina, the UN Secretary-General reported that attempts by UNHCR to gain permission to organise visits by displaced persons to their homes in "non-majority areas" had largely been refused by the authorities of the Federation of Bosnia and Herzegovina and the Republika Srpska "on grounds of lack of security guarantees or clear instructions from the leadership concerned. In other instances, visits by one ethnic group are conditioned on the other ethnic group being able to visit their own homes on the other side."[808]

873. In 1996, in a special periodic report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that groups of villagers were able to visit their homes in Montenegro with a view to returning there. Requests for a similar programme in Serbia had not been answered.[809]

874. In 1997, in a report on his visit to Mozambique, the Special Representative of the UN Secretary-General on Internally Displaced Persons reported that:

> Return was normally initiated once information on the security situation in the home area had been received and initial preparations had been made for resettlement. Often, one or two family members would travel to the area of origin and assess the situation while the rest of the family remained in the area of flight.[810]

Other International Organisations

875. No practice was found.

International Conferences

876. The Chairman's Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 called for "co-operation by the parties under UNHCR guidelines for visits by refugees and displaced persons to their localities ("assessment visits")".[811]

IV. Practice of International Judicial and Quasi-judicial Bodies

877. No practice was found.

[808] UN Secretary-General, Report of pursuant to Security Council resolution 1035 (1995), UN Doc. S/1996/210, 29 March 1996, § 19.

[809] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 83.

[810] Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 54.

[811] Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman's Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, § 13.

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

878. No practice was found.

VI. Other Practice

879. No practice was found.

Amnesty to encourage return

Note: *For practice concerning amnesty for participation in armed conflict in general, see Chapter 44, section D.*

I. Treaties and Other Instruments

Treaties

880. In paragraph 3(c) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

> Displaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings. Such immunity shall not apply to persons where there are serious evidences that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict. Such immunity shall also not apply to persons who have previously taken part in the hostilities and are currently serving in armed formations . . . Persons falling into these categories should be informed through appropriate channels of the possible consequences they may face upon return.

881. The 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that "any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law . . . or a common-law crime unrelated to the conflict, shall upon return enjoy an amnesty".

Other Instruments

882. Paragraph 2 of the 1997 Protocol on Tajik Refugees provides that:

> The Government of the Republic of Tajikistan assumes the obligation . . . not to institute criminal proceedings against returning refugees or displaced persons for their participation in the political confrontation and the civil war, in accordance with the legislation in force in the Republic.

II. National Practice

883. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

884. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General noted that:

> One potential obstacle to the return of young adult males is the requirement that they first undergo interrogations by Croatian authorities concerning their activities on behalf of the so-called "Republic of Serb Krajina". In the absence of broad amnesty legislation, these interrogations have caused widespread apprehension among potential returnees, as well as delays in the processing of applications.[812]

885. In 1996, in a statement before the UN Commission on Human Rights, the UN High Commissioner for Refugees stated that "personal security was evidently of critical importance in the context of peaceful and dignified return. The amnesty adopted by the Bosnian parliament, covering, *inter alia*, draft evaders and deserters, was thus a very welcome step."[813]

886. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that:

> The new Law on Amnesty passed by the Parliament [of Croatia]... has been hailed by most observers as a significant step towards both the return of Croatian Serb refugees and the peaceful reintegration of the region of Eastern Slavonia into the rest of the country. However, the Special Rapporteur's attention has been draw to the need to scrutinize the Law's application in practice... The potential benefit of the new amnesty legislation in raising the confidence of Croatia's Serb population and encouraging returns would be substantially damaged if persons still found themselves the subject of criminal proceedings.[814]

Other International Organisations

887. In a recommendation on Kosovo adopted in 1998, the Parliamentary Assembly of the Council of Europe urged the FRY authorities to create the conditions for displaced persons to return voluntarily in safety and dignity to their own homes, including "providing and respecting an amnesty for those wishing to return".[815]

International Conferences

888. No practice was found.

[812] UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council resolution 1019 (1995), UN Doc. S/1996/691, 23 August 1996, § 22.
[813] UN High Commissioner for Human Rights, Statement before the UN Commission on Human Rights, Summary Record, UN Doc. E/CN.4/1996/SR.4, 25 March 1996, § 54.
[814] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, §§ 54–57.
[815] Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(b).

IV. Practice of International Judicial and Quasi-judicial Bodies

889. No practice was found.

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

890. No practice was found.

VI. Other Practice

891. No practice was found.

Non-discrimination

Note: *For practice concerning non-discrimination in general, see Chapter 32, section B.*

I. Treaties and Other Instruments

Treaties

892. Article 5 of the 1969 Convention Governing Refugee Problems in Africa provides that:

> Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made . . . inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin would enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished.

893. In paragraph 3(a) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that "displaced persons/refugees have the right to return voluntarily to their places of origin or residence irrespective of their ethnic, social or political affiliation under conditions of complete safety, freedom and dignity".

894. Articles I and II of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords stated that:

> The parties shall take immediately the following building measures: the repeal of domestic legislation and administrative practices with discriminatory intent or effect . . .
>
> The parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.
>
> The parties shall not discriminate against returning displaced persons.

895. The 1997 Agreement of the Joint Working Group on Operational Procedures of Return stated that "the government of Croatia shall provide equal access and equal treatment for safe return, reconstruction, and other mechanisms specified . . . for all Croatian citizens who in 1991 resided in the Croatian Danube region . . . or who are currently living there".

Other Instruments

896. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons affirmed that voluntary return with full guarantees of security and non-discrimination was the basic right of the displaced.

897. The 1992 General Peace Agreement for Mozambique provided that "Mozambican refugees and displaced persons shall not forfeit any of the rights and freedoms of other citizens for having left their original place of residence . . . [and] shall be registered and included in electoral rolls together with other citizens in their places of residence".

898. In Article 18(2) of the 1993 Cotonou Agreement on Liberia, the parties called upon "Liberian refugees and displaced persons to return to Liberia and to their places of origin or habitual residence" and declared that "they shall not be jeopardized in any ethnic, political, religious, regional or geographical considerations".

899. Principle 29(1) of the 1998 Guiding Principles on Internal Displacement provides that:

> Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

II. National Practice

Military Manuals

900. No practice was found.

National Legislation

901. According to Colombia's Law on Internally Displaced Persons, forcibly displaced persons have the right not to be discriminated against on account of their social condition, race, religion, political opinion, place of origin or physical disability.[816]

National Case-law

902. No practice was found.

[816] Colombia, *Law on Internally Displaced Persons* (1997), Article 2(3).

Other National Practice

903. In 1997, in letters to the UN Secretary-General and the President of the UN Security Council, Afghanistan called upon the UN "to prepare the circumstances allowing all civilians who have been deported and forcibly displaced to return to their homes without being subjected to discrimination on the basis of gender, age or ethnic origin".[817]

III. Practice of International Organisations and Conferences

United Nations

904. In 1994, in a statement by its President, the UN Security Council called upon the government of Rwanda "to ensure that there are no reprisals against those wish[ing] to return to their homes and resume their occupation".[818]

905. In 1996, in a statement by its President, the UN Security Council called upon the government of Croatia "to stop all forms of discrimination against the Croatian Serb population in the provision of social benefits and reconstruction assistance".[819]

906. In 1980, in a Conclusion on Voluntary Repatriation, the Executive Committee of UNHCR stressed the importance "of returning refugees not being penalized for having left their country of origin for reasons giving rise to refugee situations".[820]

907. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General noted that a law adopted by the Croatian parliament on areas of special national interest promised "various benefits, including lower taxes and the possibility of gaining ownership of property after 10 years of occupancy, to persons moving to the region". The Secretary-General added, however, that "although the law by its terms applies equally to Serbs and Croats, the difficulties being encountered by Croatian Serbs wishing to return makes it likely that Croats rather than Serbs will be the main beneficiaries of these measures".[821]

908. In 1996, in a special report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that an "area of concern . . . involves difficulties which Croatian Serbs have encountered in acquiring documents necessary to obtain social benefits".[822]

[817] Afghanistan, Identical letters dated 19 January 1997 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/1997/54, 21 January 1997, p. 3.

[818] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/42, 10 August 1994, p. 2.

[819] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, pp. 1–2.

[820] UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, § f.

[821] UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/456, 21 June 1996, § 26.

[822] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, §§ 127–128.

Other International Organisations
909. No practice was found.

International Conferences
910. The Concerted Plan of Action adopted at the International Conference on Central American Refugees in 1989 stated that returning persons should not be subject to discrimination.[823]

IV. Practice of International Judicial and Quasi-judicial Bodies

911. No practice was found.

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

912. No practice was found.

VI. Other Practice

913. No practice was found.

E. Property Rights of Displaced Persons

Safeguard of property rights

I. Treaties and Other Instruments

Treaties
914. Article 1 of the 1952 Protocol to the ECHR provides that "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
915. Article 21(1) of the 1969 ACHR states that "everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."
916. Article 14 of the 1981 ACHPR provides that "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

[823] International Conference on Central American Refugees (CIREFCA), Guatemala City, 29–31 May 1989, Declaration and Concerted Plan of Action, UN Doc. CIREFCA/89/14, 31 May 1989, § I(21).

Other Instruments

917. Paragraph 4(a) of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provides that each party to the conflict guarantees to those who leave temporarily the territory it controls that "their goods, assets and belongings will be respected and protected".

918. Principle 21 of the 1998 Guiding Principles on Internal Displacement stipulates that:

1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
   (a) Pillage;
   (b) Direct or indiscriminate attacks or other acts of violence;
   (c) Being used to shield military operations or objectives;
   (d) Being made the object of reprisal; and
   (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

II. National Practice

Military Manuals

919. No practice was found.

National Legislation

920. Since 1997, the Federation of Bosnia and Herzegovina has adopted new property laws safeguarding property rights in order to implement the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords. These laws mainly deal with abandoned property and occupancy rights. It has also adopted instructions, claim forms and information sheets.[824]

921. In 1998, the Republika Srpska of Bosnia and Herzegovina adopted a new property law safeguarding property rights in order to implement the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords. This law mainly deals with abandoned property. It also adopted instructions, claim forms and information sheets.[825]

922. According to Colombia's Law on Internally Displaced Persons, IDPs have the right to retain ownership and possession of abandoned property.[826]

[824] Bosnia and Herzegovina, Federation, *Law on Sale of Apartments with Occupancy Rights* (1997); *Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens* (1998); *Law on the Cessation of the Application of the Law on Abandoned Apartments* (1998).

[825] Bosnia and Herzegovina, Republika Srpska, *Law on the Cessation of the Application of the Law on the Use of Abandoned Property* (1998).

[826] Colombia, *Law on Internally Displaced Persons* (1997), Article 18.

National Case-law

923. According to Colombian case-law, IDPs have the right to retain ownership and possession of abandoned property.[827]

Other National Practice

924. In 1996, during a debate in the UN Commission on Human Rights in relation to Bosnia and Herzegovina, Egypt stated that "refugees and displaced persons must be allowed to . . . recover their possessions".[828]

III. Practice of International Organisations and Conferences

United Nations

925. In February 1996, in a statement by its President on Croatia, the UN Security Council referred to the right of the local Serb population "to return to their homes . . . and to reclaim possession of property".[829] In another statement by its President in December on returning refugees and IDPs in Croatia, the UN Security Council deplored "the continued failure by the government of Croatia to effectively safeguard the property rights [of refugees and IDPs], especially the situation where many of the Serbs who had returned to the former sectors had been unable to regain possession of their properties".[830]

926. In a resolution adopted in 1996, the UN Commission on Human Rights expressed its concern over continuing human rights violations within Bosnia and Herzegovina, including "actions that undermine the principle of the right to return, including enforcement of legislation which restricts rights to claim 'socially owned' property throughout the State of Bosnia and Herzegovina".[831]

927. In a resolution adopted in 1998 on housing and property restitution in the context of the return of refugees and internally displaced persons, the UN Sub-Commission on Human Rights confirmed that:

> The adoption or application of laws by States which are designed to or result in the loss or removal of tenancy, use, ownership or other rights connected with housing or property, the active retraction of the right to reside within a particular place, or laws of abandonment employed against refugees or internally displaced persons pose serious impediments to the return and reintegration of refugees and internally displaced persons and to reconstruction and reconciliation.[832]

[827] Colombia, Constitutional Court, *Constitutional Case No. C-092*, Judgement, 7 March 1996.
[828] Egypt, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.47, 17 April 1996, § 35.
[829] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/8, 23 February 1996, p. 2.
[830] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, pp. 1–2.
[831] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 3(b).
[832] UN Sub-Commission on Human Rights, Res. 1998/26, 22 August 1998, § 3.

928. In 1996, in a report on the situation in Bosnia and Herzegovina, the UN Secretary-General noted that:

An independent Commission for Real Property Claims of Displaced Persons and Refugees has been established . . . Its function is to receive and decide any claims for real property in Bosnia and Herzegovina where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not enjoy possession of the property.[833]

929. In 1996, in a special report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that "the Croatian authorities must act firmly to safeguard property rights of Serbs in the former sectors".[834] In another report in 1997, the Special Rapporteur recommended that any "laws on the allocation of abandoned property inconsistent with the Dayton agreements and international law must immediately be repealed".[835]

930. Since September 1998, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina has adopted numerous decisions in the field of property laws and return of displaced persons and refugees. These decisions mainly deal with occupancy rights, abandoned property, socially owned property and return of confiscated property.[836]

Other International Organisations

931. No practice was found.

International Conferences

932. The Chairman's Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 called on:

the Commission on Real Property Claims for Refugees and Displaced Persons now established in Sarajevo with the assistance of the International Organisation for Migration (IOM), to proceed urgently with its task of registration so as to provide property owners with the assurance that their rights will be preserved on local authorities to cooperate with the Commission on the parties to repeal or appropriately amend property laws which are inconsistent with the right, as set out in the Peace Agreement, of return and to their property.[837]

[833] UN Secretary-General, Report pursuant to resolution 1035 (1995), UN Doc. S/1996/210, 29 March 1996, § 20.

[834] UN Commission on Human Rights, Special Rapporteur on the situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 127.

[835] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/56,29 January 1997, § 55.

[836] Office of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Decisions in the field of property laws and return of displaced persons and refugees, available on www.ohr.int.

[837] Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman's Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, § 15.

IV. Practice of International Judicial and Quasi-judicial Bodies

933. No practice was found.

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

934. No practice was found.

VI. Other Practice

935. No practice was found.

Transfer of property under duress

I. Treaties and Other Instruments

Treaties
936. Article 11 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords established a Commission for Displaced Persons and Refugees which would "receive and decide any claim for real property in Bosnia and Herzegovina". Article 12(3) of the Agreement provided that:

> in determining the lawful owner of any property, the Commission would not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing.

Other Instruments
937. Paragraph 4(c) of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provided that each party to the conflict guaranteed to those who left temporarily the territory it controlled that "any document, including a document renouncing or transferring property rights, assets or claims signed by a person who is about to leave temporarily has no legal validity and does not affect in any way that person's rights or obligations".
938. According to Paragraph 6 of the Joint Declaration by the Presidents of the FRY and Croatia (September 1992), "all statements or commitments made under duress, particularly relating to land and property, are wholly null and void".

II. National Practice

Military Manuals
939. No practice was found.

National Legislation
940. No practice was found.

National Case-law
941. No practice was found.

Other National Practice
942. In 1992, during a debate in the UN Security Council on Bosnia and Herzegovina, Austria emphasised that where persons were forced to sign statements renouncing their property rights, there could be no doubt that such documents were null and void.[838]

III. Practice of International Organisations and Conferences

United Nations
943. In a resolution adopted in 1992 in the context of the conflict in the former Yugoslavia, the UN Security Council endorsed the principles agreed by the Presidents of Croatia and the SFRY on 30 September 1992 that "all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void".[839] These principles were reaffirmed in a resolution adopted in 1993.[840]
944. In two resolutions adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Security Council reaffirmed its support for the established principle that "all statements or commitments made under duress, particularly those regarding land ownership, are null and void".[841]
945. In two resolutions adopted in 1993 and 1994 in the context of the conflict in the former Yugoslavia, the UN General Assembly considered "invalid all acts made under duress affecting ownership of property and other related questions".[842]
946. In a resolution on the former Yugoslavia adopted in 1994, the UN General Assembly reaffirmed that "the consequence of ethnic cleansing shall not be accepted by the international community and that those who have seized land and other property by ethnic cleansing and by the use of force must relinquish those lands, in conformity with norms of international law".[843]
947. In a resolution adopted in 1995 on the situation of human rights in the Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly, in relation to the property of refugees and displaced persons, considered "null any commitment made under duress".[844]

[838] Austria, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 23.
[839] UN Security Council, Res. 779, 6 October 1992, § 5.
[840] UN Security Council, Res. 820 A, 17 April 1993, § 7.
[841] UN Security Council, Res. 941, 23 September 1994, § 3; Res. 947, 30 September 1994, § 8.
[842] UN General Assembly, Res. 48/153, 20 December 1993, § 13; Res. 49/196, 23 December 1994, § 13.
[843] UN General Assembly, Res. 49/10, 3 November 1994, § 8.
[844] UN General Assembly, Res. 50/193, 22 December 1995, § 12.

948. In a resolution adopted in 2000 on the situation in Bosnia and Herzegovina, the UN General Assembly reaffirmed "its support for the principle that all statements and commitments made under duress, particularly those regarding land and property, are wholly null and void".[845]
949. In several resolutions adopted between 1992 and 1995, the UN Commission on Human Rights emphasised the invalidity of acts made under duress in relation to the forcible transfer of the property rights of displaced persons in the former Yugoslavia.[846]
950. In resolutions adopted in 1993 and 1995, the UN Sub-Commission on Human Rights recommended that the UN and the governments concerned take measures to enable the properties of returning displaced persons in the former Yugoslavia to be restored to them, any documents signed by them under duress being rejected.[847]

Other International Organisations
951. No practice was found.

International Conferences
952. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

953. In a General Recommendation adopted in 1996, CERD emphasised that "any commitments or statements relating to [the] property [of returning displaced persons] made under duress are null and void".[848]

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

954. No practice was found.

VI. Other Practice

955. No practice was found.

[845] UN General Assembly, Res. 55/24, 14 November 2000, § 19.
[846] UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 4; Res. 1994/72, 9 March 1994, § 8; Res. 1994/75, 9 March 1994, § 5; Res. 1995/89, 8 March 1995, § 8.
[847] UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, § 7; Res. 1995/8, 18 August 1995, § 5.
[848] CERD, General Recommendation XXII (Article 5 of the Convention and refugees and displaced persons), 1996, § 2.

Return of property or compensation

Note: *For practice concerning reparation for damage sustained as a result of violations of international humanitarian law in general, see Chapter 42, section B.*

I. Treaties and Other Instruments

Treaties

956. Article 16 of the 1989 Indigenous and Tribal Peoples Convention states that:

> 4. When . . . return [to their traditional lands] is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
> 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

957. In paragraph 3(g) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed to the principle that:

> Returnees, upon return, get back movable and immovable properties they left behind and should be helped to do so, or to receive wherever possible an appropriate compensation for their lost properties if return of property does not appear feasible. [A Quadripartite] Commission . . . will establish a mechanism for such property claims. Such compensation should be worked out in the framework of the reconstruction/rehabilitation programmes to be established with financial assistance through the United Nations Voluntary Fund.

958. Article I(1) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that "all refugees and displaced persons . . . shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them".

959. Article VII of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords established an independent Commission for Displaced Persons and Refugees, the mandate of which, according to Article XI, was to:

> receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

960. Article XII(2) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that "any person requesting the return

of property who is found by the Commission to be the lawful owner of that property shall be awarded its return".

Other Instruments

961. Article IV(e) of the 1992 General Peace Agreement for Mozambique provided that "refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it".

962. Paragraph 6 of the 1993 Afghan Peace Accord provided that "all public and private buildings, residential areas and properties occupied by different armed groups during the hostilities shall be returned to their original owners".

963. In Article 7 of the 1996 Agreement on the Normalisation of Relations between Croatia and the FRY, the parties agreed to ensure that displaced persons returned into possession of their property or a just compensation. It also specified that within six months from the date of entry into force of the Agreement, the contracting parties would conclude an agreement on compensation for all destroyed, damaged or lost property.

964. Principle 29(2) of the 1998 Guiding Principles on Internal Displacement provides that "when recovery of property and possessions [left behind by IDPs] is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation".

II. National Practice

Military Manuals

965. No practice was found.

National Legislation

966. No practice was found.

National Case-law

967. In the *Turundžić case* before the Human Rights Chamber of the Commission on Human Rights of Bosnia and Herzegovina in 2001, the applicants were citizens of the Federation of Bosnia and Herzegovina who held pre-war occupancy rights to apartments in Mostar, but left due to wartime hostilities. They thereafter filed repossession claims with the Commission for Real Property Claims of Displaced Persons and Refugees, which recognized the applicants' occupancy rights. The applicants' subsequent enforcement requests to the competent municipal organs went unanswered. The applicants consequently filed applications against the Federation with the Human Rights Chamber for Bosnia and Herzegovina, claiming under the 1950 ECHR respect for the home and peaceful enjoyment of property. The Chamber held that the authorities' failure

to enforce the Commission's decisions in question constituted an "ongoing interference" with the applicants' rights to respect for the home and peaceful enjoyment of property. The Chamber ordered the Federation to take all necessary steps to enforce the decisions without further delay, and further awarded compensation.[849]

Other National Practice

968. In 1992, during a debate in the UN Security Council on displaced persons in Bosnia and Herzegovina, Austria stated that compensation should be given for property that had been destroyed.[850]

969. In 1996, in a letter to the Chairman of the UN Commission on Human Rights, Croatia highlighted the fact that legislation relating to the property rights of IDPs and refugees had been amended. The legislation provided that "if the owner of a property returns to the Republic of Croatia he is entitled to use his or her property". The amendment had lifted "the time limit for the return of the persons who had abandoned their property".[851]

970. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that:

> The government shall indemnify the people of damages for the injuries they have suffered, in particular: (a) for all houses which were destroyed or which were ordered dismantled and demolished, and (b) for reasonable value of their personal properties as a result of the evacuation.[852]

971. In 1995, during a debate in the UN Security Council on the former Yugoslavia, Russia stated that "any attempt to introduce a time-limit for [Serbian inhabitants of Krajina] to reclaim their property is unacceptable".[853]

III. Practice of International Organisations and Conferences

United Nations

972. In a resolution adopted in November 1995, the UN Security Council reiterated its call upon the government of Croatia "to lift any time-limits placed on the return of refugees to Croatia to reclaim their property".[854]

973. In 1995, in a statement by its President, the UN Security Council asked the government of Croatia "as a matter of urgency . . . [to] lift any time limits

[849] Bosnia and Herzegovina, Commission on Human Rights (Human Rights Chamber), *Turundžić case*, Decision, 8 February 2001.

[850] Austria, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 23.

[851] Croatia, Letter dated 15 April 1996 to the Chairman of the UN Commission on Human Rights, UN Doc. E/CN.4/1996/159, 15 April 1996, p. 10, § 22.

[852] Philippines, Presidential Human Rights Committee, Res. No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 9.

[853] Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

[854] UN Security Council, Res. 1019, 9 November 1995, § 7.

placed on the return of refugees to reclaim their property" and noted that the deadline fixed by the Croatian authorities "constituted a virtually insurmountable obstacle for most Serb refugees".[855]

974. In 1996, in a statement by its President, the UN Security Council reiterated its appeal to Croatia to lift the time limits on return to reclaim property and stated that the decision to suspend the deadline constituted a step in the right direction which should be followed.[856]

975. In 1997, in a statement by its President, the UN Security Council called upon the government of Croatia "to promptly resolve the property issue by a return of property or just compensation".[857]

976. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly recognized "the right of refugees and displaced persons . . . to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that can not be restored to them".[858]

977. In a resolution adopted in 2000 on the situation in Bosnia and Herzegovina, the UN General Assembly called upon all sides "to implement the property laws imposed on 27 October 1999, in particular by evicting illegal occupants from the homes of returning refugees".[859]

978. In a resolution adopted in 1994, the UN Commission on Human Rights appealed to those in control of the territory of Abkhazia "to ensure the right of displaced persons and to recover their property".[860]

979. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montegnegro), the UN Commission on Human Rights noted the commitment made in the 1995 Dayton Accords that returning displaced persons would either "have their property restored or receive compensation for property that cannot be restored to them". It further expressed its concern over continuing human rights violations within Bosnia and Herzegovina, including actions that undermined the principle of the right to return, such as "unjustified evictions of persons from their homes".[861]

980. In a resolution adopted in 1997 on human rights in the occupied Syrian Golan, the UN Commission on Human Rights emphasised that "the

[855] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/63, 22 December 1995, p. 1.
[856] UN Security Council, Statement by the President, UN Doc. S/PRST/1996/2, 8 January 1996, p. 2.
[857] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/15, 19 March 1997, p. 1.
[858] UN General Assembly, Res. 50/193, 22 December 1995, § 12.
[859] UN General Assembly, Res. 55/24, 14 November 2000, § 19.
[860] UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 5.
[861] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, preamble and § 3(b).

displaced persons of the population of the occupied Syrian Golan must be allowed to . . . recover their properties".[862]

981. In a decision on Yugoslavia adopted in 1992, the UN Sub-Commission on Human Rights demanded that "full reparation be made for losses suffered as a result of the displacement".[863]

982. In a resolution adopted in 1993 with regard to the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights called for "the effective eradication of the tragic consequences of the aggression and the human rights violations in the Republic of Bosnia and Herzegovina, through joint international efforts for the reconstruction of the country". It recommended that:

> To this end, steps be taken through concerted international action and by the relevant international bodies to enable all refugees, deportees and displaced persons to return safely to their homes in the Republic of Bosnia and Herzegovina, and their properties to be restored to them, any documents signed by them under duress being rejected.[864]

983. In a resolution adopted in 1995 concerning the former Yugoslavia, the UN Sub-Commission on Human Rights recommended that the UN and the governments concerned take measures to enable the properties of returning displaced persons to be restored to them or, failing this, that compensation be paid.[865]

984. In a resolution adopted in 1998 on housing and property restitution in the context of the return of refugees and internally displaced persons, the UN Sub-Commission on Human Rights urged all States:

> to ensure the free and fair exercise of the right to return to one's home and place of habitual residence by all refugees and internally displaced persons and to develop effective and expeditious legal, administrative and other procedures to ensure the free and fair exercise of this right, including fair and effective mechanisms designed to resolve outstanding housing and property problems.[866]

985. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights emphasised that all displaced persons, "irrespective of their ethnic origins, have a fundamental right to return to their properties and that this has to be ensured".[867]

986. In a progress report submitted to the UN Sub-Commission on Human Rights in 1994, the UN Special Rapporteur on the Human Rights Dimensions

[862] UN Commission on Human Rights, Res. 1997/2, 26 March 1997, § 2.
[863] UN Sub-Commission on Human Rights, Decision 1992/103, UN Doc. E/CN.4/Sub.2/1992/58, 14 October 1992, § (d).
[864] UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, §§ 6–7.
[865] UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, §§ 5–6.
[866] UN Sub-Commission on Human Rights, Res. 1998/26, 22 August 1998, § 4.
[867] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, § 23.

of Population Transfer, including the Implantation of Settlers and Settlements stated that:

> 137. In situations where transfer is not unlawful, damage occurs nevertheless to the transferred group, and it ought, as a matter of equity, to receive compensation. An innocent victim should not be left to bear his loss alone . . .
> 138. The practice of international organs with regard to conflicts . . . confirms that restitution in kind is normally demanded in the form of reparation. Compensation is either explicitly mentioned, as in the case of the Palestinian refugees, or implicit in the language of the resolution referring to other conflicts.[868]

987. In 1997, in his final report submitted to the UN Sub-Commission on Human Rights, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights. Article 8 of the draft declaration provided that:

> The exercise of the right to return does not preclude the victims' right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.[869]

Other International Organisations

988. In an opinion adopted in 1996 on Croatia's request for membership of the Council of Europe, the Parliamentary Assembly of the Council of Europe stated that Croatia had undertaken among other things to allow displaced persons "effectively to exercise their rights to recover their property or receive compensation".[870] The Parliamentary Assembly repeated its call for the authorities to ensure that returnees were allowed either to recover their property or to receive proper compensation in two separate recommendations in 1996 on the implementation of the 1995 Dayton Accords.[871]

International Conferences

989. No practice was found.

[868] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Progress report, UN Doc. E/CN.4/Sub.2/1994/18, 30 June 1994, §§ 137–138.

[869] UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Article 8.

[870] Council of Europe, Parliamentary Assembly, Opinion 195, 24 April 1996, § 9(viii).

[871] Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, § 2; Rec. 1297, 25 April 1996, § 5(iii).

IV. Practice of International Judicial and Quasi-judicial Bodies

990. In a General Recommendation adopted in 1996, CERD emphasised that "refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them".[872]

991. In a decision on the FRY adopted in 1998, CERD reaffirmed that "displaced persons have the right . . . to be compensated appropriately for [their homes and] properties that cannot be restored to them".[873]

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

992. No practice was found.

VI. Other Practice

993. In a report submitted to ECOSOC in 1995, the Philippine Alliance of Human Rights Advocates asked the Committee to urge the Philippine government to provide IDPs with compensation for their losses.[874]

[872] CERD, General Recommendation XXII (Article 5 of the Convention and refugees and displaced persons), 1996, § 2.

[873] CERD, Decision 3(53) on the FRY, UN Doc. A/53/18 (SUPPL), 17 August 1998, § 3.

[874] Philippine Alliance of Human Rights Advocates (PAHRA), Report on the implementation by the Philippines government of Articles 10, 11 and 12 of the CESCR on the occasion of the 12th Session of ECOSOC, Manila, 20 April 1995, pp. 15 and 16.

CHAPTER 39

OTHER PERSONS AFFORDED SPECIFIC PROTECTION

A. Women

Note: *For practice concerning non-discrimination, see Chapter 32, section B. For practice concerning rape and other forms of sexual violence, see Chapter 32, section G. For practice concerning accommodation for women deprived of their liberty, see Chapter 37, section B. For practice concerning the specific needs of displaced women, see Chapter 38, section C.*

General

I. Treaties and Other Instruments

Treaties

1. Articles 12, fourth paragraph, GC I and 12, fourth paragraph, GC II provide that "women shall be treated with all consideration due to their sex".

2. Article 14, second paragraph, GC III provides that "women shall be treated with all the regard due to their sex".

3. Article 27, second paragraph, GC IV provides that "women shall be especially protected against any attack on their honour".
4. Article 119, second paragraph, GC IV provides in relation to disciplinary punishments that "account shall be taken of the internee's age, sex and state of health".
5. Article 76(1) AP I provides that "women shall be the object of special respect". Article 76 AP I was adopted by consensus.[1]
6. Article 2 of the 1979 Convention on the Elimination of Discrimination against Women provides that "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women".
7. Article 2(1) of the 2003 Protocol to the ACHPR on the Rights of Women in Africa provides that "States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures".

Other Instruments
8. Article 19 of the 1863 Lieber Code provides that "commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women . . . may be removed before the bombardment commences".
9. Article 37 of the 1863 Lieber Code states that "the United States acknowledge and protect . . . the persons of the inhabitants, especially those of women".
10. Paragraphs 4 and 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict state that:

> 4. All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of women . . .
> 5. All forms of repression and cruel and inhuman treatment of women . . . including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.

11. Article 3 of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as . . . women".
12. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 76(1) AP I.

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

13. Paragraph 2.3(2) of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 76(1) AP I.
14. Section 7.3 of the 1999 UN Secretary-General's Bulletin provides that "women shall be especially protected against any attack".

II. National Practice

Military Manuals
15. Argentina's Law of War Manual provides that, as POWs, "women shall be treated with due consideration to their sex and must in no case receive treatment less favourable than that granted to the men".[2] The manual further states that, as wounded and sick, "women shall be treated with all consideration due to their sex".[3]
16. Australia's Commanders' Guide states that "the Geneva Conventions provide particular protection for women".[4]
17. Australia's Defence Force Manual states that "women receive special protection under LOAC".[5] It also states that "priority in medical treatment can only be determined on the basis of medical need, although women are to be treated with all consideration due to their sex".[6] The manual further states that "female prisoners must be treated with due regard to their sex and must in no case be treated less favourably than male prisoners. Their sex must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities."[7]
18. Benin's Military Manual provides that "women . . . shall be treated with due respect to their sex".[8]
19. Cameroon's Instructors' Manual provides that at the approach of the enemy, "all persons shall be evacuated, with priority to women".[9]
20. Canada's LOAC Manual provides that "female POWs must be treated with due regard to their gender and must in no case be treated less favourably than male POWs. Their gender must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".[10]
21. Ecuador's Naval Manual provides that "women . . . are entitled to special respect and protection".[11]

[2] Argentina, *Law of War Manual* (1969), § 2.013(2); see also *Law of War Manual* (1989), § 3.09.
[3] Argentina, *Law of War Manual* (1969), § 3.001.
[4] Australia, *Commanders' Guide* (1994), § 603.
[5] Australia, *Defence Force Manual* (1994), § 946.
[6] Australia, *Defence Force Manual* (1994), § 992.
[7] Australia, *Defence Force Manual* (1994), § 1010.
[8] Benin, *Military Manual* (1995), Fascicule III, p. 4.
[9] Cameroon, *Instructors' Manual* (1992), p. 67, § 242(1).
[10] Canada, *LOAC Manual* (1999), p. 10-3, § 21.
[11] Ecuador, *Naval Manual* (1989), § 11.3.

22. El Salvador's Soldiers' Manual provides that it is prohibited to "attack and maltreat women".[12] It also states that "every act of violence against . . . mothers is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".[13]

23. El Salvador's Human Rights Charter of the Armed Forces states that "women must be protected" and that "women must be respected".[14]

24. France's LOAC Manual states that "the law of armed conflicts provides for special protection of the following persons: . . . women".[15]

25. India's Army Training Note orders troops not to "ill treat any one, and in particular, women".[16]

26. Indonesia's Field Manual specifies that female POWs should be respected and that they should, in all circumstances, be treated as well as male prisoners.[17]

27. Madagascar's Military Manual provides that "women . . . shall be the object of a particular respect". It adds that, as POWs, "women must be treated with due regard to their sex".[18]

28. Morocco's Disciplinary Regulations provides that soldiers in combat are required to spare women.[19]

29. The Military Manual of the Netherlands provides that "women shall be the object of special respect".[20] It also provides that "women will be treated with all consideration due to their sex".[21]

30. New Zealand's Military Manual provides that:

> Female prisoners must be treated with due regard to their sex and must in no case be treated less favourably than male prisoners. Their sex must also be taken into account in the allocation of labour and the provision of sleeping and sanitary facilities . . .
>
> Only urgent medical requirements will justify any priority in treatment among those who are sick and wounded, although women are to be treated with all consideration due to their sex.[22]

31. Nigeria's Manual on the Laws of War provides that "women should be respected".[23] It adds that "female prisoners of war must be treated with due consideration to their sex".[24]

[12] El Salvador, *Soldiers' Manual* (undated), p. 3.
[13] El Salvador, *Soldiers' Manual* (undated), p. 5.
[14] El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 7 and 13.
[15] France, *LOAC Manual* (2001), p. 96.
[16] India, *Army Training Note* (1995), p. 4/24, § 10.
[17] Indonesia, *Field Manual* (1979), pp. 7 and 18.
[18] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.
[19] Morocco, *Disciplinary Regulations* (1974), Article 25(4).
[20] Netherlands, *Military Manual* (1993), p. VIII-3.
[21] Netherlands, *Military Manual* (1993), p. VI-2.
[22] New Zealand, *Military Manual* (1992), §§ 916 and 1004(2).
[23] Nigeria, *Manual on the Laws of War* (undated), § 35.
[24] Nigeria, *Manual on the Laws of War* (undated), § 37.

32. The Rules for Combatants of the Philippines provides that "all civilians, particularly women, . . . must be respected".[25]
33. Spain's LOAC Manual provides that, as POWs, "women shall be treated with all consideration due to their sex".[26]
34. According to Sweden's IHL Manual, the "general protection of women" contained in AP I has the status of customary international law.[27] It further states that "women [in occupied territory] shall be especially protected against any form of insulting treatment".[28]
35. Switzerland's Basic Military Manual provides that "women . . . shall be the object of particular respect".[29]
36. Togo's Military Manual provides that "women . . . shall be treated with due respect to their sex".[30]
37. The UK LOAC Manual states that "priority in the order of medical treatment is decided only for urgent medical reasons. Women are to be treated with all consideration due to their sex."[31] The manual further provides that "PW are entitled in all circumstances to respect for their persons and their honour. Specific mention is made of women in this respect."[32]
38. The US Field Manual provides that "the commanders of United States ground forces will, when the situation permits, inform the enemy of their intention to bombard a place, so that the noncombatants, especially the women, . . . may be removed before the bombardment commences".[33] It also states that, as POWs, "women shall be treated with all regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men".[34] The manual further states that, as wounded and sick, "women shall be treated with all consideration due to their sex".[35]
39. The US Air Force Pamphlet provides that, as wounded and sick, "women are required to be treated with all consideration due their sex".[36]
40. The US Naval Handbook provides that "women . . . are entitled to special respect and protection".[37]
41. The YPA Military Manual of the SFRY (FRY) provides that only urgent medical reasons will determine priority of treatment among the wounded and sick, though women will be treated with all consideration due to their sex.[38]

[25] Philippines, *Rules for Combatants* (1989), Rule 1.
[26] Spain, *LOAC Manual* (1996), Vol. I, § 8.4.a.(1).
[27] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[28] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[29] Switzerland, *Basic Military Manual* (1987), Article 146(3).
[30] Togo, *Military Manual* (1996), Fascicule III, p. 4.
[31] UK, *LOAC Manual* (1981), Section 6, p. 22, § 2.
[32] UK, *LOAC Manual* (1981), Section 8, p. 29, § 6.
[33] US, *Field Manual* (1956), § 43. [34] US, *Field Manual* (1956), § 90.
[35] US, *Field Manual* (1956), § 215. [36] US, *Air Force Pamphlet* (1976), § 12-2(a).
[37] US *Naval Handbook* (1995), § 11.3
[38] SFRY (FRY), *YPA Military Manual* (1988), Article 162.

National Legislation

42. Argentina's Draft Code of Military Justice punishes "any soldier who, in the event of an armed conflict: . . . [breaches the provisions governing] the special protection accorded to women".[39]

43. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "special attention is given . . . to women . . . and they are taken great care of". It also states that "the following actions are prohibited to be carried out against civilian persons: . . . 2) . . . bad attitude towards women".[40]

44. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[41]

45. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 GC I, 12 GC II, 14 GC III and 27 and 119 GC IV, and of AP I, including violations of Article 76(1) AP I, are punishable offences.[42]

46. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[43]

47. According to Venezuela's Code of Military Justice as amended, it is a crime against international law to "make a serious attempt on the life of . . . women".[44]

National Case-law

48. No practice was found.

Other National Practice

49. The Report on the Practice of Syria asserts that Syria considers Article 76 AP I to be part of customary international law.[45]

50. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that women . . . be the object of special respect and protection".[46]

[39] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[40] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 15 and 17.
[41] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[42] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[43] Norway, *Military Penal Code as amended* (1902), § 108.
[44] Venezuela, *Code of Military Justice as amended* (1998), Article 474.
[45] Report on the Practice of Syria, 1997, Chapter 5.3.
[46] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International

III. Practice of International Organisations and Conferences

United Nations

51. In a resolution adopted in 1996, the UN Security Council denounced "the discrimination against girls and women and other violations of human rights and international humanitarian law in Afghanistan".[47]

52. In two resolutions on Afghanistan adopted in 1998, the UN Security Council demanded that "the Afghan factions put an end to discrimination against girls and women and other violations of human rights and international humanitarian law".[48]

53. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council urged all parties to armed conflicts "to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance".[49]

54. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council expressed its grave concern at the "particular impact that armed conflict has on women" and reaffirmed "the importance of fully addressing their special protection and assistance needs in the mandates of peacemaking, peacekeeping and peace-building operations".[50]

55. In a resolution adopted in 2000 on women and peace and security, the UN Security Council called upon all parties to armed conflicts to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the Geneva Conventions and Additional Protocols, the 1951 Refugee Convention, the 1979 Convention on the Elimination of Discrimination against Women, the 1989 Convention on the Rights of the Child and the 1998 ICC Statute.[51]

56. In a resolution on Afghanistan adopted in 2000, the UN Security Council reiterated "its deep concern over the continuing violation of international humanitarian law and of human rights, particularly IHL and human rights, particularly discrimination against women and girls".[52]

57. In 1998, in several statements by its President, the UN Security Council expressed deep concern at the discrimination against girls and women and other abuses of human rights and IHL in Afghanistan.[53]

Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

47 UN Security Council, Res. 1076, 22 October 1996, preamble and § 11.

48 UN Security Council, Res. 1193, 28 August 1998, § 14; Res. 1214, 8 December 1998, § 12.

49 UN Security Council, Res. 1261, 25 August 1999, § 10.

50 UN Security Council, Res. 1296, 19 April 2000, § 9.

51 UN Security Council, Res. 1325, 31 October 2000, § 9.

52 UN Security Council, Res. 1333, 19 December 2000, preamble.

53 UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998; Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998; Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998.

58. In a resolution adopted in 1998, ECOSOC condemned the continuing violations of the human rights of women and girls, including all forms of discrimination against them, throughout Afghanistan.[54]

59. In a resolution adopted in 1998 on the situation of human rights in Myanmar, the UN Commission on Human Rights expressed concern at the widespread use of forced labour, including as porters for the army. It particularly condemned this practice in relation to women.[55]

60. In a resolution adopted in 1998 on the question of human rights in Afghanistan, the UN Commission on Human Rights condemned "the widespread violations and abuses of human rights and humanitarian law . . . in particular, the human rights of women and girls".[56]

61. In 1998, in a report on violence against women, the Special Rapporteur of the UN Commission of Human Rights on Violence against Women, its Causes and Consequences stated that "it has been posited that the military establishment is inherently masculine and misogynist, inimical to the notion of women's rights. The masculinity cults that pervade military institutions are intrinsically anti-female and therefore create a hostile environment for women." The Special Rapporteur recommended at the international level that:

> 95. Existing humanitarian legal standards should be evaluated and practices revised to incorporate developing norms on violence against women during armed conflict. The Torture and Genocide Conventions and the Geneva Conventions, in particular, should be re-examined and utilized in this light.
> 96. Since peacekeeping has become an important part of the activities of the United Nations, peacekeepers should be given necessary training in gender issues before they are sent to troubled areas. Offences committed by peacekeepers should also be considered international crimes and they should be tried accordingly.[57]

The report also listed cases of violence against women in times of armed conflict in Afghanistan, Algeria, Guatemala, Haiti, India, Indonesia (East Timor), Japan (comfort women during the Second World War), Liberia, Mexico, China (Tibet), Peru, Rwanda, Sri Lanka and US.[58]

62. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN

[54] ECOSOC, Res. 1998/9, 28 July 1998, § 1.
[55] UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3.
[56] UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(b) and 3(a).
[57] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1998/54, 26 January 1998, §§ 9, 95 and 96.
[58] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1998/54, 26 January 1998, §§ 20 and 21 (Afghanistan), §§ 22 and 23 (Algeria), §§ 28 and 29 (Guatemala), §§ 30 and 31(Haiti), §§ 32–36 (India), §§ 26 and 27 (Indonesia, East Timor), §§ 37 and 38 (Japan, comfort women during the Second World War), §§ 39–44 (Liberia), §§ 45 and 46 (Mexico), § 47 (China, Tibet), §§ 48 and 49 (Peru), §§ 50–52 (Rwanda), §§ 53–55 (Sri Lanka) and §§ 56 and 57 (US).

Commission on Human Rights on Violence against Women, its Causes and Consequences stated that:

> 48. It is now widely recognized that armed conflict has a different and more damaging long-term impact on children, and that female children may face specific risks that are different from those of boys. As is reflected throughout the case studies below, girls face many if not all of the risks that are experienced by women during armed conflict ... And while they may find themselves responsible for the shelter and feeding of younger siblings, they encounter numerous obstacles that make these tasks difficult because of their age and gender ...
> 52. Despite the specific needs and experiences of girls in armed conflict, girls are often the last priority when it comes to the distribution of humanitarian aid and their needs are often neglected in the formulation of demobilization and reintegration programmes. There is growing recognition that the specific needs of girls require special protective measures, both during armed conflicts and in post-conflict situations.[59]

The report also listed cases of violence against women in times of armed conflict committed between 1997 and 2000 in Afghanistan, Burundi, Colombia, DRC, East Timor, FRY (Kosovo), India, Indonesia (West Timor), Japan (developments with regards to justice for comfort women), Myanmar, Russia (Chechnya), Sierra Leone and Sri Lanka. The report made detailed recommendations of measures to be taken at both the international and national levels.[60]

Other International Organisations

63. In a recommendation adopted in 1995 on Turkey's military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe asked Turkey "to guarantee the fundamental rights of civilians, in particular those of the more vulnerable" groups, including women.[61]

64. In a resolution adopted in 1999, the European Parliament condemned the atrocities committed against the civilian population, and particularly women, in Sierra Leone.[62]

International Conferences

65. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about "violations of human

[59] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, §§ 48 and 52.

[60] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report on Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, §§ 68–71 (Afghanistan), §§ 72 and 73 (Burundi), §§ 74 and 75 (Colombia), §§ 76–78 (DRC), §§ 79–81 (East Timor), §§ 82–84 (FRY, Kosovo), §§ 85–87, (India), §§ 89–91 (Indonesia, West Timor), §§ 92–96 (Japan), §§ 97–99 (Myanmar), §§ 100–103 (Russia, Chechnya), §§ 104–108 (Sierra Leone), §§ 109–113 (Sri Lanka) and §§ 114–135.

[61] Council of Europe, Parliamentary Assembly, Rec. 1266, 26 April 1995, § 5.

[62] European Parliament, Resolution on the situation in Sierra Leone, 14 January 1999, § G.

rights during armed conflicts, affecting the civilian population, especially women" and therefore called upon States and all parties to armed conflicts "strictly to observe international humanitarian law".[63] It further stated that:

> Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.[64]

66. The 26th International Conference of the Red Cross and Red Crescent in 1995 recognised "the fundamental link between assistance to and protection of women victims of conflict" and urged that "strong measures be taken to provide women with the protection and assistance to which they are entitled under national and international law". The Conference further encouraged:

> States, the Movement and other competent entities and organizations to develop preventive measures, assess existing programmes and set up new programmes to ensure that women victims of conflict receive medical, psychological and social assistance, provided if possible by qualified personnel who are aware of the specific issues involved.[65]

67. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made . . . to spare the life, protect and respect the civilian population, with particular protective measures for women and girls".[66]

IV. Practice of International Judicial and Quasi-judicial Bodies

68. In 1992, in its General Recommendation on violence against women, the CEDAW stated that "gender-based violence . . . impairs or nullifies the enjoyment by women of human rights and fundamental freedoms [including] . . . the right to equal protection according to humanitarian norms in time of international or internal armed conflict".[67]

69. In 1998, in its concluding observations on the report of Mexico, the CEDAW expressed concern about the situation of indigenous women in Chiapas and

[63] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29).
[64] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § II(38).
[65] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § B(b) and (e).
[66] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).
[67] CEDAW, General Recommendation No. 19 (Violence against women), 30 January 1992, § 7(c).

recommended that "the government of Mexico pay special attention to safeguarding the human rights of women in conflict zones".[68]

70. In 1998, in its report to the UN General Assembly, the CEDAW stated in relation to Indonesia that it was:

> concerned that the information provided on the situation of women in areas of armed conflict reflects a limited understanding of the problem. The Government's remarks are confined to the participation of women in the armed forces and do not address the vulnerability of women to sexual exploitation in conflict situation, as well as a range of other human rights abuses affecting women in such contexts.[69]

71. In 1999, in a report to the UN General Assembly, the CEDAW stated that "States parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as those trapped in situations of armed conflict". The Committee expressed concern at "the persistence of widespread violence as a result of the armed conflict" in Colombia, stating that "women are the principal victims" and that they "lack the resources needed for survival in a situation in which they are called upon to assume greater responsibilities". In relation to Georgia, the Committee expressed concern that "the National Action Plan [had] not yet been implemented". The plan addressed, *inter alia*, "making special efforts for women . . . victims of armed conflicts".[70]

72. In 2000, in a report to the UN General Assembly, the CEDAW stated that it was "concerned that women [in India] were exposed to high levels of violence, . . . humiliation and torture in areas where there are armed insurrections". It recommended:

> a review of prevention of terrorism legislation and the Armed Forces Special Provisions Acts, . . . so that special powers given to security forces do not prevent the investigation and prosecution of acts of violence against women in conflict areas and during detention and arrest.[71]

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

73. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "women . . . shall be treated with all regard due to their sex".[72]

74. In its pledge to promote the respect of women in armed conflicts, made at the 27th International Conference of the Red Cross and Red Crescent in 1999,

[68] CEDAW, Concluding observations on the report of Mexico, UN Doc. A/53/38, 14 May 1998, § 425.
[69] CEDAW, Report to the UN General Assembly, UN Doc. A/53/38/Rev.1, 14 May 1998, § 295.
[70] CEDAW, Report to the UN General Assembly, UN Doc. A/54/38/Rev.1, 20 August 1999, Part I, §§ 16 and 358 and Part II, § 96.
[71] CEDAW, Report to the UN General Assembly, UN Doc. A/55/38, 17 August 2000, §§ 71 and 72.
[72] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 666.

the ICRC pledged "to put emphasis throughout its activities on the respect which must be accorded to women and girl children" and furthermore "to ensure that the specific protection, health and assistance needs of women and girl children affected by armed conflicts are appropriately assessed in its operations with the aim to alleviate the plight of the most vulnerable".[73]

VI. Other Practice

75. The Bangkok NGO Declaration on Human Rights adopted in 1993 states that "in crisis situations – ethnic violence, communal riots, armed conflicts, military occupation and displacement – women's rights are specifically violated".[74]

Particular care for pregnant women and nursing mothers

Note: *For practice concerning the establishment of hospital and safety zones to protect expectant mothers and mothers of children under seven, see Chapter 11, section A.*

I. Treaties and Other Instruments

Treaties

76. Article 16, first paragraph, GC IV provides that "expectant mothers, shall be the object of particular protection and respect".

77. Article 38, fifth paragraph, GC IV provides that, as aliens in the territory of a party to the conflict, "pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned".

78. Article 50, fifth paragraph, Article 89, fifth paragraph, and Article 132, second paragraph, GC IV contain specific mentions in relation to the provision of food, clothing, medical assistance and evacuation for both pregnant women and nursing mothers.

79. Article 18, first paragraph, Article 21, Article 22, first paragraph, Article 23, first paragraph, Article 91, second paragraph, and Article 127, third paragraph, GC IV contain specific mentions in relation to medical assistance to and transport for pregnant women.

80. Article 17 GC IV provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . maternity cases".

[73] ICRC, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

[74] World Conference on Human Rights, Regional Preparatory Meeting for Asia–Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 3.

81. Article 70(1) AP I provides that "in distribution of relief consignments, priority shall be given to ... expectant mothers, maternity cases and nursing mothers, who under the fourth Geneva Convention or under this Protocol are to be accorded privileged treatment or special protection". Article 70 AP I was adopted by consensus.[75]
82. Article 76(2) AP I provides that "pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority". Article 76 AP I was adopted by consensus.[76]
83. According to Article 8(a) AP I, the terms "wounded" and "sick" also cover maternity cases and expectant mothers. Article 8 AP I was adopted by consensus.[77]

Other Instruments
84. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 76(2) AP I.
85. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 76(2) AP I.

II. National Practice

Military Manuals
86. Argentina's Law of War Manual (1969) contains several specific rules intended to protect pregnant women and nursing mothers from the effects of war.[78]
87. Argentina's Law of War Manual (1989) provides that "maternity cases, pregnant women ... are considered as" included in the concept of wounded and sick.[79] It further states that "pregnant women and mothers with dependent young children, who are arrested for reasons related to the armed conflict, shall be cared for with absolute priority".[80]
88. Australia's Commanders' Guide provides that the terms "wounded" and "sick" "also cover maternity cases ... and expectant mothers".[81]

[75] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.
[76] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[77] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.
[78] Argentina, *Law of War Manual* (1969), §§ 1.014, 4.004(1) and 4.006; see also *Law of War Manual* (1989), §§ 4.05 and 4.11.
[79] Argentina, *Law of War Manual* (1989), § 2.02.
[80] Argentina, *Law of War Manual* (1989), § 4.13.
[81] Australia, *Commanders' Guide* (1994), glossary, p. xxiv.

89. Australia's Defence Force Manual provides specific rules "for the protection from the effects of war of . . . expectant mothers and mothers of children under seven years".[82]
90. Canada's LOAC Manual contains several specific rules intended to protect maternity cases and expectant mothers.[83]
91. Colombia's Basic Military Manual provides that "in these cases, the IHL rules favour especially the civilian population, so that the assistance and protection which the parties to the conflict shall bring are given in priority to the most vulnerable persons or groups of persons, who are: . . . pregnant women".[84]
92. France's LOAC Teaching Note provides that "a particular attention shall be paid to the protection of . . . pregnant women and mothers accompanied by children under seven years old".[85]
93. France's LOAC Manual contains specific rules intended to protect maternity cases and provides that "out of concern for their protection, pregnant women and maternity cases . . . are included in the same category as the wounded and sick under humanitarian law".[86]
94. Germany's Military Manual contains specific rules intended to protect "expectant mothers and mothers of children under seven from any attack".[87]
95. Kenya's LOAC Manual contains specific rules intended to protect expectant mothers and maternity cases.[88]
96. Madagascar's Military Manual provides that maternity cases and pregnant women are included in the same category as the wounded and sick.[89]
97. The Military Manual of the Netherlands provides that "pregnant women and mothers having dependent infants shall be respected".[90]
98. New Zealand's Military Manual contains several specific rules intended to protect expectant mothers and mothers of children under seven.[91]
99. Nigeria's Operational Code of Conduct provides that "under no circumstances should pregnant women be ill-treated or killed".[92]
100. Nigeria's Military Manual provides that "duly recognized civilian hospitals with their staff, as well as land, sea or air transport of wounded and sick persons, the infirm or maternity cases are entitled to similar respect and

[82] Australia, *Defence Force Manual* (1994), §§ 735, 940, 946 and 1216; see also *Commanders' Guide* (1994), § 926.
[83] Canada, *LOAC Manual* (1999), p. 4-10, § 103, p. 6-4, § 35, p. 11-2, § 16, p. 11-3, § 23 and p. 12-4, § 32.
[84] Colombia, *Basic Military Manual* (1995), p. 25.
[85] France, *LOAC Teaching Note* (2000), pp. 4–5; see also *LOAC Manual* (2001), p. 125.
[86] France, *LOAC Manual* (2001), pp. 32 and 64.
[87] Germany, *Military Manual* (1992), § 512.
[88] Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 5–6.
[89] Madagascar, *Military Manual* (1994), Fiche No. 4-SO, § B.
[90] Netherlands, *Military Manual* (1993), p. VIII-3.
[91] New Zealand, *Military Manual* (1992), §§ 508(3), 1106(1), 1108, 1110, 1111(1), 1118, 1131(1), 1318(1) and 1405(4).
[92] Nigeria, *Operational Code of Conduct* (1967), § 4(a).

protection as provided in the first and second conventions for their military counterparts".[93]

101. Spain's LOAC Manual provides that "pregnant women and mothers of young children shall receive a particular attention".[94]

102. Switzerland's Basic Military Manual contains several rules intended to protect specifically maternity cases and pregnant women.[95]

103. The UK Military Manual contains several rules intended to protect specifically maternity cases and pregnant women.[96]

104. The UK LOAC Manual contains specific rules intended to protect specifically expectant women and mothers with children under seven years of age.[97]

105. The US Field Manual contains several rules intended to protect specifically maternity cases and pregnant women.[98]

106. The US Air Force contains several rules intended to protect specifically maternity cases and pregnant women.[99]

National Legislation

107. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "pregnant women and women with young children have to be assured of kind treatment and care".[100]

108. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[101]

109. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 14, 16, 17, 18, 21, 22, 23, 38, 50, 89, 91, 127 and 132 GC IV, and of AP I, including violations of Articles 70(1) and 76(2) AP I, are punishable offences.[102]

110. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[103]

111. The Act on Child Protection of the Philippines provides that "expectant mothers and nursing mothers shall be given additional food in proportion to their physiological needs".[104]

[93] Nigeria, *Military Manual* (1994), p. 18, § 12.
[94] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1), see also §§ 4.5.b.(3), 9.4.a and 9.5.a.
[95] Switzerland, *Basic Military Manual* (1987), Articles 33, 36 and 37.
[96] UK, *Military Manual* (1958), §§ 28, 29, 32–35, 46 and 538.
[97] UK, *LOAC Manual* (1981), Section 9, p. 34, §§ 2, 3 and 5.
[98] US, *Field Manual* (1956), §§ 44, 253, 256, 257, 260–262, 277(5), 296, 383.
[99] US, *Air Force Pamphlet* (1976), §§ 14-3 and 14-5.
[100] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.
[101] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[102] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[103] Norway, *Military Penal Code as amended* (1902), § 108.
[104] Philippines, *Act on Child Protection* (1992), Sections 23–24.

National Case-law
112. No practice was found.

Other National Practice
113. The Report on the Practice of Syria asserts that Syria considers Article 76 AP I to be part of customary international law.[105]

III. Practice of International Organisations and Conferences

114. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

115. No practice was found.

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

116. No practice was found.

VI. Other Practice

117. No practice was found.

Death penalty on pregnant women and nursing mothers

I. Treaties and Other Instruments

Treaties
118. Article 6(5) of the 1966 ICCPR provides that "sentence of death shall not . . . be carried out on pregnant women".
119. Article 4(5) of the 1969 ACHR provides that "capital punishment shall not be . . . applied to pregnant women".
120. Article 76(3) AP I provides that:

> To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Article 76 AP I was adopted by consensus.[106]
121. Article 6(4) AP II provides that "the death penalty shall not be pronounced . . . on pregnant women or mothers of young children". Article 6 AP II was adopted by consensus.[107]

[105] Report on the Practice of Syria, 1997, Chapter 5.3.
[106] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[107] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

Other Instruments

122. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 76(3) AP I.

123. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 76(3) AP I.

II. National Practice

Military Manuals

124. Argentina's Law of War Manual provides that "it is not possible to pronounce the death penalty against pregnant women or nursing mothers. If pronounced, it must not be executed."[108] With respect to non-international conflicts in particular, the manual states that "the death penalty shall not be pronounced against . . . pregnant women and mothers of young children".[109]

125. Canada's LOAC Manual provides, with respect to non-international conflicts in particular, that "the death penalty shall not be carried out on pregnant women or mothers of young children".[110]

126. New Zealand's Military Manual provides, with respect to non-international conflicts, that "the death penalty shall not be carried out on pregnant women or mothers of young children".[111]

127. Nigeria's Operational Code of Conduct provides that "under no circumstances should pregnant women be ill-treated or killed".[112]

128. Spain's LOAC Manual provides that if pregnant women and mothers of young children are condemned to death, the sentence shall not be executed on them.[113]

National Legislation

129. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 76(3) AP I, as well as any "contravention" of AP II, including violations of Article 6(4) AP II, are punishable offences.[114]

130. Under Jordanian legislation, it is prohibited to pronounce or carry out the death penalty on pregnant women and this prohibition is valid for the three months following the birth of the child.[115]

[108] Argentina, *Law of War Manual* (1989), § 3.28, see also § 5.11.
[109] Argentina, *Law of War Manual* (1989), § 7.10.
[110] Canada, *LOAC Manual* (1999), p. 17-4, § 30.
[111] New Zealand, *Military Manual* (1992), § 1815(3).
[112] Nigeria, *Operational Code of Conduct* (1967), § 4(a).
[113] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1).
[114] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[115] Jordan, *Criminal Code* (1960), Article 17; *Code of Criminal Procedure as amended* (1961), Article 338.

131. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[116]

National Case-law

132. No practice was found.

Other National Practice

133. The Report on the Practice of Syria asserts that Syria considers Article 76 AP I to be customary.[117]

134. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[118]

III. Practice of International Organisations and Conferences

135. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

136. No practice was found.

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

137. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict, shall be avoided. The death penalty for those offences shall in no circumstances be executed on such women."[119]

VI. Other Practice

138. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

[116] Norway, *Military Penal Code as amended* (1902), § 108(b).
[117] Report on the Practice of Syria, 1997, Chapter 5.3.
[118] Report on US Practice, 1997, Chapter 5.3.
[119] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 203.

University in Turku/Åbo, Finland in 1990, states that "sentences of death shall not be carried out on pregnant women [or] mothers of young children".[120]

B. Children

Note: *For practice concerning rape and other forms of sexual violence, see Chapter 32, section G. For practice concerning accommodation of children deprived of their liberty, see Chapter 37, section C. For practice concerning the specific needs of displaced children, see Chapter 38, section C.*

Special protection

I. Treaties and Other Instruments

Treaties

139. Article 23, first paragraph, GC IV provides that "each High Contracting Party . . . shall permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen".

140. Article 24, first paragraph, GC IV provides that "the Parties to the conflict shall take all necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources".

141. Article 38, fifth paragraph, GC IV provides that children under 15 years, aliens in the territory of a party to the conflict, "shall benefit by any preferential treatment to the same extent as the nationals of the State concerned".

142. Article 50 GC IV provides that "the Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under fifteen years".

143. Article 76, fifth paragraph, GC IV provides that, in the treatment of detainees in occupied territory, "proper regard shall be paid to the special treatment due to minors".

144. Article 89, fifth paragraph, GC IV provides that "children under fifteen years of age [who are interned] shall be given additional food, in proportion with their physiological needs".

145. According to Article 8(a) AP I, the terms "wounded" and "sick" also cover new-born babies. Article 8 AP I was adopted by consensus.[121]

146. Article 70(1) AP I provides that "in the distribution of relief consignments, priority shall be given to . . . children". Article 70 AP I was adopted by consensus.[122]

[120] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 8(3), *IRRC*, No. 282, p. 333.
[121] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.
[122] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

147. Article 77(1) AP I provides that "children shall be the object of special respect". Article 77 AP I was adopted by consensus.[123]
148. Article 4(3) AP II provides that "children shall be provided with the care and aid they require". Article 4 AP II was adopted by consensus.[124]
149. Article 38 of the 1989 Convention on the Rights of the Child provides that:

> 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child . . .
> 4. In accordance with their obligation under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by armed conflict.

150. Upon ratification of the 1989 Convention on the Rights of the Child, the Netherlands stated that "in times of armed conflict, provisions shall prevail that are most conducive to guaranteeing the protection of children under international law".[125]
151. Article 22 of the 1990 African Charter on the Rights and Welfare of the Child provides that:

> 1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child . . .
> 3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

Other Instruments
152. Paragraphs 4 and 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict state that:

> 4. All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of . . . children.
> 5. All forms of repression and cruel and inhuman treatment of . . . children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.

[123] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[124] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[125] Netherlands, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 February 1995, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

153. Rule 13.5 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice provides that "while in custody, juveniles shall receive care, protection and all necessary individual assistance . . . that they may require in view of their age, sex and personality".
154. Rule 24.1 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice provides that "efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance . . . in order to facilitate the rehabilitative process".
155. Article 3 of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as . . . children".
156. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(1) AP I.
157. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(1) AP I.
158. Article 2(24) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the Agreement seeks to protect and promote "the right of children . . . to protection, care, and a home, especially against physical and mental abuse, prostitution, drugs, forced labour, homelessness, and other similar forms of oppression and exploitation".
159. Section 7.4 of the 1999 UN Secretary-General's Bulletin provides that "children shall be the object of special respect".
160. In paragraph 26 of the United Nations Millennium Declaration, the heads of State and Government declared they would:

> spare no effort to ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible.

161. Article 24 of the 2000 EU Charter of Fundamental Rights provides that "children shall have the right to such protection and care as is necessary for their well-being".

II. National Practice

Military Manuals

162. Argentina's Law of War Manual (1969) provides that "the belligerent parties shall take the necessary measures to ensure that children under the age of 7 who have been orphaned or separated from their families are not left to their own resources".[126] It further states that "the occupying Power shall not hinder

[126] Argentina, *Law of War Manual* (1969), § 4.007; see also *Law of War Manual* (1989), § 4.12.

the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under 15 years".[127]

163. Argentina's Law of War Manual (1989) provides that new-born babies are considered as included in the concept of wounded and sick.[128] It further states that "children shall be the object of a special respect and shall be protected against any form of indecent assault" and that "they are to receive care and aid as they require on account of their age or any other reasons".[129] With respect to non-international conflicts in particular, the manual provides that "children shall receive the assistance and care they require".[130]

164. Australia's Commanders' Guide states that the terms "wounded" and "sick" "also cover . . . new born babies".[131]

165. Australia's Defence Force Manual provides that "children are granted special protection under LOAC. Important rules are shown below: a. because of their age children should receive all the aid and care they require."[132] The manual further states that "the occupying power must take necessary steps to ensure that children under 15 years of age and who are separated from their families are not left to their own resources".[133]

166. Benin's Military Manual provides that "children shall be treated with respect due to their . . . age".[134]

167. Canada's LOAC Manual provides that "belligerents must make provision for the care of children under 15 who have been orphaned or separated from their families as a result of the conflict. They must ensure the maintenance of such children."[135] With respect to non-international armed conflicts in particular, the manual states that "children are to receive such aid and protection as required".[136]

168. Colombia's Basic military Manual provides that "IHL rules favour especially the civilian population so that assistance and protection, which the parties to the conflict shall bring, are given in priority to the most vulnerable persons or groups of persons, who are: children".[137] The manual further states that, with respect to non-international armed conflicts in particular, "care and aid shall be provided to children".[138]

[127] Argentina, *Law of War Manual* (1969), § 5.009.
[128] Argentina, *Law of War Manual* (1989), § 2.02.
[129] Argentina, *Law of War Manual* (1989), § 4.12.
[130] Argentina, *Law of War Manual* (1989), § 7.04.
[131] Australia, *Commanders' Guide* (1994), glossary, p. xxiv.
[132] Australia, *Defence Force Manual* (1994), § 947.
[133] Australia, *Defence Force Manual* (1994), § 1215.
[134] Benin, *Military Manual* (1995), Fascicule III, p. 4.
[135] Canada, *LOAC Manual* (1999), p. 11-3, § 25.
[136] Canada, *LOAC Manual* (1999), p. 17-3, § 22.
[137] Colombia, *Basic Military Manual* (1995), p. 25.
[138] Colombia, *Basic Military Manual* (1995), p. 74.

169. Ecuador's Naval Manual provides that "children are entitled to special respect and protection".[139]

170. El Salvador's Soldiers' Manual provides that it is prohibited to "attack and maltreat . . . children". The manual further states that "any act of violence against . . . children . . . is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".[140]

171. El Salvador's Human Rights Charter of the Armed Forces provides that children must be respected and protected.[141]

172. France's LOAC Teaching Note provides that "particular attention shall be paid to the protection of . . . children".[142]

173. France's LOAC Manual provides that "with concern about protection, . . . new-born babies . . . are assimilate to wounded and sick under humanitarian law".[143] It further states that "the law of armed conflicts provides for special protection of the following persons: . . . children".[144]

174. Germany's Military Manual provides that "children shall be the object of special respect and protection. They shall be provided with the care and aid they require, whether because of their youth or for any other reasons." It adds that "if they fall into the power of an adverse party, they shall be granted special protection".[145]

175. India's Manual of Military Law provides that special care must be taken in respect of children.[146]

176. India's Army Training Note orders troops not to "ill treat any one, and in particular, . . . children".[147]

177. The Report on the Practice of Indonesia, with reference to the Military Manual, states that children under 15 years of age, orphaned or separated from their families as a result of conflict, shall be protected and given access to health care and food.[148]

178. Italy's IHL Manual provides that the occupying power "shall take all necessary measures to ensure the care . . . of minors".[149]

179. Kenya's LOAC Manual provides that "parties to the conflict are to care for children under 15 years of age who are orphaned and who are separated from their families. They are not to be subjected to political propaganda."[150]

180. Madagascar's Military Manual provides that "children shall be the object of a particular respect and be protected against indecent assault". It adds that "the occupant must . . . ensure the welfare of children".[151]

[139] Ecuador, *Naval Manual* (1989), § 11.3.
[140] El Salvador, *Soldiers' Manual* (undated), pp. 3 and 5.
[141] El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 7 and 13.
[142] France, *LOAC Teaching Note* (2000), p. 4; see also *LOAC Manual* (2001), pp. 62 and 96.
[143] France, *LOAC Manual* (2001), p. 32.
[144] France, *LOAC Manual* (2001), p. 96.
[145] Germany, *Military Manual* (1992), § 505.
[146] India, *Manual of Military Law* (1983), p. 5/3–5/6.
[147] India, *Army Training Note* (1995), p. 4/24, § 10.
[148] Report on the Practice of Indonesia, 1997, Chapter 5.3, referring to *Military Manual* (1982).
[149] Italy, *IHL Manual* (1991), Vol. I, § 48(9).
[150] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.
[151] Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

181. Morocco's Disciplinary Regulations provides that soldiers in combat are required to spare children.[152]

182. The Military Manual of the Netherlands states that "children shall be protected against any form of indecent assault. Children shall be provided with the care and aid they require, because of their age."[153]

183. New Zealand's Military Manual provides that "the Occupying Power must take the necessary steps to ensure that children under fifteen separated from their families are not left to their own resources".[154] It further states that "belligerents must make provision for the care of children under 15 who have been orphaned or separated from their families as a result of war".[155] The manual then states that, as aliens in the territory of a party to the conflict, "children under 15 . . . must be given the benefit of any preferential treatment that is accorded to similar classes of nationals of the belligerent".[156] With respect to non-international armed conflicts in particular, the manual provides that children under 15 "are to receive such aid and protection as they require".[157]

184. Nicaragua's Military Manual provides that "special measures for children under 15 who are orphaned or are separated from their families as a result of the war" shall be taken.[158]

185. Nigeria's Operational Code of Conduct provides that "children must not be molested or killed. They will be protected and cared for."[159] It adds that "youths and school children must not be attacked unless they are engaged in open hostility against Federal Government Forces. They should be given all protection and care."[160]

186. The Rules for Combatants of the Philippines provides that "all civilians, particularly . . . children . . . must be respected".[161]

187. Spain's LOAC Manual provides that "children are also the object of a special respect and they shall be protected against any form of indecent assault. If they are taken prisoner, they shall be protected under special provisions."[162]

188. According to Sweden's IHL Manual, the "general protection of . . . children" contained in AP I has the status of customary international law.[163] The manual further provides that "the occupying power also has a particular responsibility in the area of child care".[164]

189. Switzerland's Basic Military Manual provides that "children shall be the object of a particular respect. Children shall be protected against any form of

[152] Morocco, *Disciplinary Regulations* (1974), Article 25(4).
[153] Netherlands, *Military Manual* (1993), p. VIII-3.
[154] New Zealand, *Military Manual* (1992), § 1317(2).
[155] New Zealand, *Military Manual* (1992), § 1112(1).
[156] New Zealand, *Military Manual* (1992), § 1118(1).
[157] New Zealand, *Military Manual* (1992), § 1813(1).
[158] Nicaragua, *Military Manual* (1996), Article 14(40).
[159] Nigeria, *Operational Code of Conduct* (1968), § 4(b).
[160] Nigeria, *Operational Code of Conduct* (1968), § 4(c).
[161] Philippines, *Rules for Combatants* (1989), Rule 1.
[162] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1), see also § 5.2.a.(2).
[163] Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.
[164] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 123.

indecent assault."[165] It also states that "children shall be the object of a particular protection and respect".[166] The manual further provides that "necessary measures must be taken so that children under 15 years of age, who are separated from their families as a result of war, are not left to their own resources".[167] In addition, the manual states that "transports of ... children ... effected by convoys of vehicles and hospital trains, shall be respected and protected in the same way as hospitals".[168]

190. Togo's Military Manual provides that "children shall be treated with respect due to their ... age".[169]

191. The UK Military Manual provides that:

> 35. Belligerents must allow the free passage of ... all consignments of essential foodstuffs, clothing and tonics intended for children under 15 ...
> 36. Belligerents must make provision for the care of children under 15 who have been orphaned or separated from their families as a result of the war. They must ensure the maintenance of such children ... Belligerents must also facilitate the reception of these children by neutral countries for the duration of hostilities, with the consent of the Protecting Power, if any, and under due safeguards as above, and must endeavour to arrange for all children under 12 to be easily identifiable.[170]

The manual further states that as aliens in the territory of a party to the conflict, "children under fifteen ... must be given the benefit of any preferential treatment that is accorded to similar classes of nationals of the belligerents".[171] It also provides that "the Occupant must not prevent the application of any measures which may have been adopted prior to the occupation in favour of children under fifteen ... with regard to food, medical care and protection against the effects of war".[172]

192. The UK LOAC Manual provides that "the free passage of medical and hospital stores and objects for religious worship is guaranteed as well as essential food and clothes for children".[173] It adds that "parties to the conflict are to care for children under 15, orphans and those separated from their families. They are not to be subject to political propaganda."[174]

193. The US Field Manual reproduces Articles 23, 24, 38, 50 and 89 GC IV.[175]

[165] Switzerland, *Basic Military Manual* (1987), Article 146(3).
[166] Switzerland, *Basic Military Manual* (1987), Article 36; see also *Military Manual* (1984), p. 39 and *Teaching Manual* (1986), p. 107.
[167] Switzerland, *Basic Military Manual* (1987), Article 157(1).
[168] Switzerland, *Basic Military Manual* (1987), Article 37.
[169] Togo, *Military Manual* (1996), Fascicule III, p. 4.
[170] UK, *Military Manual* (1958), §§ 35–36.
[171] UK, *Military Manual* (1958), § 46.
[172] UK, *Military Manual* (1958), § 538.
[173] UK, *LOAC Manual* (1981), Section 9, p. 34, § 5.
[174] UK, *LOAC Manual* (1981), Section 9, p. 34, § 6.
[175] US, *Field Manual* (1956), §§ 44, 262, 263, 277, 296 and 389.

194. The US Air Force Pamphlet states that "children under 15 . . . enjoy the same preferential treatment provided for the nationals of the state concerned".[176]

195. The US Naval Handbook provides that "children are entitled to special respect and protection".[177]

National Legislation

196. Argentina's Draft Code of Military Justice punishes "any soldier who, in the event of an armed conflict: . . . [breaches the provisions governing] the special protection accorded to children".[178]

197. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in case of evacuation of civilian persons from a besieged zone, "special attention is given to children and they are taken great care of".[179]

198. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[180]

199. The Law on the Rights of the Child of Belarus states that children separated from their families as a result of armed conflict must be protected and provided with material and medical assistance by the public authorities.[181]

200. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 23, 24, 38, 50, 76 and 89 GC IV, and of AP I, including violations of Articles 70(1) and 77(1) AP I, as well as any "contravention" of AP II, including violations of Article 4(3) AP II, are punishable offences.[182]

201. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[183]

202. According to Venezuela's Code of Military Justice as amended, it is a crime against international law to "make a serious attempt on the life of . . . children".[184]

[176] US, *Air Force Pamphlet* (1976), § 14-5, see also § 14-3.
[177] US, *Naval Handbook* (1995), § 11.3.
[178] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[179] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.
[180] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[181] Belarus, *Law on the Rights of the Child* (1993), Article 30.
[182] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[183] Norway, *Military Penal Code as amended* (1902), § 108.
[184] Venezuela, *Code of Military Justice as amended* (1998), Article 474.

National Case-law

203. No practice was found.

Other National Practice

204. In a statement before the HRC in 1988, the Colombian representative reported that the child vaccination campaigns in Colombia had served as a model in other States, including El Salvador, where hostilities had been suspended in order to allow children to be vaccinated.[185]

205. According to a statement by France's Permanent Representative to the UN in 1999, France considers that the age limit to be protected as a child (15 years) in the 1989 Convention on the Rights of the Child is not satisfactory and that it should be raised to 18 years to ensure a better and more effective protection of children during conflicts.[186]

206. In 1995, its initial report to the CRC, Ghana reported that the "government agency responsible for abandoned and orphaned children worked with the Save the Children Fund to provide care for the children affected by the conflict" in the northern part of the country.[187]

207. In 1992, in its initial report to the CRC, Indonesia reported that according to its national legislation, "in any circumstances ... children should be protected first".[188]

208. The Report on the Practice of Jordan states that special care is provided to children who have been orphaned or separated from their families.[189]

209. In 1993, in its initial report to the CRC, the Philippines reported that:

> 200. The Special Protection Act declares children as "Zones of Peace". This Act provides that children shall not be the object of attack and shall be the object of special respect. They are to be protected from any form of threat, assault, torture or other cruel, inhuman or degrading treatment ...
> 201. In any barangay where armed conflict occurs, the barangay chairperson shall submit to the municipal social welfare and development officer the names of all children residing in the barangay within 24 hours of the start of the conflict.
> ...
> 203. In any case where a child is arrested for reasons related to armed conflict, he or she shall be entitled to ... immediate full legal assistance ...
> 204. In support of the Special Protection Act, the Armed Forces of the Philippines issued in 1991 a memorandum order specifically on the protection of children during military operations.
> ...
> 206. Children who are lost, abandoned or orphaned as a result of an armed conflict are referred to the local Council for the Protection of Children or to the Department

[185] Colombia, Statement before the HRC, UN Doc. CCPR/C/SR.819, 14 July 1988, § 8.
[186] France, Statement of the Permanent Representative of France to the UN, "Protection of civilians affected by armed conflict", New York, 12 February 1999, *Politique étrangère de la France*, February 1999.
[187] Ghana, Report to the CRC, UN Doc. CRC/C/3/Add.39, 19 December 1995, § 126.
[188] Indonesia, Report to the CRC, UN Doc. CRC/C/3/Add.10, 14 January 1993, § 104.
[189] Report on the Practice of Jordan, 1997, Chapter 5.3.

of Social Welfare and Development. All efforts are undertaken to locate the child's parents and relative. Arrangements are made for the temporary care of the child by a licensed foster family or a child-caring agency.[190]

210. In 1994, in its initial report to the CRC, Sri Lanka stated, with respect to child victims of armed conflict and refugees, that "there are several urgent needs that have to be met [including] the special health and nutritional needs of infants and pre-school children ... [and the] care and rehabilitation of children traumatized by violence".[191]

211. In 1993, in a statement before the CRC, Sudan referred to "days of tranquillity and corridors of peace. The former had begun in 1985 and had continued ever since ... The corridors had been used, for example, in vaccination campaigns run by UNICEF and in most cases the rebel movements had participated in those campaigns."[192]

212. In 1993, in its initial report to the CRC, Sudan stated that:

> 3. In fact, the efforts made by the Government of the Sudan ... are conclusive proof of its concern with and commitment to the rights and happiness of children; the Sudan is the country which introduced security corridors in areas of fighting and sought to cooperate with United Nations agencies ... to ensure the delivery of relief supplies to children, mothers and all citizens throughout the whole of the Sudan, including the areas controlled by the rebel movement.
> 17. .... concerning the situation of children in areas of armed conflict, ... "special" care is directed towards children and valuable efforts are being made ... to protect children and respond to their needs.[193]

213. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.[194]

214. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support ... the principle that ... children be the object of special respect and protection".[195]

215. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons

[190] Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, §§ 200, 201, 203, 204 and 206.
[191] Sri Lanka, Initial report to the CRC, UN Doc. CRC/C/8/Add.13, 5 May 1994, § 146.
[192] Sudan, Statement before the CRC, UN Doc. CRC/C/SR.70, 1 February 1993, §§ 13 and 20.
[193] Sudan, Initial report to the CRC, UN Doc. CRC/C/3/Add.20, 2 August 1993, §§ 3 and 17.
[194] Report on the Practice of Syria, 1997, Chapter 5.3.
[195] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[196]

III. Practice of International Organisations and Conferences

United Nations

216. In a resolution adopted in 1998, the UN Security Council expressed concern at the plight of children affected by the conflict in Sierra Leone and welcomed "the efforts of the government of Sierra Leone to coordinate an effective national response to the needs of children affected by armed conflict".[197]

217. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council called upon parties to armed conflicts "to undertake feasible measures during armed conflicts to minimize the harm suffered by children, such as 'days of tranquillity' to allow the delivery of basic necessary services and . . . to promote, implement and respect such measures".[198]

218. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reiterated its grave concern at "the particular impact that armed conflict has on children" and further reaffirmed in this regard "the importance of fully addressing their special protection and assistance needs in the mandates of peacemaking, peacekeeping and peace-building operations".[199]

219. In a resolution adopted in 2000, the UN Security Council emphasised the need to provide special protection for children in armed conflict and listed in detail what practical measures could be taken.[200]

220. In 1998, in a statement by its President on Sierra Leone, the UN Security Council condemned as gross violations of IHL the "atrocities carried out against the civilian population, particularly . . . children".[201]

221. In 1998, in a statement by its President on children and armed conflict, the UN Security Council strongly condemned "the targeting of children in armed conflicts . . . in violation of international humanitarian law".[202]

222. In 1999, in a statement by its President, the UN Security Council expressed particular concern at "the harmful impact of armed conflict on children".[203]

[196] Report on US Practice, 1997, Chapter 5.3.
[197] UN Security Council, Res. 1181, 13 July 1998, preamble.
[198] UN Security Council, Res. 1261, 25 August 1999, § 8.
[199] UN Security Council, Res. 1296, 19 April 2000, § 9.
[200] UN Security Council, Res. 1314, 11 August 2000, §§ 1–16.
[201] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, § 1.
[202] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, § 2.
[203] UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, § 5.

223. In a resolution adopted in 1993 on protection of children affected by armed conflicts, the UN General Assembly called upon States:

> fully to respect the provisions of the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977, as well as those of the Convention on the Rights of the Child, which accord children affected by armed conflicts special protection and treatment.[204]

224. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly urged all parties "to stop attacks on sites that usually have a significant presence of children as well as during the 'days of tranquillity' which had been agreed for the purpose of ensuring peaceful polio vaccination campaigns".[205]

225. In two resolutions adopted in 1982, ECOSOC expressed concern about the plight of children in situations of armed conflict and called upon governments and organisations to observe the rights of children, intensify their actions in this field and make generous contributions in this respect.[206]

226. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its deep concern at "the continuing violations of human rights in Myanmar . . . [including] the widespread use of forced child labour".[207]

227. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights reaffirmed "the importance of the special attention for children in situations of armed conflict, in particular in the areas of health and nutrition, education and social reintegration".[208]

228. In 1997, in its Conclusion on Refugee Children and Adolescents, the Executive Committee of the UNHCR called upon States and relevant parties "to respect and observe rights and principles that are in accordance with international human rights and humanitarian law [including] . . . (iv) the right of children affected by armed conflict to special protection and treatment".[209]

229. In 1998, in a report on assistance to unaccompanied refugee minors, which included a section on internally displaced children, the UN Secretary-General noted that UNICEF was "pressing for an end to the systematic abduction of children from northern Uganda . . . [to] camps in southern Sudan . . . [where] they were tortured, enslaved, raped and otherwise abused".[210]

230. In 1996, in a report on the impact of armed conflict on children, the UN Expert on the Situation of Children in Armed Conflicts recommended that "during conflicts, Governments should support the health of their population

[204] UN General Assembly, Res. 48/157, 20 December 1993, § 2.
[205] UN General Assembly, Res. 55/116, 4 December 2000, § 3(d).
[206] ECOSOC, Res. 1982/24, 4 May 1982, §§ 3–4 and preamble; Res. 1982/25, 4 May 1982, §§ 1–2.
[207] UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3(a), (c) and (d).
[208] UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 13(d).
[209] UNHCR, Executive Committee, Conclusion No. 84(XLVIII): Refugee Children and Adolescents, 20 October 1997, § a(iv).
[210] UN Secretary-General, Report on assistance to unaccompanied refugee minors, UN Doc. A/53/325, 26 August 1998, § 20.

by facilitating 'days of tranquillity' or 'corridors of peace' to ensure continuity of basic child health measures and delivery of humanitarian relief".[211]

Other International Organisations

231. In a resolution adopted in 1987, the Parliamentary Assembly of the Council of Europe condemned the imprisonment and torture of children during armed conflicts.[212]

232. In a recommendation adopted in 1991, the Parliamentary Assembly of the Council of Europe expressed shock at the hundreds of deaths daily in the Kurdish provinces of Iraq, with special reference to children.[213]

233. In a recommendation adopted in 1995 on Turkey's military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe asked Turkey to guarantee the fundamental rights of civilians, with special reference to vulnerable groups, including children.[214]

234. In a resolution adopted in 1989, the European Parliament expressed grave concern at the trial and imprisonment in Turkey of persons below adult age for political offences and called for their release.[215]

235. In a resolution adopted in 1989, the European Parliament stated that it considered that the most serious negative developments in the world with regard to respect for human rights included large-scale detention and reported torture or ill-treatment of children and minors in areas of civil unrest.[216]

International Conferences

236. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about "violations of human rights during armed conflicts, affecting the civilian population, especially . . . children" and therefore called upon States and all parties to armed conflicts "strictly to observe international humanitarian law".[217]

237. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of children in armed conflicts in which it recalled that "according to the Geneva Conventions and the two Additional Protocols, children under the age of 15 years who have taken direct part in hostilities and

[211] UN Expert on the Situation of Children in Armed Conflicts, Report on the impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, Annex, § 165(c), see also §§ 208 and 280.
[212] Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 13.
[213] Council of Europe, Parliamentary Assembly, Rec. 1150, 24 April 1991, § 3.
[214] Council of Europe, Parliamentary Assembly, Rec. 1266, 26 April 1995, § 5.
[215] European Parliament, Resolution on human rights violations in Turkey, 16 January 1989, § A(1).
[216] European Parliament, Resolution on the May Day events and continuing aggravation of the domestic political climate in Turkey, 26 June 1989, § 6(d).
[217] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29), see also § II (50).

fall into the power of an adverse Party continue to benefit from special protection, whether or not they are prisoners of war" and invited "governments and the Movement to do their utmost to ensure that children who have taken part, directly or indirectly, in hostilities are systematically rehabilitated to normal life".[218]

238. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it urgently drew attention to "the obligation to take all requisite measures to provide children with the protection and assistance to which they are entitled under national and international law", strongly condemned "the deliberate killing and exploitation of, and abuse of and violence against, children", and called for "particularly stringent measures to prevent and punish such behaviour". The Conference further encouraged

> States, the Movement and other competent entities and organizations to develop preventive measures, assess existing programmes and set up new programmes to ensure that child victims of conflict receive medical, psychological and social assistance, provided if possible by qualified personnel who are aware of the specific issues involved.[219]

239. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made . . . to spare the life, protect and respect the civilian population, with particular protective measures for . . . groups with special vulnerabilities such as children" and that "children receive the special protection, care and assistance . . . to which they are entitled under national and international law".[220]

IV. Practice of International Judicial and Quasi-judicial Bodies

240. In 1993, in its preliminary observations on Sudan, the CRC expressed concern at "the effects of armed conflict on children . . . In emergency situations, all parties involved should do their utmost to facilitate humanitarian assistance to protect the lives of children."[221] In its concluding observations on the report of Sudan, the Committee stated that it continued to be alarmed at "the

[218] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, §§ 1, 3 and 6.

[219] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § C(a), (b) and (g).

[220] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a) and (f).

[221] CRC, Preliminary observations on Sudan, UN Doc. CRC/C/15/Add.6, 18 February 1993, § 9.

effects of emergency situations on children, as well as the problems faced by homeless . . . children. Reports on the forced labour and slavery of children give cause for the Committee's deepest concern."[222]

241. In 1993, in its concluding observations on the report of Peru, the CRC expressed concern that:

due to the internal violence [in Peru], several registration centres had been destroyed, adversely affecting the situation of thousands of children who are often without any identity documents, thus running the risk of their being suspected of involvement in terrorist activities . . .

The Committee deplores that, under [Peruvian law], children between 15 and 18 years of age who are suspected of being involved in terrorist activities do not benefit from safeguards and guarantees afforded by the system of administration of juvenile justice under normal circumstances . . .

The Committee also recommends that the provision of [the] law . . . be repealed or amended in order for children below 18 years of age to enjoy fully the rights guaranteed to [juveniles in non-emergency situations].[223]

242. In 1995, in its concluding observations on the report of the UK, the CRC stated that:

The Committee is concerned about the absence of effective safeguards to prevent the ill-treatment of children under emergency legislation. In this connection, the Committee observes that . . . it is possible to hold children as young as 10 for seven days without charge. It is also noted that the emergency legislation which gives the police and the army the power to stop, question and search people on the street has led to complaints of children being mistreated.[224]

243. In 1997, in its consideration of reports of Uganda, the CRC recommended that Uganda take "measures to stop the killing and abduction of children . . . in the area of the armed conflict".[225] It also recommended that "special attention be directed to refugee and internally displaced children to ensure that they have equal access to basic facilities" such as health and social services.[226]

244. In 1995, in examining a case involving the house arrest of the wife of the former President of Peru and their children, the IACiHR considered that the detention of the minors required separate examination. In view of the special

[222] CRC, Concluding observations on the report of Sudan, UN Doc. CRC/C/15/Add.10, 18 October 1993, § 14.

[223] CRC, Concluding observations on the report of Peru, UN Doc. CRC/C/15/Add.8, 18 October 1993, §§ 8, 9 and 17–18.

[224] CRC, Concluding observations on the report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/38, 20 February 1995, § 212.

[225] CRC, Consideration of reports of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 19 and 34.

[226] CRC, Consideration of reports of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 21 and 37.

protection required for children under international law, the Commission found the measures taken by the Peruvian armed forces depriving the children of their freedom to be "particularly repugnant".[227]

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

245. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "children shall be treated with all regard due to their . . . age".[228]

246. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on child soldiers in which it appealed to all parties to armed conflicts "strictly to observe the rules of international humanitarian law affording special protection to children" and invited National Red Cross and Red Crescent Societies "to do everything possible to protect children during armed conflicts, particularly by ensuring that their basic needs are met".[229]

247. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "children and adolescents shall be granted favoured treatment at all times".[230]

248. In 1994, in a joint statement, the ICRC, the International Federation of Red Cross and Red Crescent Societies, UNHCR and UNICEF reaffirmed that they "will continue to do their utmost to improve protection, medical and social conditions . . . so that the safety and the welfare of [unaccompanied] children can be ensured".[231]

249. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on children in armed conflicts, which recognised that "the 1949 Geneva Conventions and the 1977 Additional Protocols, as well as Articles 38 and 39 of the 1989 United Nations Convention on the Rights of the Child, accord children special protection and treatment". The resolution also endorsed the Plan of Action for the Red Cross and Red Crescent Movement which aimed "to take concrete action to protect and assist child victims of armed conflicts".[232]

[227] IACiHR, *Case 11.006 (Peru)*, Report, 7 February 1995, Sections VI (B)(1) and VII (1).

[228] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 666.

[229] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 14, §§ 1 and 3.

[230] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

[231] ICRC, International Federation of Red Cross and Red Crescent Societies, UNHCR and UNICEF, Joint statement on the evacuation of unaccompanied children from Rwanda, 27 June 1994, § 4.

[232] International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 5, preamble and § 2.

VI. Other Practice

250. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every child has the right to the measures of protection required by his or her condition as a minor and shall be provided with the care and aid the child requires".[233]

Education

I. Treaties and Other Instruments

Treaties

251. Article 24, first paragraph, GC IV provides that "the parties to the conflict shall take the necessary measures to ensure that [the education of] children under fifteen, who are orphaned or are separated from their families," is facilitated.

252. Article 50 GC IV provides that:

> The Occupying Power shall, with the co-operation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.
> ...
> Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

253. Article 94, second paragraph, GC IV provides that the education of interned children shall be ensured.

254. Article 13 of the 1966 ICESCR provides that "the States Parties to the present Covenant recognize the right of everyone to education". It further provides that "primary education shall be compulsory and available free to all".

255. Article 78(2) AP I provides that "whenever an evacuation occurs ... each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity". Article 78 AP I was adopted by consensus.[234]

256. Article 4(3)(a) AP II provides that children "shall receive education, including religious and moral education, in keeping with the wishes of their parents,

[233] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 10, *IRRC*, No. 282, p. 334.

[234] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 254.

or in the absence of parents, of those responsible for their care". Article 4 AP II was adopted by consensus.[235]

257. Article 28 of the 1989 Convention on the Rights of the Child provides that "the States Parties recognize the right of the child to education".

258. Article 11 of the 1990 African Charter on the Rights and Welfare of the Child provides that "every child shall have the right to an education".

259. Article 1(12) of the 1995 Agreement on Human Rights annexed to the Dayton Accords states that "the Parties shall secure to all persons within their jurisdiction the right to education".

Other Instruments

260. Article 26 of the 1948 UDHR provides that "everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages."

261. Rule 13.5 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice states that "while in custody, juveniles shall receive . . . educational [assistance]".

262. Rule 24.1 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice states that "efforts shall be made to provide juveniles, at all stages of the proceedings, with . . . education".

263. Guideline 20 of the 1990 Guidelines for the Prevention of Juvenile Delinquency states that "governments are under an obligation to make public education accessible to all young persons".

264. Rule 38 of the 1990 Rules for the Protection of Juveniles Deprived of their Liberty states that "every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for a return to society".

265. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 78(2) AP I.

266. Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 78(2) AP I.

267. Principle 23 of the 1998 Guiding Principles on Internal Displacement states that:

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of . . . girls in educational programmes.

[235] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

II. National Practice

Military Manuals

268. Argentina's Law of War Manual (1969) provides that the parties to the conflict shall take the necessary measures for children under seven years of age to ensure "their maintenance, the exercise of their religion and their education are facilitated in all circumstances. The latter shall, as far as possible, be entrusted to persons of a similar cultural tradition."[236] The manual also states that "the occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children".[237] It adds that:

> Should the local institutions be inadequate for the purpose, the occupying Power shall make arrangements to ensure the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.[238]

269. Argentina's Law of War Manual (1989) provides, with respect to non-international armed conflicts, that "children shall receive the assistance and care they require, in particular concerning their education, including their religious or moral education".[239]

270. Australia's Defence Force Manual provides that "the occupying power must ensure that . . . proper steps are taken to maintain [the] education and religious welfare" of children under 15 years of age.[240]

271. Canada's LOAC Manual provides that belligerents "must ensure the maintenance of [children under 15] and facilitate the exercise of their religion, while their education must as far as possible be entrusted to persons of a similar cultural tradition".[241] The manual further states that, with respect to non-international armed conflicts in particular, "children are to receive such aid and protection as required including: a. an education which makes provision for their religious and moral care".[242]

272. Colombia's Basic Military Manual provides that education shall be provided to children.[243]

273. The Report on the Practice of Indonesia, with reference to the Military Manual, states that children under 15 years of age, orphaned or separated from their families as a result of conflict, shall be given access to education.[244]

[236] Argentina, *Law of War Manual* (1969), § 4.007; see also *Law of War Manual* (1989), § 4.12.
[237] Argentina, *Law of War Manual* (1969), § 5.009; see also *Law of War Manual* (1989), § 6.06.
[238] Argentina, *Law of War Manual* (1969), § 5.009.
[239] Argentina, *Law of War Manual* (1989), § 7.04.
[240] Australia, *Defence Force Manual* (1994), § 1215.
[241] Canada, *LOAC Manual* (1999), p. 11-3, § 25.
[242] Canada, *LOAC Manual* (1999), p. 17-3, § 22.
[243] Colombia, *Basic Military Manual* (1995), p. 74.
[244] Report on the Practice of Indonesia, 1997, Chapter 5.3, referring to *Military Manual* (1982).

274. Italy's IHL Manual provides that the occupying power "shall take all necessary measures to ensure . . . the education of minors".[245]
275. New Zealand's Military Manual provides that belligerents "must ensure the maintenance of [children under 15] and facilitate the exercise of their religion, while their education must as far as possible be entrusted to persons of a similar cultural tradition".[246] It further states that "the Occupying Power must take the necessary steps to ensure that children under fifteen separated from their families are not left to their own resources and that proper steps are taken to maintain their education and religious welfare".[247] With respect to non-international armed conflicts in particular, the manual states that children "are to receive such aid and protection as they require, including an education which makes provision for their religious and moral care".[248]
276. Switzerland's Basic Military Manual provides that "necessary measures must be taken for children under 15 years . . . in any circumstances, so that their care, religious practice and education are facilitated".[249]
277. The UK Military Manual provides that belligerents "must ensure the maintenance of [children under 15] and facilitate the exercise of their religion, while their education must as far as possible be entrusted to persons of similar cultural tradition".[250] The manual further states that:

> If the local institutions are not adequate for the purpose, the Occupant must make arrangements for the maintenance and education of children who are orphaned or separated from their parents as a result of the war and who can not be adequately looked after by a near relative or friend. The persons entrusted for the maintenance and education of such children shall, if possible, be persons of the children's own nationality, language and religion.[251]

278. The US Field Manual reproduces Articles 24 and 50 GC IV.[252]

National Legislation
279. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[253]
280. Croatia's Law on Displaced Persons and Directive on Displaced Persons provide that displaced children shall be educated.[254]

[245] Italy, *IHL Manual* (1991), Vol. I, § 48(9).
[246] New Zealand, *Military Manual* (1992), § 1112(1).
[247] New Zealand, *Military Manual* (1992), § 1317(2).
[248] New Zealand, *Military Manual* (1992), § 1813(1).
[249] Switzerland, *Basic Military Manual* (1987), Article 157(1).
[250] UK, *Military Manual* (1958), § 36. [251] UK, *Military Manual* (1958), § 538.
[252] US, *Field Manual* (1956), §§ 263 and 383.
[253] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[254] Croatia, *Law on Displaced Persons* (1993), Article 13; *Directive on Displaced Persons* (1991), Articles 2 and 13.

281. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 24, 50 and 94 GC IV, and of AP I, including violations of Article 78(2) AP I, as well as any "contravention" of AP II, including violations of Article 4(3)(a) AP II, are punishable offences.[255]

282. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[256]

283. The Report on the Practice of Russia considers the 1997 Law on Refugees to be applicable to internally displaced persons. One of the principal rights contained in this law is the right of children to receive a primary education.[257]

National Case-law

284. No practice was found.

Other National Practice

285. According to the Report on the Practice of France, the French authorities consider the persistent closing of schools and universities in the West Bank to be a matter of serious concern.[258]

286. With reference to two memoranda on accommodation in detention camps, the Report on the Practice of Malaysia states that during the communist insurgency, children were detained in Advanced Approved Schools and were provided with an education.[259]

287. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that "the government shall undertake appropriate measures so that the schooling of children evacuees shall not be prejudiced".[260]

288. In 1994, in its initial report to the CRC, Sri Lanka stated, with respect to child victims of armed conflict and refugees, that "there are several urgent needs that have to be met [including] ... education for children of school age".[261]

[255] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[256] Norway, *Military Penal Code as amended* (1902), § 108.
[257] Report on the Practice of Russia, 1997, Chapter 5.5.
[258] Report on the Practice of France, 1999, Chapter 5.7.
[259] Report on the Practice of Malaysia, 1997, Chapter 5.5, referring to Memorandum on Accommodation in Detention Camps, 13 June 1950, Ref. (4) in DCHQ/87/50 and Memorandum on Accommodation in Detention Camps, 6 December 1950, Ref. (56) in DCHQ/187/50.
[260] Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 12.
[261] Sri Lanka, Initial report to the CRC, UN Doc. CRC/C/8/Add.13, 5 May 1994, § 146.

289. In 1993, in a statement before the CRC, Sudan reported that "education for displaced children had been made available in the form of special schools in the camps".[262]

290. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[263]

III. Practice of International Organisations and Conferences

United Nations

291. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned "attacks on objects protected under international law, including places that usually have a significant presence of children such as . . . schools, and calls on all parties concerned to put an end to such practices".[264]

292. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council reiterated "the importance of ensuring that children continue to have access to basic services during conflict and post-conflict periods, including, *inter alia*, education and health care".[265]

293. In a resolution adopted in 1999, the UN General Assembly urged all parties involved in Kosovo "to support the efforts of the United Nations Children's Fund to ensure that all children in Kosovo return to school as soon as possible and to contribute to the rebuilding and repair of schools destroyed or damaged during the conflict in Kosovo".[266]

294. In a resolution adopted in 1999 on the rights of the child, the UN Commission on Human Rights reaffirmed "the importance of special attention for children in situations of armed conflict, particularly in the area of . . . education".[267]

295. In 1997, in its Conclusion on Refugee Children and Adolescents, the Executive Committee of the UNHCR called upon States and relevant parties "to respect and observe rights and principles that are in accordance with international human rights and humanitarian law [including] . . . (iii) the right of children and adolescents to education".[268]

[262] Sudan, Statement before the CRC, UN Doc. CRC/C/SR.90, 5 November 1993, § 28.
[263] Report on US Practice, 1997, Chapter 5.3.
[264] UN Security Council, Res. 1261, 25 August 1999, § 2.
[265] UN Security Council, Res. 1314, 11 August 2000, § 14.
[266] UN General Assembly, Res. 54/183, 17 December 1999, § 21.
[267] UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 13(d).
[268] UNHCR, Executive Committee, Conclusion No. 84(XLVIII): Refugee Children and Adolescents, 20 October 1997, § a(iii).

296. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law".[269]

297. In 1996, in a report on the impact of armed conflict on children, the UN Expert on the Situation of Children in Armed Conflict recommended that, with respect to education, "all possible efforts should be made to maintain education systems during conflicts", including "outside of formal school buildings" and in camps for displaced persons.[270]

298. In 1995, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reported that in some of the camps for displaced persons in northern Burundi, "a number of NGOs have attempted to provide some minimum educational facilities".[271]

299. In 1996, in a report on the situation of human rights in Zaire, the Special Rapporteur of the UN Commission on Human Rights recommended that the government establish resettlement programmes for IDPs, with special emphasis on the provision of education for children".[272]

300. In 1997, in a report on his visit to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons noted that "as regards education, displaced children were to some extent accommodated within the existing school system". However, "education was severely interrupted and the quality remained poor for a number of years".[273]

Other International Organisations

301. In a resolution adopted in 1993, the Parliamentary Assembly of the Council of Europe urged member States "to supply children in the former Yugoslavia affected by the conflict with a minimum of education and the educational and play materials (books, toys, etc.) which is vital for children's development".[274]

302. In a recommendation on the former Yugoslavia adopted in 1994, the Parliamentary Assembly of the Council of Europe stated that children and students who had been moved outside the areas of fighting should, "as far as possible, . . . be able to continue their education in refugee camps or at least

[269] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

[270] UN Expert on the Situation of Children in Armed Conflict, Report on the impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, § 203(a)–(d)

[271] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 82.

[272] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6/Add.1, 16 September 1996, p. 25, § (j).

[273] Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 24 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 47.

[274] Council of Europe, Parliamentary Assembly, Res. 1011, 28 September 1993, § 7(x).

in the neighbourhood, where tuition in their own language can more easily be provided".[275]

International Conferences

303. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "children receive the special protection, care and assistance, including access to education and recreational facilities, to which they are entitled under national and international law".[276]

IV. Practice of International Judicial and Quasi-judicial Bodies

304. In 1995, in discussing the question of children and armed conflict, the CRC recalled that provisions essential for the realisation of the rights of the child included access to education.[277]

305. In 1997, in its concluding observations on the report of Uganda, the CRC expressed concerns "about the difficulties encountered . . . by displaced children in securing access to basic education" and recommended that Uganda pay special attention to "internally displaced children to ensure that they have equal access to basic facilities".[278]

306. In 1999, in its General Comment on Article 13 of the 1966 ICESCR, the UN Committee on Economic, Social and Cultural Rights held that "education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location . . . or via modern technology". It also held that "States parties have immediate obligations in relation to the right to education, such as the 'guarantee' that the right 'will be exercised without discrimination of any kind' and the obligation 'to take steps' towards the full realization of article 13". States must also "fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials and training teachers".[279]

307. In its judgement in the *Cyprus case* in 2001, the ECtHR found that "there has been a violation of Article 2 of Protocol No. 1 [to the 1950 ECHR (right to education)] in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them".[280]

[275] Council of Europe, Parliamentary Assembly, Rec. 1239, 14 April 1994, § 25.
[276] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(f).
[277] CRC, Report on the 8th Session, UN Doc. CRC/C/38, 20 February 1995, §§ 45, 70 and 135.
[278] CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 21 and 37.
[279] UN Committee on Economic, Social and Cultural Rights, General Comment No. 13 (The right to education (Article 13 ICESCR)), 8 July 1999, §§ 6(b), 43 and 50.
[280] ECtHR, *Cyprus case*, Judgement, 10 May 2001, § 280.

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

308. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on child soldiers in which it invited National Red Cross and Red Crescent Societies "to do everything possible to protect children during armed conflicts, particularly by . . . organizing educational activities for them".[281]

VI. Other Practice

309. No practice was found.

Evacuation

Note: *For practice concerning the establishment of hospital and safety zones to protect children, see Chapter 11, section A.*

I. Treaties and Other Instruments

Treaties

310. Article 17 GC IV provides that "the parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas . . . of children".

311. Article 24, second paragraph, GC IV provides that "the Parties to the conflict shall facilitate the reception of such children [orphaned or separated from their families] in a neutral country for the duration of the conflict with the consent of the Protecting Power".

312. Article 78(1) AP I provides that:

> No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required . . .
>
> In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

Article 78 AP I was adopted by consensus.[282]

313. Article 4(3)(e) AP II provides that:

> Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking

[281] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 14, § 3.

[282] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 254.

place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Article 4 AP II was adopted by consensus.[283]

Other Instruments

314. Article 19 of the 1863 Lieber Code provides that "Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially . . . children, may be removed before the bombardment commences".

315. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 78(1) AP I.

316. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 78(1) AP I.

II. National Practice

Military Manuals

317. Argentina's Law of War Manual (1969) provides that "the belligerents shall endeavour to conclude agreements for the removal from besieged areas of . . . children".[284] The manual also provides that "the belligerent parties shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards".[285]

318. Argentina's Law of War Manual (1989) provides that "no party in conflict shall undertake the evacuation of children to a foreign country. If an evacuation has been undertaken, they shall take all the necessary measures to facilitate the return of the children to their families and their country."[286] With respect to non-international conflicts in particular, the manual states that "all the necessary measures shall be taken so that, with the consent of their parents or guardians, they [children under 15 years] are transferred from the area in which hostilities are taking place".[287]

319. Australia's Defence Force Manual states that "the opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of . . . children".[288] It further states that:

As is the case with women, children are granted special protection under LOAC. Important rules are shown below . . .

[283] CDDH, *Official Records*, Vol. VI, CDDH/SR.50, 3 June 1977, p. 90.
[284] Argentina, *Law of War Manual* (1969), § 1.014.
[285] Argentina, *Law of War Manual* (1969), § 4.007.
[286] Argentina, *Law of War Manual* (1989), § 4.12.
[287] Argentina, *Law of War Manual* (1989), § 7.04.
[288] Australia, *Defence Force Manual* (1994), § 735; see also *Commanders' Guide* (1994), § 926.

e. children who are not nationals of the state may not be evacuated by that state to a foreign country unless the evacuation is temporary and accords to certain conditions set out in AP I.[289]

320. Cameroon's Instructors' Manual provides that at the approach of the enemy, "all persons shall be evacuated, with priority . . . children".[290]

321. Canada's LOAC Manual provides that "belligerents must also facilitate the reception of these children [children under 15 who have been orphaned or separated from their families] by neutral countries for the duration of hostilities, with the consent of the Protecting Power, if any".[291] It also states that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of . . . children".[292] With respect to non-international armed conflicts in particular, the manual provides that "if the children's safety requires their removal from the area in which they are, this should be done, whenever possible, with the consent of their parents or guardians. Persons responsible for the safety and well-being of the children should also accompany them."[293]

322. Colombia's Basic Military Manual provides that, with respect to non-international armed conflicts in particular, "all measures shall be taken in order to temporarily transfer the children to safety zones, accompanied by persons responsible for their safety".[294]

323. France's LOAC Manual provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . children".[295]

324. The Report on the Practice of Indonesia, with reference to the Military Manual, states that children under 15 years of age, orphaned or separated from their families as a result of conflict, should be evacuated to neutral States.[296]

325. The Military Manual of the Netherlands provides that "children shall not be evacuated without reason to a foreign country. Exception shall be made for a temporary evacuation where compelling reasons of the health and safety of the children so required."[297]

326. New Zealand's Military Manual provides that:

> Belligerents must also facilitate the reception of these children [children under 15 who have been orphaned or separated from their families] by neutral States for the duration of hostilities, with the consent of the Protecting Power, if any, and under due safeguards as above.[298]

[289] Australia, *Defence Force Manual* (1994), § 947.
[290] Cameroon, *Instructors' Manual* (1992), p. 67, § 242(1).
[291] Canada, *LOAC Manual* (1999), p. 11-3, § 25.
[292] Canada, *LOAC Manual* (1999), p. 6-4, § 35.
[293] Canada, *LOAC Manual* (1999), p. 17-3, § 23.
[294] Colombia, *Basic Military Manual* (1995), p. 74.
[295] France, *LOAC Manual* (2001), p. 64.
[296] Report on the Practice of Indonesia, 1997, Chapter 5.3, referring to *Military Manual* (1982).
[297] Netherlands, *Military Manual* (1993), p. VIII-3.
[298] New Zealand, *Military Manual* (1992), § 1112(1), see also § 1405(5).

The manual refers to Article 17 GC IV, which "requires that belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . children".[299] With respect to non-international armed conflicts in particular, the manual provides that "if children's safety requires their removal from the area in which they are, the consent of their parents or guardians should be obtained whenever possible and the children accompanied by persons responsible for their safety and well-being".[300]

327. Spain's LOAC Manual provides that "in besieged or encircled areas where there is a civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of . . . children".[301]

328. Sweden's IHL Manual provides that:

> It is also possible for the parties to reach an agreement during a conflict that all acts of war shall cease temporarily within a given part of a conflict area. Such agreements are commonly made to afford protection to civilian populations, and specially to such exposed groups as children[302]

329. Switzerland's Basic Military Manual provides that "belligerents shall conclude special agreements in order to evacuate . . . children . . . from besieged areas".[303] It further provides that it is prohibited to evacuate children into a foreign country, except with the temporary authorisation of the government.[304]

330. The UK Military Manual states that "the belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . children".[305]

331. The UK LOAC Manual states that "a local cease-fire may be arranged for the removal from besieged or encircled areas of . . . children".[306]

332. The US Field Manual provides that "the commanders of United States ground forces will, when the situation permits, inform the enemy of their intention to bombard a place, so that the noncombatants, especially . . . children, may be removed before the bombardment commences".[307] It further states that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . children".[308] The manual also provides that "the parties to the conflict shall facilitate the reception of such children [under fifteen, who are orphaned or are separated from their families as a result of the war] in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards".[309]

[299] New Zealand, *Military Manual* (1992), § 508(3).
[300] New Zealand, *Military Manual* (1992), § 1813(1).
[301] Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.
[302] Sweden, *IHL Manual* (1991), Section 3.4.1, p. 84.
[303] Switzerland, *Basic Military Manual* (1987), Article 33.
[304] Switzerland, *Basic Military Manual* (1987), Article 157.
[305] UK, *Military Manual* (1958), § 29.
[306] UK, *LOAC Manual* (1981), Section 9, p. 34, § 3.
[307] US, *Field Manual* (1956), § 43.
[308] US, *Field Manual* (1956), § 256, see also § 44.
[309] US, *Field Manual* (1956), § 263.

333. The US Air Force Pamphlet states that "removal of ... children ... from besieged or encircled areas is encouraged".[310]

National Legislation

334. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[311]

335. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 and 24 GC IV, and of AP I, including violations of Article 78(1) AP I, as well as any "contravention" of AP II, including violations of Article 4(3)(e) AP II, are punishable offences.[312]

336. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".[313]

337. The Act on Child Protection of the Philippines provides that children should be given priority during evacuations resulting from armed conflict.[314]

National Case-law

338. No practice was found.

Other National Practice

339. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that no state arrange for the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or safety, except in occupied territory, so require".[315]

340. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons

[310] US, *Air Force Pamphlet* (1976), § 14-3.
[311] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[312] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[313] Norway, *Military Penal Code as amended* (1902), § 108.
[314] Philippines, *Act on Child Protection* (1992), Sections 23–24.
[315] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[316]

III. Practice of International Organisations and Conferences

United Nations
341. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law".[317]

Other International Organisations
342. No practice was found.

International Conferences
343. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

344. No practice was found.

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

345. No practice was found.

VI. Other Practice

346. No practice was found.

Death penalty on children

I. Treaties and Other Instruments

Treaties
347. Article 68, fourth paragraph, GC IV provides that "in any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence".
348. Article 6(5) of the 1966 ICCPR provides that "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age".

[316] Report on US Practice, 1997, Chapter 5.3.
[317] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

349. Article 4(5) of the 1969 ACHR provides that "capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age".
350. Article 77(5) AP I provides that "the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed". Article 77 AP I was adopted by consensus.[318]
351. Article 6(4) AP II provides that "the death penalty shall not be pronounced on persons who were under the age of eighteen years of age at the time of the offence". Article 6 AP II was adopted by consensus.[319]
352. Article 37(a) of the 1989 Convention on the Rights of the Child provides that:

> No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

Other Instruments
353. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(5) AP I.
354. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(5) AP I.

II. National Practice

Military Manuals
355. Argentina's Law of War Manual (1969) provides that "in any case, the death penalty may not be pronounced against a protected person who was under the age of 18 at the time of the offence".[320]
356. Argentina's Law of War Manual (1989) provides that, with respect to non-international armed conflicts in particular, "the death penalty shall not be pronounced against a person who is under the age of 18".[321]
357. Australia's Defence Force Manual provides that "the death penalty must not be executed on children who are under the age of 18 at the time the offence was committed".[322]

[318] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[319] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 85.
[320] Argentina, *Law of War Manual* (1969), § 5.028(1).
[321] Argentina, *Law of War Manual* (1989), § 7.10, see also §§ 3.28 and 5.11.
[322] Australia, *Defence Force Manual* (1994), § 947.

358. Canada's LOAC Manual provides that, with respect to non-international armed conflicts in particular, "regardless of the offence committed, no death penalty shall be pronounced upon persons under the age of eighteen at the time of the offence".[323]

359. According to the Report on the Practice of Jordan, national legislation provides that the death penalty may not be pronounced on a minor who was under 18 years of age at the time of the offence.[324]

360. The Military Manual of the Netherlands provides that "the death penalty shall not be pronounced on persons who were under the age of eighteen years of age at the time of the offence".[325]

361. New Zealand's Military Manual provides that "in any case, the death penalty may not be pronounced [by the Occupying Power] against a protected person who was under 18 years of age at the time of the offence".[326]

362. Switzerland's Basic Military Manual provides that the occupying power can only pronounce the death penalty when the accused is over the age of 18 years.[327]

363. The UK Military Manual provides that "in any case, the death penalty may not be pronounced against a protected person who was under 18 years of age at the time of the offence".[328]

364. The US Field Manual reproduces Article 68 GC IV.[329]

National Legislation

365. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[330]

366. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 68 GC IV, and of AP I, including violations of Article 77(5) AP I, as well as any "contravention" of AP II, including violations of Article 6(4) AP II, are punishable offences.[331]

367. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[332]

[323] Canada, *LOAC Manual* (1999), p. 17-4, § 30.
[324] Report on the Practice of Jordan, 1998, Chapter 5.3
[325] Netherlands, *Military Manual* (1993), p. XI-5.
[326] New Zealand, *Military Manual* (1992), § 1327(1)(c).
[327] Switzerland, *Basic Military Manual* (1987), Article 173.
[328] UK, *Military Manual* (1958), § 566(c).
[329] US, *Field Manual* (1956), § 438.
[330] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[331] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[332] Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law
368. No practice was found.

Other National Practice
369. In 1993, Peru informed the CRC that "children convicted of committing terrorist activities could not receive life sentences" and that "even if the death penalty were introduced for terrorists, it would not be applied to adolescents under the age of 18 because the Convention [on the Rights of the Child] took precedence over all other legislation".[333]
370. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.[334]
371. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[335]

III. Practice of International Organisations and Conferences

United Nations
372. No practice was found.

Other International Organisations
373. No practice was found.

International Conferences
374. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon African States:

> to respect fully the provisions of international humanitarian law, in particular in the case of captured child soldiers, especially by . . . ensuring that neither the death penalty nor life imprisonment without possibility of release is imposed for offences committed by persons below 18 years of age.[336]

IV. Practice of International Judicial and Quasi-judicial Bodies

375. No practice was found.

[333] Peru, Statement before the CRC, UN Doc. CRC/C/SR.84, 30 September 1993, §§ 25 and 39.
[334] Report on the Practice of Syria, 1997, Chapter 5.3.
[335] Report on US Practice, 1997, Chapter 5.3.
[336] African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 5.

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

376. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the pronouncement of the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed".[337]

VI. Other Practice

377. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "sentences of death shall not be carried out on . . . children under 18 years of age at the time of the commission of the offence".[338]

C. Recruitment of Child Soldiers

I. Treaties and Other Instruments

Treaties

378. Article 50, second paragraph, GC IV, provides that the occupying power may not enlist children "in formations or organizations subordinate to it".

379. Article 77(2) AP I provides that:

> The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

Article 77 AP I was adopted by consensus.[339]

380. Article 4(3)(c) AP II provides that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities". Article 4 AP II was adopted by consensus.[340]

381. Article 38(3) of the 1989 Convention on the Rights of the Child provides that:

> States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have

[337] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 204.
[338] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 8 (3), *IRRC*, No. 282, p. 333.
[339] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[340] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

382. Upon ratification of the 1989 Convention on the Rights of the Child, Colombia stated that "the age [for recruitment] shall be understood to be 18 years, given the fact that, under Colombian law, the minimum age for recruitment into the armed forces of personnel called for military service is 18 years".[341]

383. Upon ratification of the 1989 Convention on the Rights of the Child, the Netherlands stated that "it is of the opinion that ... the minimum age for the recruitment or incorporation of children in the armed forces should be above 15 years".[342]

384. Upon ratification of the 1989 Convention on the Rights of the Child, Spain expressed its disagreement at the Convention "permitting the recruitment and participation in armed conflict of children having attained the age of 15 years".[343]

385. Upon ratification of the 1989 Convention on the Rights of the Child, Uruguay stated that it "will not under any circumstances recruit persons who have not attained the age of 18 years".[344]

386. Article 22(2) of the 1990 African Charter on the Rights and Welfare of the Child provides that "States Parties to the present Charter shall ... refrain, in particular, from recruiting any child".

387. Under Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute, "conscripting or enlisting children under the age of fifteen years" into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.

388. Article 1 of the 1999 Convention on the Worst Forms of Child Labour states that each State party "shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency" Article 3(a) lists "forced or compulsory recruitment of children [under 18] for use in armed conflict" as one of the worst forms of child labour.

389. The 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

Article 2: States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

[341] Colombia, Declaration made upon ratification of the Convention on the Rights of the Child, 28 January 1991, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 15.

[342] Netherlands, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 February 1995, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

[343] Spain, Declarations made upon ratification of the Convention on the Rights of the Child, 6 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 29.

[344] Uruguay, Declarations made upon ratification of the Convention on the Rights of the Child, 20 November 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 32.

Article 3:

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
   (a) Such recruitment is genuinely voluntary;
   (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
   (c) Such persons are fully informed of the duties involved in such military service;
   (d) Such persons provide reliable proof of age prior to acceptance into national military service . . .
5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit . . . persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment . . . including the adoption of legal measures necessary to prohibit and criminalize such practices . . .

Article 6:

. . .

3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration . . .

Article 7:

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.

390. Article 4 of the 2002 Statute of the Special Court for Sierra Leone provides that "the Special Court shall have the power to prosecute persons who

committed the following serious violations of international humanitarian law: . . . conscripting or enlisting children under the age of 15 years into armed forces or groups".

Other Instruments

391. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(1) AP I.

392. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(1) AP I.

393. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxvi) and (e)(vii), "conscripting or enlisting children under the age of fifteen years" into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

394. Argentina's Law of War Manual provides that, with respect to non-international armed conflicts in particular, "children under the age of 15 shall not be recruited in the armed forces".[345]

395. Cameroon's Instructors' Manual states that children under the age of 15 "should not be recruited into the armed forces".[346]

396. Canada's LOAC Manual provides that, with respect to non-international armed conflicts in particular, "children are to receive such aid and protection as required including: . . . a ban on their enlistment . . . while under the age of fifteen".[347]

397. Colombia's Basic Military Manual provides that, with respect to non-international armed conflicts in particular, it is prohibited to "recruit and allow direct participation in hostilities of children under the age of 15".[348]

398. France's LOAC Manual provides that "it is prohibited to recruit persons under 15 into the armed forces".[349] It considers such recruitment "a war crime".[350]

399. Germany's Military Manual provides that "the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take direct part in hostilities and, in particular, they shall

[345] Argentina, *Law of War Manual* (1989), § 7.04.
[346] Cameroon, *Instructors' Manual* (1992), p. 15, § 15.
[347] Canada, *LOAC Manual* (1999), p. 17-3, § 22.
[348] Colombia, *Basic Military Manual* (1995), p. 75.
[349] France, *LOAC Manual* (2001), p. 40.
[350] France, *LOAC Manual* (2001), p. 63.

refrain from recruiting them into their armed forces".[351] The manual further states that children under 15 "shall not be enlisted".[352]

400. Kenya's LOAC Manual states that "children under the age of 15 shall not be recruited into the armed forces".[353]

401. The Military Manual of the Netherlands provides that "children may not be recruited in armed forces".[354]

402. New Zealand's Military Manual provides that, with respect to non-international armed conflicts in particular, children "are to receive such aid and protection as they require, including . . . a ban on their enlistment . . . while under the age of fifteen".[355]

403. Nigeria's Military Manual states that "children under 15 years shall not be recruited".[356]

404. Spain's LOAC Manual provides that "all possible means shall be taken, within the limits of military necessity, to avoid recruiting children under 15".[357]

405. The US Field Manual reproduces Article 50 GC IV.[358]

National Legislation

406. Under Argentina's Draft Code of Military Justice, breaches of treaty provisions providing for special protection of children are war crimes.[359]

407. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "using, conscripting or enlisting children" in both international and non-international armed conflicts.[360]

408. Azerbaijan's Criminal Code provides that "recruiting minors into the armed forces" constitutes a war crime.[361]

409. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[362]

410. The Law on the Rights of the Child of Belarus prohibits recruitment into the armed forces under the age of 18.[363]

411. The Criminal Code of Belarus provides that it is a war crime to "recruit into the armed forces children under the age of 15 years".[364]

[351] Germany, *Military Manual* (1992), § 306. [352] Germany, *Military Manual* (1992), § 505.
[353] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.
[354] Netherlands, *Military Manual* (1993), p. III-2, § 1.
[355] New Zealand, *Military Manual* (1992), § 1813.
[356] Nigeria, *Military Manual* (1994), p. 38, § 4.
[357] Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1). [358] US, *Field Manual* (1956), § 383.
[359] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).
[360] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.68 and 268.88.
[361] Azerbaijan, *Criminal Code* (1999), Article 116.0.5.
[362] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[363] Belarus, *Law on the Rights of the Child* (1993), Article 29.
[364] Belarus, *Criminal Code* (1999), Article 136(5).

412. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "conscripting or enrolling children under 15 years of age into national armed forces" constitutes a war crime in non-international armed conflicts.[365]

413. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[366]

414. Colombia's Law on Judicial Cooperation states that children under 18 may not be recruited into the armed forces, unless their parents give their consent. A five-year term of imprisonment is imposed on anyone who recruits children under 18.[367]

415. Colombia's Penal Code imposes a criminal sanction on "anyone, who, in period of armed conflict, recruits minors under 18 years of age".[368]

416. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[369]

417. Croatia's Defence Law imposes a military service obligation only for persons who are 19 years old in the year when they start their military service. In wartime or in case of direct peril to the independence and integrity of the Republic, the President may impose a military service obligation for persons who are 17 years old.[370]

418. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "conscripting or enlisting children under the age of fifteen years into the national armed forces" is a crime in both international and non-international armed conflicts.[371]

419. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups".[372]

420. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 50 GC IV, and of AP I, including violations of Article 77(2) AP I, as well as any

[365] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(D)(g).
[366] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[367] Colombia, *Law on Judicial Cooperation* (1997), Articles 13–14.
[368] Colombia, *Penal Code* (2000), Article 162.
[369] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[370] Croatia, *Defence Law* (1993), Article 98(1) and (5).
[371] Georgia, *Criminal Code* (1999), Article 413(d).
[372] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(5).

"contravention" of AP II, including violations of Article 4(3)(c) AP II, are punishable offences.[373]

421. Jordan's Military Service Law No. 2 provides that children under 16 years old may not be enlisted in the armed forces.[374]

422. Malawi's National Service Act states that no person under the age of 18 years shall be liable for military service.[375]

423. Malaysia's Armed Forces Act establishes a minimum age of 18 for anyone to be considered for enrolment or recruitment in the armed forces. Persons below the age of 18 may be appointed as apprentices, but they are not considered as recruits and are therefore not subjected to service law.[376]

424. Under Mali's Penal Code, "conscripting or enlisting children under the age of fifteen years into the national armed forces or groups" constitutes a war crime in international armed conflicts.[377]

425. Under the International Crimes Act of the Netherlands, "conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups" is a crime, whether committed in an international or a non-international armed conflict.[378]

426. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.[379]

427. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".[380]

428. The Act on Child Protection of the Philippines, in an article on "Children in situations of armed conflict", provides that "children shall not be recruited to become members of the Armed Forces of the Philippines or its civilians units or other armed groups".[381]

429. Under Spain's Penal Code, breaches of international treaty provisions providing for special protection of children are punished.[382]

430. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.[383]

[373] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[374] Jordan, *Military Service Law No. 2* (1972), Chapter 2, Article 5.
[375] Malawi, *National Service Act* (1951), Article 4.
[376] Malaysia, *Armed Forces Act* (1972), Section 18.
[377] Mali, *Penal Code* (2001), Article 31(i)(26).
[378] Netherlands, *International Crimes Act* (2003), Articles 5(5)(r) and 6(3)(f).
[379] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[380] Norway, *Military Penal Code as amended* (1902), § 108.
[381] Philippines, *Act on Child Protection* (1992), Article X, Section 22(b).
[382] Spain, *Penal Code* (1995), Article 612(3).
[383] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

431. Ukraine's Military Service Law states that 18 years is the recruitment age for the armed forces. Adolescents of 15 to 17 years old can enter military schools after having passed a medical examination. Military education and military service for persons who have not reached 15 years of age are forbidden.[384]
432. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.[385]
433. The FRY Army Act states that military conscription duty falls in the year when a draftee is to become 18, but a conscript may be recruited when he is turning 17 on personal request or under an order of the President in case of war.[386]

National Case-law
434. No practice was found.

Other National Practice
435. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Canada pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[387]
436. According to the Report on the Practice of Chile, it is the *opinio juris* of Chile that persons under the age of 18 must not be recruited in any hostilities.[388]
437. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Denmark pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[389]
438. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Finland pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[390]
439. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Guinea pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[391]

[384] Ukraine, *Military Service Law* (1992), Article 15.
[385] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[386] FRY, *Army Act* (1994), Article 291.
[387] Canada, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[388] Report on the Practice of Chile, 1997, Chapter 5.3.
[389] Denmark, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[390] Finland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[391] Guinea, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

440. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Iceland pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[392]

441. In 1996, during a debate in the UN Security Council on the situation in Liberia, Italy described the warlords' practice of recruiting children for combat as "one of the most despicable actions". It insisted that the international community should use every means available to stop such behaviour immediately, notably the inclusion of a provision in the future ICC Statute aimed at "bring[ing] to justice the perpetrators of such intolerable acts".[393]

442. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mexico pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[394]

443. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age" and " to ensure non-conscription of teenagers under 18 years old to join the army".[395]

444. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Norway pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[396]

445. In 1993, in its initial report to the CRC, the Philippines stated that "children are not to be recruited into the Armed Forces of the Philippines or into any armed group".[397]

446. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Africa pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[398]

447. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Sweden pledged "to promote the adoption of national and international

[392] Iceland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[393] Italy, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 6.
[394] Mexico, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[395] Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[396] Norway, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[397] Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, § 200.
[398] South Africa, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[399]

448. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Switzerland pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[400]

449. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.[401]

450. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand pledged "to prevent the recruitment of children below the age of 18 years into the situation of armed conflict".[402]

451. In 1996, during a debate in the UN Security Council on the situation in Liberia, the US denounced the practice of recruiting children for combat and called it an "abhorrent practice".[403]

452. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions.[404]

453. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Uruguay pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".[405]

III. Practice of International Organisations and Conferences

United Nations

454. In a resolution adopted in 1996 concerning the situation in Liberia, the UN Security Council condemned "the practice of some factions of recruiting . . . children for combat". It referred to such practice as "inhumane and abhorrent".[406] In a further resolution on the same subject adopted the same year, the Security Council condemned "in the strongest possible terms the practice of recruiting . . . children for combat" and demanded that "the warring parties

[399] Sweden, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[400] Switzerland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[401] Report on the Practice of Syria, 1997, Chapter 5.3.
[402] Thailand, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[403] US, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 15.
[404] Report on US Practice, 1997, Chapter 5.3.
[405] Uruguay, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[406] UN Security Council, Res. 1071, 30 August 1996, § 9.

immediately cease this inhumane and abhorrent activity and release all child soldiers for demobilization".[407]

455. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned "the targeting of children in situations of armed conflict, including . . . recruitment . . . of children in armed conflict in violation of international law".[408]

456. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council requested parties to armed conflict:

> to include, where appropriate, provisions for the protection of children, including the disarmament, demobilization and reintegration of child combatants, in peace negotiations and in peace agreements and the involvement of children, where possible, in these processes.[409]

457. In 1998, in a statement by its President concerning children and armed conflict, the UN Security Council strongly condemned "the recruitment . . . of child soldiers" and called upon "all parties concerned to put an end to such practice". It also called upon all parties concerned "to comply strictly with their obligations under international law, in particular their obligations under the Geneva Conventions of 1949, the Additional Protocols of 1977 and the United Nations Convention on the Rights of the Child of 1989". The Security Council expressed its readiness "to support efforts aimed at obtaining commitments to put to an end the recruitment . . . of children in armed conflicts . . . [and] to give special consideration to the . . . demobilization of child soldiers".[410]

458. In 1998, in a statement by its President, the UN Security Council condemned the recruitment of child soldiers in the DRC.[411]

459. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly welcomed the commitments undertaken by the SPLM/A "not to recruit into its armed forces children under the age of eighteen and to demobilize all child soldiers still remaining in the military and hand them over to the competent civil authorities for reintegration.[412]

460. In two resolutions adopted in 1993 and 1994, the UN Commission on Human Rights deplored "the continued practice of enlisting children in the armed forces".[413]

461. In a resolution adopted in 1995, the UN Commission on Human Rights stated that it was "deeply worried by the continued practice of enlisting

[407] UN Security Council, Res. 1083, 27 November 1996, § 6.
[408] UN Security Council, Res. 1261, 25 August 1999, § 2.
[409] UN Security Council, Res. 1314, 11 August 2000, § 11.
[410] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998.
[411] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998.
[412] UN General Assembly, Res. 55/116, 4 December 2000, § 1(m).
[413] UN Commission of Human Rights, Res. 1993/83, 10 March 1993, preamble; Res. 1994/94, 9 March 1994, preamble.

children in armed forces, in contravention of the Convention on the Rights of the Child".[414]

462. In two resolutions adopted in 1996 and 1998, the UN Commission on Human Rights urged all parties to the conflict in Afghanistan "to prohibit ... the recruitment of children as para-combatants".[415]

463. In a resolution adopted in 1998 on the elimination of violence against women, the UN Commission on Human Rights called upon States "to protect children, especially the girl child, in situations of armed conflict against ... recruitment ... through adherence to the applicable principles of international human rights and humanitarian law".[416]

464. In a resolution adopted in 1998 on the situation of human rights in Myanmar, the UN Commission on Human Rights expressed "its deep concern ... at continuing violations of the rights of children in contravention of the Convention on the Rights of the Child, in particular by ... recruitment ... into the armed forces".[417]

465. In a resolution adopted in 1998 on the abduction of children from northern Uganda, the UN Commission on Human Rights acknowledged "the concern expressed in the concluding observations of the Committee on the Rights of Child ... about ... the recruitment of children as child soldiers in northern Uganda" and condemned in the strongest terms "all parties involved in ... recruitment of children as child soldiers, particularly the Lord's Resistance Army".[418]

466. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights called upon all States and other parties to armed conflict "to end the use of children as soldiers and ensure their demobilization".[419]

467. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its concern at the forcible recruitment and kidnapping of children by non-governmental armed groups in Burundi and invited the government to take measures to combat these practices.[420]

468. In 1996, in a report on the impact of armed conflict on children, the UN Expert on the Situation of Children in Armed Conflict stated that "practical protection measures to prevent ... the recruitment of children into armed forces must be a priority in all assistance programmes in refugee and displaced camps".[421]

[414] UN Commission on Human Rights, Res. 1995/79, 8 March 1995, preamble.
[415] UN Commission on Human Rights, Res. 1996/75, 23 April 1996, § 4; Res. 1998/70, 21 April 1998, § 5(c).
[416] UN Commission on Human Rights, Res. 1998/52, 17 April 1998, § 9(g).
[417] UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3(d).
[418] UN Commission on Human Rights, Res. 1998/75, 22 April 1998, preamble and § 3.
[419] UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 12(b).
[420] UN Commission on Human Rights, Res. 1998/82, 24 April 1998, § 8.
[421] UN Expert on the Situation of Children in Armed Conflict, Report on the impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, Annex, § 90(c).

469. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General mentioned the important commitments resulting from the visit to Sierra Leone of his Special Representative for Children in Armed Conflict. He noted that the government agreed "not to recruit children under 18 years of age into a new national army. The Civil Defence Force committed to stop recruiting and initiating children under 18 and to begin the process of demobilization of child combatants within their ranks."[422]

470. In 1998, in a report on the UNOMSIL in Sierra Leone, the UN Secretary-General collected allegations concerning the initiation, by the Civil Defence Force, of children between the ages of 15 and 17. He welcomed "the commitment of the government and the Civil Defence Force not to recruit children under the age of 18 as soldiers" and urged them "to implement their undertaking to demobilize any children currently under arms as soon as possible".[423]

471. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General stated that compliance with IHL norms and principles had "worsened in recent years because of the changing pattern of conflicts" and gave as an illustration the fact that "young children are being recruited and trained to fight in violation of the Convention on the Rights of the Child and the Additional Protocols of the Geneva Conventions".[424]

472. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that he had "announced a minimum age requirement for United Nations peacekeepers . . . and asked contributing Governments to send in their national contingent's troops preferably not younger than 21 years of age, and in no case less than 18". He therefore recommended that the UN Security Council:

> urge Member States to support the proposal to raise the minimum age for recruitment . . . to 18, and accelerate the drafting of an optional protocol on the situation of children in armed conflict to the Convention on the Rights of the Child for consideration by the General Assembly.[425]

473. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law". He also stated that:

[422] UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 23.

[423] UN Secretary-General, First progress report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 43 and 59.

[424] UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, pp. 2–3.

[425] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 42 and Recommendation 8.

Other serious violations of international humanitarian law falling within the jurisdiction of the Court include: . . . abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities . . .

The prohibition of child recruitment has by now acquired a customary international law status.[426]

474. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that "it has been impossible to ascertain how many adolescents have been recruited – voluntarily or under duress – into various armies. In the Bihac pocket, there have been allegations that boys as young as 16 may have been forcibly drafted into the army." The Special Rapporteur also noted that in the United Nations Protected Areas, "many boys of 15 to 17 years of age have volunteered for, and sometimes been accepted, into the army of the so-called 'Serbian Republic of Krajina'".[427]

475. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur on Violence against Women, its Causes and Consequences stated that "despite the specific needs and experiences of girls in armed conflict, girls are often the last priority when it comes to the distribution of humanitarian aid and their needs are often neglected in the formulation of demobilization and reintegration programmes".[428]

476. In 1992, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL noted that:

60. . . . ONUSAL observers were able to verify that [a] huge number of children under 15 were in the FMLN ranks. When this situation was taken up with the Political and Diplomatic Commission of FMLN, it pledged to respect the international norms in force [Article 4(3)(c) AP II], which did not entirely prove to be the case. Although in several instances it was ascertained that the enlistments had been voluntary and in others it was not possible to establish the age of the minors, this prohibited recruitment practice was observed during the course of the conflict . . . [but] irregular recruitment, on the part of both the armed forces and FMLN, gradually ceased with the signing of the Peace Agreement on 16 January 1992.

. . .

101. . . . In regard to military recruitment, it was recommended that wide publicity be given to the Ministry of Defence regulations on recruitment procedures . . . FMLN was recommended to observe the rules of international humanitarian law

[426] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 14, 15(c) and 17.

[427] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, § 241.

[428] UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, § 52.

concerning the prohibition of the recruitment of minors under the age of 15 . . . in hostilities.[429]

Other International Organisations

477. In a resolution adopted in 1996, the OAU Council of Ministers "exhorted all African countries, in particular the warring parties in those countries embroiled in civil wars, . . . to refrain from recruiting children under the age of 18 in armed conflicts or violent activities of any kind whatsoever" and urged them to "release child combatants from the army".[430] In another resolution adopted at the same session, the Council of Ministers reiterated its appeal to member States and to all the parties engaged in armed conflict "to put an end to the recruitment of children in these conflicts".[431]

478. The statement adopted at the 1997 OAU/African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) Continental Conference on Children in Situations of Armed Conflict noted that "the recruitment of children under the age of 18 years into armed forces, militias or rebel forces, should be outlawed as stipulated in the African Charter on the Rights and Welfare of the Child, and treated as a crime against humanity".[432]

479. In the recommendations of the fifth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1998, the participants "firmly condemned the recruitment of children into forces engaged in fighting".[433]

480. In 1998, speaking on behalf of the SADC in the Sixth Committee of the UN General Assembly, South Africa declared that the 1998 ICC Statute

> would also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful for children under the age of 15 to be robbed of their childhood by being recruited to national armed forces . . . [This act] was a war crime and would be punished.[434]

International Conferences

481. The 25th International Conference of the Red Cross in 1986 recalled that, in accordance with Article 77 AP I, the parties to the conflict shall refrain from recruiting children who have not attained the age of fifteen into their armed forces and that "in recruiting among those persons who have attained the age of fifteen but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest".[435]

[429] ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/955-S/24375, 12 August 1992, Annex, §§ 60 and 101.
[430] OAU, Council of Ministers, Res. 1659 (LXIV), 1–5 July 1996, §§ 5–7.
[431] OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 8.
[432] OAU/ANPPCAN Continental Conference on Children in Situations of Armed Conflict in Africa, Addis Ababa, 24–26 July 1997, Final Statement, § 10.
[433] OAU/ICRC, Fifth seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 30–31 March 1998, Recommendations, § 3.
[434] SADC, Statement by South Africa on behalf of SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.
[435] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 2.

482. The 26th International Conference of the Red Cross and Red Crescent in 1995 strongly condemned "recruitment and conscription of children under the age of 15 years in the armed forces or armed groups, which constitute a violation of international humanitarian law" and demanded that "those responsible for such acts be brought to justice and punished". The Conference further took note of "the efforts of the Movement to promote a principle of non-recruitment . . . of children under the age of 18 years".[436]

483. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon all African States to end "the recruitment of all children under 18 years of age into the armed forces", to prohibit "the recruitment of all children into militia forces under their jurisdiction" and to bring to justice "those who continue to recruit or use children as soldiers". They also called upon armed opposition groups "to end the recruitment of children".[437]

484. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting international humanitarian law, the 102nd Inter-Parliamentary Conference requested all States "to take all feasible measures to ensure that children who have not attained the age of 18 years . . . are not recruited under compulsion into the armed forces; and to ensure the early adoption of the Optional Protocol on the Involvement of Children in Armed Conflict".[438]

485. The Plan of Action for the years 2000–2003 adopted in 1999 at the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to respect and ensure respect for international humanitarian law and to ensure, in particular, that "all measures, including penal measures, are taken to stop . . . [the] recruitment [of children under the age of 15 years] into the armed forces or into armed groups which constitute[s] a violation of international humanitarian law".[439] The Conference stated that:

> The International Federation, National Societies and the ICRC will continue their efforts in pursuance of decisions taken within the International Movement and notably the *Plan of Action for Children Affected by Armed Conflict* (CABAC), to

[436] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § C(c) and (f).

[437] African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, §§ 2–3.

[438] 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 4.

[439] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(f).

"promote the principle of non-recruitment . . . of children below the age of 18 years in armed conflicts".[440]

486. In its Final Declaration in 2002, the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict pledged "to give particular attention to vulnerable groups to prevent all forms of recruitment for military purpose of children under 18 years old".[441]

IV. Practice of International Judicial and Quasi-judicial Bodies

487. In 1997, in its concluding observations on Myanmar, the CRC strongly recommended that "the army of the State party should absolutely refrain from recruiting under-aged children in the light of existing international human rights and humanitarian standards" and that "all forced recruitment of children should be abolished".[442]

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

488. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that "children under the age of fifteen years shall not be recruited into the armed forces" and that "in recruiting among the persons having attained the age of fifteen years but not the age of eighteen years, priority shall be given to those who are the oldest".[443]

489. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on child soldiers in which it stressed "the responsibility of recruiters and commanders in armed forces or groups to prevent the recruitment and enrolment of children" and requested the ICRC and the International Federation of Red Cross and Red Crescent Societies, in cooperation with the Henry Dunant Institute, "to draw up and implement a Plan of Action for the Movement aimed at promoting the principle of non-recruitment . . . of children below the age of eighteen in armed conflicts".[444]

490. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "those under the age of 15 shall not be recruited".[445]

[440] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 7.

[441] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, § 9.

[442] CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, § 42.

[443] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 38.

[444] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 4, preamble and § 4.

[445] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

491. In 1994, in a statement before the Third Committee of the UN General Assembly, the ICRC stated that IHL prohibits the recruitment of children in both international and non-international armed conflicts and referred to Article 77(2) AP I, Article 4(3) AP II and Article 38 of the 1989 Convention on the Rights of the Child. The ICRC observed that despite these clear prohibitions, an ever-increasing number of children were involved in combat, emphasised the need for full compliance with the existing rules and expressed full support for the adoption of an optional protocol to the 1989 Convention on the Rights of the Child to prohibit the recruitment of children under 18.[446]

492. In a document submitted to the CRC in 1995, the ICRC recalled that "in an international armed conflict, if children take part in the hostilities despite the prohibition against this in the Geneva Conventions, they are nevertheless entitled to prisoner-of-war status in the event of capture".[447]

493. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on children in armed conflicts in which it endorsed "the Plan of Action for the Red Cross and Red Crescent Movement prepared by the International Federation and the ICRC, in cooperation with the Henry Dunant Institute, which aims to promote the principle of . . . non-recruitment of children below the age of 18 years in armed conflicts".[448]

494. In 1996, in a statement before the Third Committee of the UN General Assembly, the ICRC condemned the recruitment of children in armed forces and considered that "legal standards must be raised with a view to prohibiting the recruitment of children below 18 years of age".[449]

495. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC listed recruiting children under the age of 15 years in the armed forces as a serious violation of IHL in international and non-international armed conflicts that should be subject to the jurisdiction of the ICC.[450]

496. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, IHL and human rights in which it appealed to all National Societies "to promote the Movement's position on the 18-year age limit for recruitment . . . with a view to encouraging their respective governments to adopt national legislation and recruitment procedures in line with this position". It

[446] ICRC, Statement before the Third Committee of the UN General Assembly, 11 November 1994, p. 2.

[447] ICRC, Document submitted to the CRC, Administration of Juvenile Justice, Geneva, 13 November 1995, p. 1.

[448] International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 5, § 2.

[449] ICRC, Statement before the Third Committee of the UN General Assembly, 12 November 1996, p. 1.

[450] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 2(v) and 3(xii).

asked National Societies that had already adopted the 18-year age limit for recruitment "to urge their governments to make their positions known to other governments, and to encourage their respective governments to participate in and support the process of drafting an optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts".[451]

497. In 1998, in a statement before the Third Committee of the UN General Assembly, the ICRC welcomed the adoption of the 1998 ICC Statute, "which lists as a war crime the conscription or enlistment of children under 15 into armed forces or groups".[452]

498. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on children affected by armed conflict in which it encouraged all National Societies:

> to support, particularly through contacts with their government, the adoption of international instruments implementing the principle of non-participation . . . of children below the age of 18 in armed conflicts with a view to such instruments being applicable to all situations of armed conflict and to all armed groups.[453]

VI. Other Practice

499. In 1994, in a report on Angola, Human Rights Watch condemned the enrolment of children below the age of 15 in armed forces as a violation of human rights.[454]

500. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "children who have not yet attained the age of fifteen years shall not be recruited in or allowed to join armed forces or armed groups".[455]

501. The Report on SPLM/A Practice alleges that "the SPLM/A still recruits into the army . . . children under the age of 15 years, which is against the Convention on the Rights of the Child".[456]

[451] International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, §§ 5 and 6.

[452] ICRC, Statement before the Third Committee of the UN General Assembly, 21 October 1998, p. 2.

[453] International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 8, § 4.

[454] Human Rights Watch, *Arms Project Angola: Arms Trade and Violations of the Laws of War since the 1992 Elections*, Luanda, 1994, pp. 83 ff.

[455] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 10, *IRRC*, No. 282, p. 334.

[456] Report on SPLM/A Practice, 1998, Chapter 5.3.

D. Participation of Child Soldiers in Hostilities

I. Treaties and Other Instruments

Treaties

502. Article 77(2) AP I provides that "the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities". Article 77 AP I was adopted by consensus.[457]

503. Article 4(3)(c) AP II provides that "children who have not attained the age of 15 shall . . . [not be] allowed to take part in hostilities". Article 4 AP II was adopted by consensus.[458]

504. Article 38(2) of the 1989 Convention on the Rights of the Child provides that "States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities".

505. Upon ratification of the 1989 Convention on the Rights of the Child, Argentina stated that "it would have like the Convention categorically to prohibit the use of children in armed conflicts".[459]

506. Upon ratification of the 1989 Convention on the Rights of the Child, Austria stated that "to determine an age limit of 15 years for taking part in hostilities . . . is incompatible with . . . the best interests of the child".[460]

507. Upon signature of the 1989 Convention on the Rights of the Child, Colombia stated that "it would have been preferable to fix [the age for taking part in armed conflicts] at 18 years in accordance with the principles and norms prevailing in various regions and countries, including Colombia".[461]

508. Upon ratification of the 1989 Convention on the Rights of the Child, Germany stated that it "regrets the fact that . . . even 15-year-olds may take a part in hostilities as soldiers, because this age limit is incompatible with the consideration of a child's best interests".[462]

509. Upon ratification of the 1989 Convention on the Rights of the Child, the Netherlands stated that "it is of the opinion that States should not be allowed to involve children directly or indirectly in hostilities".[463]

[457] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.
[458] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.
[459] Argentina, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 4 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 12.
[460] Austria, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 August 1992, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 12.
[461] Colombia, Declaration made upon signature of the Convention on the Rights of the Child, 26 January 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 15.
[462] Germany, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 March 1992, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 19.
[463] Netherlands, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 February 1995, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

510. Upon ratification of the 1989 Convention on the Rights of the Child, Spain expressed its disagreement at the Convention "permitting the recruitment and participation in armed conflict of children having attained the age of 15 years".[464]

511. Upon ratification of the 1989 Convention on the Rights of the Child, Uruguay stated that "it will not authorize any persons under its jurisdiction who have not attained the age of 18 years to take a direct part in hostilities".[465]

512. Article 22(2) of the 1990 African Charter on the Rights and Welfare of the Child provides that "States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities".

513. According to Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute, "using [children under the age of fifteen years] to participate actively in hostilities" constitutes a war crime in both international and non-international armed conflicts. During the March–April 1998 session of the Preparatory Committee for the Establishment of an International Criminal Court, when the proposal for this war crime was developed, the words "using" and "participate" were explained in a footnote to provide guidance for the interpretation of the scope of this provision. This footnote read:

> The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.[466]

514. The 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

> Article 1
> States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.
> . . .
> Article 4
> 1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, . . . use in hostilities persons under the age of 18 years.

[464] Spain, Declarations made upon ratification of the Convention on the Rights of the Child, 6 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 29.

[465] Uruguay, Declarations made upon ratification of the Convention on the Rights of the Child, 20 November 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 32.

[466] Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negociations, Results*, Kluwer Law International, The Hague, 1999, p. 118.

2. States Parties shall take all feasible measures to prevent such . . . use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

515. Article 4(c) of the 2002 Statute of the Special Court for Sierra Leone provides that "the Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: . . . using [children under the age of 15 years] . . . to participate actively in hostilities".

Other Instruments

516. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77 AP I.

517. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(2) AP I.

518. In paragraph 16 of the 1999 Algiers Declaration, the OAU Assembly of Heads of State and Government reaffirmed its "determination to work relentlessly towards the promotion of the Rights and Welfare of the Child, and [its] commitment to combat all forms of child exploitation, and, in particular, put an end to the phenomenon of child soldiers".

519. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxvi) and (e)(vii), "using [children under the age of 15 years] to participate actively in hostilities" constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

520. Argentina's Law of War Manual (1989) provides that "the belligerent parties shall take all measures to ensure that children under the age of 15 do not participate directly in hostilities".[467] With respect to non-international armed conflicts in particular, the manual states that "children under the age of 15 shall not . . . be authorized to participate in hostilities".[468]

521. Australia's Defence Force Manual provides that "children are granted special protection under LOAC. Important rules are shown below: . . . children under 15 years of age should not take a direct part in hostilities."[469]

522. Canada's LOAC Manual provides that, with respect to non-international armed conflicts in particular, "children are to receive such aid and protection

[467] Argentina, *Law of War Manual* (1989), § 4.12.
[468] Argentina, *Law of War Manual* (1989), § 7.04.
[469] Australia, *Defence Force Manual* (1994), § 947.

as required including: . . . a ban on their . . . participation in the hostilities while under the age of fifteen".[470] The manual adds that "children under fifteen who do take part in hostilities remain protected".[471]

523. Colombia's Basic Military Manual provides that, with respect to non-international armed conflicts in particular, it is prohibited to "allow direct participation in hostilities of children under the age of 15".[472]

524. France's LOAC Manual provides that "only children aged at least 15 can participate in hostilities". It adds that "to make them participate directly in hostilities is a war crime". The manual states, however, that "a child who does take part in an armed conflict shall benefit, because of his military activity, from the status of combatant and of prisoner of war in case of capture".[473]

525. Germany's Military Manual provides that "the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take direct part in hostilities".[474]

526. The Military Manual of the Netherlands provides that "the parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities".[475]

527. New Zealand's Military Manual provides that, with respect to non-international armed conflicts in particular, children "are to receive such aid and protection as they require, including . . . a ban on their . . . participation in the hostilities while under the age of fifteen". Referring to Article 4(3) AP II, it adds that "children under the age of fifteen who do in fact take part in hostilities remain protected by the Article".[476]

528. Nigeria's Military Manual deplores the fact that in past and current armed conflicts, such as those in Liberia, Chad, the Middle East or in Biafra, "children below the ages of 12 and 13 were used for the prosecution of the conflicts".[477]

National Legislation

529. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including the use of one or more persons under the age of 15 years "to participate actively in hostilities" in both international and non-international armed conflicts.[478]

530. The Law on the Rights of the Child of Belarus provides that it is prohibited "to make children participate in hostilities and armed conflicts".[479]

[470] Canada, *LOAC Manual* (1999), p. 17-3, § 22.
[471] Canada, *LOAC Manual* (1999), p. 17-3, § 23.
[472] Colombia, *Basic Military Manual* (1995), p. 75.
[473] France, *LOAC Manual* (2001), p. 40, see also p. 63.
[474] Germany, *Military Manual* (1992), § 306, see also § 505.
[475] Netherlands, *Military Manual* (1993), p. VIII-3, see also p. III-2, § 1.
[476] New Zealand, *Military Manual* (1992), § 1813(1).
[477] Nigeria, *Military Manual* (1994), p. 33, § 11.
[478] Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.68 and 268.88.
[479] Belarus, *Law on the Rights of the Child* (1993), Article 29.

531. The Criminal Code of Belarus provides that it is a war crime to allow children under the age of 15 years to take part in hostilities".[480]

532. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, using children under 15 years of age in national armed forces to participate actively in hostilities constitutes a war crime in non-international armed conflict.[481]

533. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.[482]

534. Colombia's Law on Judicial Cooperation states that children under 18 may not be sent to participate in actual military activities.[483]

535. Colombia's Penal Code imposes a criminal sanction on "anyone, who, in period of armed conflict, . . . forces [minors under 18 years of age] to participate directly or indirectly in the hostilities or armed operations".[484]

536. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.[485]

537. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "uses [children under the age of 15 years] to participate actively in hostilities".[486]

538. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "using [children under the age of 15 years] to participate actively in hostilities", is a crime in both international and non-international armed conflicts.[487]

539. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 77(2) AP I, as well as any "contravention" of AP II, including violations of Article 4(3)(c) AP II, are punishable offences.[488]

540. According to the Report on the Practice of Jordan, the Military Service Law provides that children under 16 years old may not take a direct part in hostilities.[489]

[480] Belarus, *Criminal Code* (1999), Article 136(5).
[481] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(D)(g).
[482] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).
[483] Colombia, *Law on Judicial Cooperation* (1997), Articles 13–14.
[484] Colombia, *Penal Code* (2000), Article 162.
[485] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[486] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(5).
[487] Georgia, *Criminal Code* (1999), Article 413(d).
[488] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[489] Report on the Practice of Jordan, 1997, Chapter 5.3, referring to *Military Service Law* (1972), Article 2.

541. Malaysia's Armed Forces Act provides that persons below the age of 18 may be appointed as apprentices, but are not considered as recruits and therefore, not being subjected to service law, do not participate in hostilities.[490]
542. Under Mali's Penal Code, "using [children under the age of 15 years] to participate actively in hostilities" constitutes a war crime in international armed conflicts.[491]
543. Under the International Crimes Act of the Netherlands, "using [children under the age of fifteen years] to participate actively in hostilities" is a crime, whether committed in an international or a non-international armed conflict.[492]
544. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.[493]
545. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".[494]
546. The Act on Child Protection of the Philippines, in an article on "Children in situations of armed conflict", provides that "children shall not . . . take part in the fighting, or be used as guides, couriers or spies".[495]
547. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.[496]
548. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.[497]

National Case-law
549. No practice was found.

Other National Practice
550. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belgium pledged "to prohibit in times of war any person under 18 to take part in any kind of armed operational engagement".[498]
551. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Canada pledged "to promote the adoption of national and international

[490] Malaysia, *Armed Forces Act* (1972), Section 18.
[491] Mali, *Penal Code* (2001), Article 31(i)(26).
[492] Netherlands, *International Crimes Act* (2003), Articles 5(5)(r) and 6(3)(f).
[493] New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).
[494] Norway, *Military Penal Code as amended* (1902), § 108(b).
[495] Philippines, *Act on Child Protection* (1992), Article X, Section 22(b).
[496] Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).
[497] UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).
[498] Belgium, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[499]

552. According to the Report on the Practice of Chile, it is the *opinio juris* of Chile that persons under the age of 18 must not participate in any hostilities.[500]

553. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Denmark pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[501]

554. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Finland pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[502]

555. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Guinea pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[503]

556. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Iceland pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[504]

557. The Report on the Practice of Iran emphasises that "Iraq denied using children at the battlefront and accused Iran of using children of Iraqi residents in Iran (sons of Iraqi dissidents) for propaganda".[505]

558. In 1988, during the Iran–Iraq War, the Iraqi President stated that "using children in war, without having the mature ability to make decisions, involves a violation of fundamental rights of the human being".[506]

559. In 1996, during a debate in the UN Security Council on the situation in Liberia, Italy described the warlords' practice of deploying children for combat as "one of the most despicable actions". It insisted that the international community should use every means available to stop such behaviour immediately, notably the inclusion of a provision in the future ICC Statute aimed at "bring[ing] to justice the perpetrators of such intolerable acts".[507]

[499] Canada, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[500] Report on the Practice of Chile, 1997, Chapter 5.3.
[501] Denmark, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[502] Finland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[503] Guinea, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[504] Iceland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[505] Report on the Practice of Iran, 1997, Chapter 5.3.
[506] Iraq, Speech by the President of Iraq, 1 December 1988, Report on the Practice of Iraq, 1998, Chapter 1.1.
[507] Italy, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 6.

560. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mexico pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[508]

561. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[509]

562. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Norway pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[510]

563. In 1993, in its initial report to the CRC, the Philippines stated that "children are . . . not allowed to take part in the fighting and not to be used as guides, couriers and spies".[511]

564. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Africa pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[512]

565. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Sweden pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[513]

566. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Switzerland pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[514]

567. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.[515]

568. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that . . . all feasible measures be taken in order that children under the age of fifteen do not take a direct part in hostilities".[516]

[508] Mexico, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[509] Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[510] Norway, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[511] Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, § 200.
[512] South Africa, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[513] Sweden, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[514] Switzerland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[515] Report on the Practice of Syria, 1997, Chapter 5.3.
[516] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International

569. In 1996, during a debate in the UN Security Council on the situation in Liberia, the US stated that "the era of the child soldier in Liberia must come to an end immediately" and that it "is an outrage by any standard of civilization that children under the age of 15, numbering between 4,000 and 6,000, are toting automatic weapons, slaughtering innocent civilians and ignoring the rule of law".[517] It denounced again what it called this "abhorrent practice".[518]
570. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".[519]
571. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Uruguay pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".[520]

III. Practice of International Organisations and Conferences

United Nations

572. In a resolution on Liberia adopted in 1996, the UN Security Council condemned the practice of some factions of "deploying children for combat". It referred to such practice as "inhumane and abhorrent".[521] In a further resolution on the same subject adopted the same year, the Security Council also condemned in the strongest possible terms the practice of "deploying children for combat" and demanded that the warring parties "immediately cease this inhumane and abhorrent activity".[522]
573. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned "the targeting of children in situations of armed conflict, including . . . use of children in armed conflict in violation of international law".[523]
574. In 1998, in a statement by its President, the UN Security Council expressed its grave concern at "the harmful impact of armed conflict on children" and strongly condemned "the use in hostilities" of child soldiers. It called

Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.
[517] US, Statement before the UN Security Council, UN Doc. S/PV.3621, 25 January 1996, p. 5.
[518] US, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 15.
[519] Report on US Practice, 1997, Chapter 5.3.
[520] Uruguay, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[521] UN Security Council, Res. 1071, 30 August 1996, § 9.
[522] UN Security Council, Res. 1083, 27 November 1996, § 6.
[523] UN Security Council, Res. 1261, 25 August 1999, § 2.

upon all parties concerned "to put an end to such practice" and "to comply strictly with their obligations under international law, in particular their obligations under the Geneva Conventions of 1949, the Additional Protocols of 1977 and the United Nations Convention on the Rights of the Child of 1989". The UN Security Council expressed its readiness "to support efforts aimed at obtaining commitments to put to an end the ... use of children in armed conflicts".[524]

575. In 1998, in a statement by its President, the UN Security Council condemned the use of child soldiers in the DRC.[525]

576. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN General Assembly expressed its deep concern about "the use of children as soldiers by all the parties, despite repeated calls from the international community to put an end to this practice".[526]

577. In a resolution adopted in 1998 on the elimination of violence against women, the UN Commission on Human Rights called upon States "to protect children, especially the girl child, in situations of armed conflict against participation, ... through adherence to the applicable principles of international human rights and humanitarian law".[527]

578. In a resolution adopted in 1998 on the abduction of children from northern Uganda, the UN Commission on Human Rights concurred with the comments of the CRC on "the involvement of children in the conflict in northern Uganda, in particular the recommendation on measures to stop ... the use of children as child soldiers".[528]

579. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights called upon all States and other parties to armed conflict "to end the use of children as soldiers".[529]

580. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General welcomed the commitment of the government and the Civil Defence Force not to send children under the age of 18 into combat".[530]

581. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General recommended that the UN Security Council:

> urge Member States to support the proposal to raise the minimum age for ... participation in hostilities to 18, and accelerate the drafting of an optional protocol on the situation of children in armed conflict to the Convention on the Rights of the Child for consideration by the General Assembly.[531]

[524] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998.
[525] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998.
[526] UN General Assembly, Res. 51/112, 12 December 1996, preamble.
[527] UN Commission on Human Rights, Res. 1998/52, 17 April 1998, § 9(g).
[528] UN Commission on Human Rights, Res. 1998/75, 22 April 1998, preamble and § 2.
[529] UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 12(b).
[530] UN Secretary-General, First progress report on the UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 43 and 59.
[531] UN Secretary-General, Report on the protection of civilians in armed conflicts, UN Doc. S/1999/957, 8 September 1999, § 42 and Recommendation 8.

582. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law".[532]

583. In 1992, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL noted that:

> 60. . . . ONUSAL observers were able to verify that [a] huge number of children under 15 were in the FMLN ranks. When this situation was taken up with the Political and Diplomatic Commission of FMLN, it pledged to respect the international norms in force [Article 4(3)(c) AP II], which did not entirely prove to be the case.
> . . .
> 101. . . . FMLN was recommended to observe the rules of international humanitarian law concerning the prohibition of . . . participation [of minors under the age of 15] in hostilities.[533]

Other International Organisations

584. In a resolution adopted in 1996 on the plight of African children in situation of armed conflicts, the OAU Council of Ministers exhorted "all African countries, in particular the warring parties in those countries embroiled in civil wars, to keep children out of war situation". It also reaffirmed that "the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes".[534] In another resolution adopted at the same session, the Council of Ministers expressed extreme "concern about the increasing use of children in armed conflicts".[535]

International Conferences

585. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of children in armed conflict in which it recalled that, in accordance with Article 77 AP I, "the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen do not take a direct part in hostilities". It also expressed "its deep concern that children under the age of 15 years are trained for military combat" and recommended that "in all circumstances children should be educated to respect humanitarian principles".[536]

586. The 26th International Conference of the Red Cross and Red Crescent in 1995 recommended that "parties to conflict refrain from arming children under the age of 18 years and take every feasible step to ensure that children under the

[532] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.
[533] ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/955-S/24375, 12 August 1992, Annex, §§ 60 and 101.
[534] OAU, Council of Ministers, Res. 1659 (LXIV), 1–5 July 1996, §§ 5–7.
[535] OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 8.
[536] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 4.

age of 18 years do not take part in hostilities". It took note of "the efforts of the Movement to promote a principle of . . . non-participation in armed conflicts of children under the age of 18 years".[537]

587. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 solemnly declared that "the use of any child under 18 years of age by any armed force or armed group is wholly unacceptable, even where that child claims or is claimed to be a volunteer". They called upon all African States to bring to justice "those who continue to recruit or use children as soldiers". They also condemned "the use of children as soldiers by armed opposition groups" and called upon these groups "to demobilise or release into safety children already being used as soldiers".[538]

588. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting International humanitarian law, the 102nd Inter-Parliamentary Conference requested all States "to take all feasible measures to ensure that children who have not attained the age of 18 years do not take part in hostilities or military action . . . and to ensure the early adoption of the Optional Protocol on the Involvement of Children in Armed Conflict".[539]

589. The Plan of Action for the years 2000–2003 adopted in 1999 at the 27th International Conference of the Red Cross and Red Crescent requested that:

> All the parties to an armed conflict take effective measures to respect and ensure respect for international humanitarian law and to ensure, in particular . . .
>
> [that] all measures, including penal measures, are taken to stop the participation of children under the age of 15 years in armed hostilities . . . which constitute[s] a violation of international humanitarian law . . .
>
> The International Federation, National Societies and the ICRC will continue their efforts in pursuance of decisions taken within the International Movement and notably the *Plan of Action for Children Affected by Armed Conflict* (CABAC), to "promote the principle of . . . non-participation of children below the age of 18 years in armed conflicts".[540]

IV. Practice of International Judicial and Quasi-judicial Bodies

590. In 1997, in its concluding observations on the report of Uganda, the CRC expressed its concern about the "involvement of children as child soldiers" in northern Uganda and recommended that:

[537] 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § C(d) and (f).

[538] African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, §§ 1–3.

[539] 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 4.

[540] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, §§ 1(f) and 7.

Awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention [on the Rights of the Child], *inter alia* with regard to children, should be made known to the parties to the armed conflict in the northern part of the State party's territory, and that violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators. Furthermore, the Committee recommends that the State party take measures to stop . . . the use of children as child soldiers in the area of the armed conflict.[541]

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

591. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on child soldiers in which it invited "States and other parties to armed conflicts to strengthen the protection of children in armed conflicts through unilateral declarations or bilateral or regional instruments setting at eighteen the minimum age for participation in hostilities".[542]

592. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on child soldiers in which it expressed its deep concern about "the great number of children who bear arms in armed conflicts" and requested the ICRC and the International Federation of Red Cross and Red Crescent Societies, in cooperation with the Henry Dunant Institute, "to draw up and implement a Plan of Action for the Movement aimed at promoting the principle of . . . non-participation of children below the age of eighteen in armed conflicts".[543]

593. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "those under the age of 15 shall not be . . . authorized to take a direct or indirect part in hostilities".[544]

594. In 1994, in a statement before the Third Committee of the UN General Assembly, the ICRC recalled the relevant treaty provisions prohibiting the participation of children in hostilities. Underscoring the constant violations of these strict provisions, the ICRC pleaded for fuller compliance with the existing rules, and expressed the full support of the ICRC for the adoption of an optional protocol to the 1989 Convention on the Rights of the Child that would forbid any involvement in hostilities of children under 18.[545]

595. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on children in armed conflicts which endorsed "the Plan of Action for the Red Cross and Red Crescent Movement, prepared by the International

[541] CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 19 and 34.

[542] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 14, § 2.

[543] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 4, preamble and § 4.

[544] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

[545] ICRC, Statement before the Third Committee of the UN General Assembly, 11 November 1994, p. 2.

Federation and the ICRC, in cooperation with the Henry Dunant Institute, which aims to promote the principle of non-participation . . . of children below the age of 18 years in armed conflicts".[546]

596. In 1996, in a statement before the Third Committee of the UN General Assembly, the ICRC pointed out that "the shocking reality of armed conflicts is that, in many instances, children below the age of 15 take part in hostilities, in breach of existing international standards contained in IHL instruments and in the Convention on the Rights of the Child".[547]

597. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC listed allowing children under the age of 15 years to take part in hostilities as a serious violation of IHL in international and non-international armed conflicts that should be subject to the jurisdiction of the ICC.[548]

598. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, IHL and human rights in which it appealed to all National Societies "to promote the Movement's position on the 18-year age limit for . . . participation in hostilities with a view to encouraging their respective governments to adopt national legislation . . . in line with this position". It asked National Societies that had already adopted the 18-year age limit for participation "to urge their governments to make their positions known to other governments, and to encourage their respective governments to participate in and support the process of drafting an optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts".[549]

599. In 1998, in a statement before the Third Committee of the UN General Assembly, the ICRC welcomed the adoption of the ICC Statute, which included in its list of war crimes the use of children under 15 to participate actively in hostilities. The ICRC noted that:

> The notion of participation must be understood to include both taking a direct part in the fighting and active participation in related activities, such as reconnaissance, espionage and sabotage. The same applies to the use of children as decoys, as messengers or at military checkpoints.[550]

600. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on children affected by armed conflict in which it encouraged all National Societies:

[546] International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 5, § 2.

[547] ICRC, Statement before the Third Committee of the UN General Assembly, 12 November 1996, p. 1.

[548] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 2(v) and 3(xii).

[549] International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, §§ 5 and 6.

[550] ICRC, Statement before the Third Committee of the UN General Assembly, 21 October 1998, p. 2.

to support, particularly through contacts with their government, the adoption of international instruments implementing the principle of non-participation ... of children below the age of 18 in armed conflicts with a view to such instruments being applicable to all situations of armed conflict and to all armed groups.[551]

VI. Other Practice

601. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "children who have not yet attained the age of fifteen years shall not be allowed to take part in acts of violence. All efforts shall be made not to allow persons below the age of 18 to take part in acts of violence."[552]

602. The Report on SPLM/A Practice alleges that "the SPLM/A still ... deploys in combat children under the age of 15 years, which is against the Convention on the Rights of the Child".[553]

E. The Elderly, Disabled and Infirm

Note: *For practice concerning the establishment of hospital and safety zones to protect the elderly, see Chapter 11, section A. For practice concerning the specific needs of displaced elderly persons, see Chapter 38, section C.*

The elderly

I. Treaties and Other Instruments

Treaties

603. Article 17 GC IV provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of ... aged persons".

604. Articles 16, 44, 45 and 49 GC III and Articles 27, 85 and 119 GC IV state in relation to the treatment of detainees that the age of detained persons should be taken into account.

Other Instruments

605. Article 3 of the 1990 Cairo Declaration on Human Rights in Islam provides that "in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men".

[551] International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 8, § 4.

[552] Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 10, *IRRC*, No. 282, p. 334.

[553] Report on SPLM/A Practice, 1998, Chapter 5.3.

II. National Practice

Military Manuals

606. Argentina's Law of War Manual (1969) provides that "the belligerents shall endeavour to conclude agreements for the removal from a besieged area of . . . the elderly".[554]

607. Australia's Defence Force Manual provides that "the opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of . . . aged persons".[555]

608. Canada's LOAC Manual provides that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of . . . aged persons".[556]

609. Colombia's Basic Military Manual provides that "in these cases the IHL rules favour especially the civilian population so that assistance and protection, which the parties to the conflict shall bring, are given in priority to the most vulnerable persons or groups of persons, who are: . . . elderly".[557]

610. El Salvador's Soldiers' Manual provides that it is prohibited to "attack and maltreat . . . the elderly".[558] It further states that "every act of violence against . . . the elderly . . . is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".[559]

611. El Salvador's Human Rights Charter of the Armed Forces provides that "the elderly must be protected".[560]

612. France's LOAC Teaching Note provides that "particular attention shall be paid to the protection of . . . the elderly".[561] It further states that "hospital zones are created, by mutual agreement between the belligerents, in order to protect from the effects of war . . . aged persons".[562]

613. France's LOAC Manual provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . aged persons".[563]

614. Kenya's LOAC Manual provides that "a local cease-fire may be arranged for the removal from the besieged or encircled areas of . . . old persons".[564]

615. Morocco's Disciplinary Regulations provides that soldiers in combat are required to spare the elderly.[565]

554 Argentina, *Law of War Manual* (1969), § 1.014.
555 Australia, *Defence Force Manual* (1994), § 735; see also *Commanders' Guide* (1994), § 926.
556 Canada, *LOAC Manual* (1999), p. 6-4, § 35.
557 Colombia, *Basic Military Manual* (1995), p. 25.
558 El Salvador, *Soldiers' Manual* (undated), p. 3.
559 El Salvador, *Soldiers' Manual* (undated), p. 4.
560 El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 7.
561 France, *LOAC Teaching Note* (2000), p. 4.
562 France, *LOAC Teaching Note* (2000), p. 5; see also *LOAC Manual* (2001), p. 125.
563 France, *LOAC Manual* (2001), p. 64.
564 Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.
565 Morocco, *Disciplinary Regulations* (1974), Article 25(4).

616. New Zealand's Military Manual refers to Article 17 GC IV, which "requires that belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . aged persons".[566]
617. The Rules for Combatants of the Philippines provides that all civilians, particularly the elderly, must be respected.[567]
618. Spain's LOAC Manual provides that "the law of armed conflicts provides a particular protection to . . . the elderly".[568] In addition, the manual states that "in besieged or encircled areas where there is a civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of . . . aged persons".[569]
619. Sweden's IHL Manual provides that:

> It is also possible for the parties to reach an agreement during a conflict that all acts of war shall cease temporarily within a given part of a conflict area. Such agreements are commonly made to afford protection to civilian populations, and specially to such exposed groups as . . . old people.[570]

620. Switzerland's Basic Military Manual provides that "belligerents shall conclude special agreements in order to evacuate the . . . elderly . . . from besieged areas".[571] It further states that "transports of civilian . . . aged persons . . . effected by vehicles and hospital trains, shall be respected in the same way as hospitals".[572]
621. The UK Military Manual provides that "the belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . old persons".[573]
622. The UK LOAC Manual provides that "a local cease-fire may be arranged for the removal from besieged or encircled areas of . . . old persons".[574]
623. The US Field Manual provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . aged persons".[575]
624. The US Air Force Pamphlet provides that "removal of . . . aged persons . . . from besieged or encircled areas is encouraged".[576]

National Legislation
625. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in case of evacuation of civilian persons

[566] New Zealand, *Military Manual* (1992), § 508(3).
[567] Philippines, *Rules for Combatants* (1989), Rule 1.
[568] Spain, *LOAC Manual* (1996), Vol. I, § 5.2.a.(2).
[569] Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.
[570] Sweden, *IHL Manual* (1991), Section 3.4.1, p. 84.
[571] Switzerland, *Basic Military Manual* (1987), Article 33.
[572] Switzerland, *Basic Military Manual* (1987), Article 37.
[573] UK, *Military Manual* (1958), § 29. [574] UK, *LOAC Manual* (1981), Section 9, p. 34, § 3.
[575] US, *Field Manual* (1956), § 256, see also § 44. [576] US, *Air Force Pamphlet* (1976), § 14-3.

from a besieged zone, "special attention is given to the old people, and they are taken great care of".[577]

626. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[578]

627. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 16, 44, 45 and 49 GC III and 14, 17, 27, 85 and 119 GC IV, is a punishable offence.[579]

628. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".[580]

629. According to Venezuela's Code of Military Justice as amended, it is a crime against international law to "make a serious attempt on the life of... elderly people".[581]

National Case-law

630. No practice was found.

Other National Practice

631. The Report on the Practice of Jordan states that special care is provided for the elderly.[582]

III. Practice of International Organisations and Conferences

United Nations

632. In 1997, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that the Croatian Office for Displaced Persons and Refugees had advised the Office of the High Commissioner for Human Rights that "emphasis in the immediate future will be placed on applications for return from relatives of elderly Serbs remaining in the former sectors, who require the assistance of younger family members to lead a normal life".[583]

[577] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.
[578] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
[579] Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
[580] Norway, *Military Penal Code as amended* (1902), § 108(a).
[581] Venezuela, *Code of Military Justice as amended* (1998), Article 474.
[582] Report on the Practice of Jordan, 1997, Chapter 5.3.
[583] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, § 51.

Other International Organisations

633. In a recommendation adopted in 1995 on Turkey's military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe asked Turkey to guarantee the fundamental rights of civilians, with special reference to the more vulnerable, including the elderly.[584]

International Conferences

634. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about "violations of human rights during armed conflicts, affecting the civilian population, especially ... the elderly" and therefore called upon States and all parties to armed conflicts "strictly to observe international humanitarian law".[585]

635. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made ... to spare the life, protect and respect the civilian population, with particular protective measures for ... groups with special vulnerabilities such as ... the elderly".[586]

IV. Practice of International Judicial and Quasi-judicial Bodies

636. No practice was found.

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

637. No practice was found.

VI. Other Practice

638. No practice was found.

The disabled and infirm

Note: *For practice concerning the establishment of hospital and safety zones to protect the infirm, see Chapter 11, section A.*

[584] Council of Europe, Parliamentary Assembly, Rec. 1266, 26 April 1995, § 5.

[585] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29).

[586] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

I. Treaties and Other Instruments

Treaties

639. Article 30, second paragraph, GC III provides that "special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation".

640. Article 110 GC III provides for special care for and evacuation of disabled POWs.

641. Article 16, first paragraph, GC IV provides that the infirm "shall be the object of particular protection and respect".

642. Article 17 GC IV provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . infirm".

643. Articles 21, 22, first paragraph, and 127, third paragraph, GC IV contain specific mentions of the infirm in relation to transport and evacuation.

644. Articles 16, 44, 45 and 49 GC III and 27, 85 and 119 GC IV state in relation to the treatment of detainees that the state of health of detained persons should be taken into account.

645. According to Article 8(a) AP I, the terms "'wounded' and 'sick' mean persons . . . who, because of . . . physical or mental disability, are in need of medical assistance or care . . . and other persons who may be in need of immediate medical assistance or care, such as the infirm". Article 8 AP I was adopted by consensus.[587]

Other Instruments

646. Article 2(24) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that:

> This Agreement seeks . . . to protect and promote the full scope of human rights and fundamental freedoms, including: . . . the right of . . . the disabled to protection, care, and a home, especially against physical and mental abuse, prostitution, drugs, forced labour, homelessness, and other similar forms of oppression and exploitation.

II. National Practice

Military Manuals

647. Argentina's Law of War Manual (1969) provides that "transports of . . . the infirm . . . effected by convoys of vehicles and hospital trains on land or on sea, shall be respected and protected".[588]

[587] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

[588] Argentina, *Law of War Manual* (1969), §§ 4.004(1) and 4.006(1); see also *Law of War Manual* (1989), § 4.05.

648. Argentina's Law of War Manual (1989) states that "the infirm are considered as" included in the concept of wounded and sick.[589]
649. Australia's Commanders' Guide provides that the terms "wounded" and "sick" "also cover . . . other persons who may be in need of immediate medical assistance or care, such as the infirm".[590]
650. Australia's Defence Force Manual states that "the opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm".[591]
651. Canada's LOAC Manual provides that "special protection and respect must be given to . . . the infirm".[592] It also states that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of . . . [the] infirm".[593]
652. Colombia's Basic Military manual provides that the IHL rules favour especially the civilian population so that assistance and protection, which the parties in conflict shall bring, are given in priority to the most vulnerable persons or groups of persons, who are: . . . infirm".[594]
653. El Salvador's Soldiers' Manual provides that "every act of violence against . . . [the] infirm . . . is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".[595]
654. France's LOAC Teaching Note provides that "particular attention shall be paid to the protection of the disabled".[596]
655. France's LOAC Manual provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm".[597] The manual also provides that "out of concern for their protection, . . . the disabled . . . are included in the same category as the wounded and sick under humanitarian law".[598]
656. Madagascar's Military Manual provides that "persons who could need immediate medical care such as the infirm . . . are included in" the terms "wounded" and "sick".[599]
657. New Zealand's Military Manual refers to Article 17 GC IV, which "requires that belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm".[600] It further provides that "special protection must be given to . . . the infirm".[601] The manual also

[589] Argentina, *Law of War Manual* (1989), § 2.02.
[590] Australia, *Commanders' Guide* (1994), glossary, p. xxiv.
[591] Australia, *Defence Force Manual* (1994), § 735; see also *Commanders' Guide* (1994), § 926.
[592] Canada, *LOAC Manual* (1999), p. 11-2, § 16.
[593] Canada, *LOAC Manual* (1999), p. 6-4, § 35.
[594] Colombia, *Basic Military Manual* (1995), p. 25.
[595] El Salvador, *Soldiers' Manual* (undated), pp. 4–5.
[596] France, *LOAC Teaching Note* (2000), p. 4.
[597] France, *LOAC Manual* (2001), p. 64. [598] France, *LOAC Manual* (2001), p. 32.
[599] Madagascar, *Military Manual* (1994), Fiche No. 4-SO, § B.
[600] New Zealand, *Military Manual* (1992), § 508(3).
[601] New Zealand, *Military Manual* (1992), § 1108.

provides that "infirm internees . . . must not be transferred if the journey would seriously prejudice their health, except when their safety imperatively so demands".[602] According to the manual, "convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying . . . the infirm . . . must be protected and respected in the same way as civilian hospitals".[603] In addition, it is forbidden to attack "aircraft used for the removal of . . . the infirm".[604]

658. Nigeria's Military Manual provides that "duly recognized civilian hospitals with their staff, as well as land, sea or air transport of . . . the infirm . . . are entitled to similar respect and protection as provided in the first and second conventions for their military counter parts".[605]

659. Spain's LOAC Manual provides that "in besieged or encircled areas where there is a civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of . . . [the] infirm".[606]

660. Switzerland's Basic Military Manual provides that "belligerents shall conclude special agreements in order to evacuate the . . . infirm . . . from besieged areas".[607] It also states that "the infirm . . . shall be the object of a particular protection and respect".[608] The manual further provides that "transports of . . . the infirm . . . effected by vehicles and hospital trains, shall be respected in the same way as hospitals".[609]

661. The UK Military Manual provides that:

> Special protection and respect must be given to . . . the infirm . . .
>
> The belligerents shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm . . .
>
> Convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying . . . the infirm . . . must be protected and respected in the same way as civilian hospitals.[610]

662. The US Field Manual provides that:

> Special facilities shall be afforded for the care to be given to the disabled [POWS], in particular to the blind, and for their rehabilitation, pending repatriation . . .
>
> The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . [the] infirm . . .
>
> Civilian hospitals organized to give care to . . . the infirm . . . may in no circumstances be the object of attack, but shall be respected and protected by the Parties to the conflict . . .

602 New Zealand, *Military Manual* (1992), § 1131(1).
603 New Zealand, *Military Manual* (1992), § 1110(1).
604 New Zealand, *Military Manual* (1992), § 1110(2).
605 Nigeria, *Military Manual* (1994), p. 18, § 12.
606 Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.
607 Switzerland, *Basic Military Manual* (1987), Article 33.
608 Switzerland, *Basic Military Manual* (1987), Article 36.
609 Switzerland, *Basic Military Manual* (1987), Article 37.
610 UK, *Military Manual* (1958), §§ 28, 29, 32 and 33.

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying . . . the infirm . . .shall be respected and protected in the same manner as the hospitals provided for in Article 18.[611]

663. The US Air Force Pamphlet provides that the "infirm . . . must be the object of particular protection and respect".[612]

National Legislation

664. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in case of evacuation of civilian persons from a besieged zone, "special attention is given to the invalids, and they are taken great care of".[613]

665. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.[614]

666. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 16, 30, 44, 45 and 49 GC III and 16, 17, 18, 21, 22, 27, 119 and 127 GC IV, is a punishable offence.[615]

667. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".[616]

National Case-law

668. No practice was found.

Other National Practice

669. The Report on the Practice of Jordan states that special care is provided for the disabled.[617]

III. Practice of International Organisations and Conferences

United Nations

670. In 1992, in a report submitted to the UN Security Council, the UN Secretary-General reported that ICRC delegates in Bosnia and Herzegovina

611 US, *Field Manual* (1956), §§ 107, 256, 257 and 260, see also § 44.
612 US, *Air Force Pamphlet* (1976), § 14-3.
613 Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.
614 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).
615 Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).
616 Norway, *Military Penal Code as amended* (1902), § 108(a).
617 Report on the Practice of Jordan, 1997, Chapter 5.3.

were "involved in the evacuation of specially vulnerable groups, such as ... handicapped people".[618]

Other International Organisations

671. No practice was found.

International Conferences

672. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about "violations of human rights during armed conflicts, affecting the civilian population, especially ... the disabled" and therefore called upon States and all parties to armed conflicts "strictly to observe international humanitarian law".[619]

673. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made ... to spare the life, protect and respect the civilian population, with particular protective measures for ... groups with special vulnerabilities such as ... persons with disabilities".[620]

IV. Practice of International Judicial and Quasi-judicial Bodies

674. No practice was found.

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

675. No practice was found.

VI. Other Practice

676. No practice was found.

[618] UN Secretary-General, Report pursuant to Security Council Resolution 752 (1992), UN Doc. S/24000, 26 May 1992, §§ 9 and 10.

[619] World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29), see also § II(63).

[620] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

PART VI

IMPLEMENTATION

CHAPTER 40

COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW

A. Respect for International Humanitarian Law

General

I. Treaties and Other Instruments

Treaties

1. Article 25 of the 1929 GC provides that "the provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances".

2. Article 82 of the 1929 Geneva POW Convention provides that "the provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances".

3. Common Article 1 of the 1949 Geneva Conventions provides that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

4. Article 1(1) AP I provides that "the High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances". Article 1 AP I was adopted by 87 votes in favour, one against and 11 abstentions.[1]
5. Article 38(1) of the 1989 Convention on the Rights of the Child provides that "States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child".

Other Instruments
6. Article 3(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, dealing with tasks of the National Red Cross and Red Crescent Societies, provides that the National Societies "also co-operate with their governments to ensure respect for international humanitarian law and to protect the red cross and red crescent emblems".
7. In the introductory paragraph to the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook "to respect and ensure respect for International Humanitarian Law".
8. Paragraph 14 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "the parties will respect the provisions of the Geneva Conventions and will ensure that any paramilitary or irregular units not formally under their command, control or political influence respect the present agreement".
9. Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the parties commit themselves to respect and to ensure respect for the Article 3 of the four Geneva Conventions".
10. Article 3(i) and (ii) of the 1992 London Programme of Action on Humanitarian Issues provides that:

> In carrying out the Programme of Action, the parties to the conflict undertook to abide by the following provisions:
>
> i) all parties to the conflict are bound to comply with their obligations under International Humanitarian Law and in particular the Geneva Conventions of 1949 and the Additional Protocols thereto . . .
> ii) all parties to the conflict have the responsibility to exercise full authority over undisciplined elements within their areas so as to avoid anarchy, breaches of international humanitarian law and human rights abuse.

11. Paragraph 16 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict states that "States shall respect and ensure respect for the obligations under international law applicable in armed conflict,

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41, § 58.

including the rules providing protection for the environment in times of armed conflict".

12. Principle 5 of the 1998 Guiding Principles on Internal Displacement provides that "all authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons".

13. Article 1 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that "every State has the obligation to respect, ensure respect for and enforce international human rights and humanitarian law norms".

14. Article 3 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

> The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, *inter alia*, a State's duty to:
> (a) Take appropriate legal and administrative measures to prevent violations;
> (b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;
> (c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;
> (d) Afford appropriate remedies to victims; and
> (e) Provide for or facilitate reparation to victims.

II. National Practice

Military Manuals

15. Argentina's Law of War Manual states that "States have the responsibility to respect the treaties that they have ratified. The Geneva Conventions and Protocol I expressly oblige States not only to respect [those agreements], but also to ensure respect by issuing orders and instructions for that purpose."[2]

16. Australia's Commanders' Guide states that "Australia is responsible for ensuring that its military forces comply with LOAC" and that "all ADF members are responsible for ensuring that their conduct complies with the LOAC."[3] It adds that:

> Mission planners are responsible for ensuring that operations plans and ROE fully comply with LOAC. To discharge this responsibility, all operations plans and ROE should be reviewed by ADF legal advisers experienced in operations law. In addition, targeting lists and individual missions are to be carefully scrutinised by military planners and their operations law advisers.[4]

[2] Argentina, *Law of War Manual* (1989), § 8.01.
[3] Australia, *Commanders' Guide* (1994), §§ 1201–1202.
[4] Australia, *Commanders' Guide* (1994), § 1205.

17. Australia's Defence Force Manual states that "Australia is responsible for ensuring that its military forces comply with the laws of armed conflict (LOAC) . . . All ADF members are responsible for ensuring that their conduct complies with LOAC."[5]
18. Belgium's Law of War Manual states that "the States signatory to the [Geneva] Conventions have undertaken to take a series of measures to promote respect thereof".[6]
19. Belgium's LOAC Teaching Directive states that "the general aim to be reached is to ensure in all circumstances full respect for the law of armed conflicts and the rules of engagement by all members of the Armed Forces".[7]
20. Belgium's Teaching Manual for Soldiers states that the purpose of the instruction is "to bring the soldier in an armed conflict to react spontaneously in conformity with the elementary principles of humanity".[8] The manual also provides the following rule for the combatant: "I must behave like a disciplined soldier and I respect humanitarian rules."[9]
21. Benin's Military Manual states that every combatant must "respect and ensure respect in all circumstances for the laws and customs of war, that means the law of war".[10] It emphasises that "the commander of forces engaged in a military operation is responsible for ensuring respect for the law of war".[11] The manual further states that "if the duty of the commander is to ensure respect for and the application of the law of war in all circumstances, it is important for the soldier to know and to understand that this law aims to limit and alleviate to the greatest extent possible the calamities of war".[12]
22. Cameroon's Disciplinary Regulations states that action against the enemy must be conducted "within the framework of respect for the laws and customs of war".[13] It also provides that "the Armed Forces shall conduct their operations . . . with the intent to respect sincerely . . . international humanitarian law".[14] The manual further provides that "respect for the rules of international law must be a natural duty for a Cameroonian soldier".[15]
23. Cameroon's Instructors' Manual provides that "the Armed Forces shall be subject to a regime of internal discipline which ensures respect for the Law of War".[16] It also states that "each commander ensures respect for the Law of War within his sphere of command . . . The Law of War is above all a question of order and discipline."[17] The manual further specifies that "the State must respect

[5] Australia, *Defence Force Manual* (1994), §§ 1301 and 1302.
[6] Belgium, *Law of War Manual* (1983), p. 55.
[7] Belgium, *LOAC Teaching Directive* (1996), Section 1.
[8] Belgium, *Teaching Manual for Soldiers* (undated), p. 3.
[9] Belgium, *Teaching Manual for Soldiers* (undated), p. 10.
[10] Benin, *Military Manual* (1995), Fascicule I, preamble, p. 3.
[11] Benin, *Military Manual* (1995), Fascicule II, p. 14.
[12] Benin, *Military Manual* (1995), Fascicule II, p. 17.
[13] Cameroon, *Disciplinary Regulations* (1975), Article 26.
[14] Cameroon, *Disciplinary Regulations* (1975), Article 31.
[15] Cameroon, *Disciplinary Regulations* (1975), Article 35.
[16] Cameroon, *Instructors' Manual* (1992), p. 15, § 15.
[17] Cameroon, *Instructors' Manual* (1992), p. 86, §§ 11 and 12.

and ensure respect for the Law of Geneva and its rules" and that "from the beginning of the hostilities, the parties to the conflict: . . . shall ensure respect for the Law of War in their sphere of authority".[18]

24. Canada's LOAC Manual states that:

> The means for securing observance [of the law of armed conflict] depends upon the actions of the States which are bound by particular treaties in accordance with the terms of those treaties, or on their obligation to give effect to the requirements of customary international law.[19]

25. Canada's Code of Conduct instructs soldiers: "You must obey the Law of Armed Conflict".[20] It specifies that "it is CF policy to respect and abide by the Law of Armed Conflict in all circumstances".[21] It also states that "all CF personnel, allied and coalition personnel and opposing forces are required to abide by the Law of Armed Conflict and the basic principles these rules represent".[22] The manual further states that "it might appear that a momentary advantage may be gained from a breach of the Law of Armed Conflict or the Code of Conduct. However, experience has shown that even a momentary lapse in your duty may dishonour your country and also adversely affect the accomplishment of the overall mission."[23] It adds that:

> The obligation to obey these rules and the Law of Armed Conflict is a requirement under Canadian military law which includes the Criminal Code of Canada. Breaches of the Law of Armed Conflict or these rules by CF personnel will be dealt with regardless of which side is successful. Canada is committed to see that its forces conduct their operations in compliance with the Law of Armed Conflict. The Code of Service Discipline applies to CF members worldwide. As a result, your conduct must always be governed by the principles of Canadian law and society incorporated in the Code of Conduct.[24]

26. Colombia's Basic Military Manual notes that "States must . . . respect and ensure respect for the norms [of IHL] in all circumstances".[25]

27. Colombia's Instructors' Manual states that "the States which have ratified . . . international conventions and treaties on the law of war must respect them and ensure their respect in all circumstances".[26]

28. Congo's Disciplinary Regulations provides that combatants must not "violate the laws and customs of war established by international conventions signed by the Congolese Government".[27]

[18] Cameroon, *Instructors' Manual* (1992), pp. 133 and 138, § 462.22.
[19] Canada, *LOAC Manual* (1999), p. 15-1, § 2.
[20] Canada, *Code of Conduct* (2001), Introduction, § 14.
[21] Canada, *Code of Conduct* (2001), Rule 11, § 1.
[22] Canada, *Code of Conduct* (2001), Rule 11, § 2.
[23] Canada, *Code of Conduct* (2001), Rule 11, § 7.
[24] Canada, *Code of Conduct* (2001), Rule 11, § 8.
[25] Colombia, *Basic Military Manual* (1995), p. 37.
[26] Colombia, *Instructors' Manual* (1999), p. 14.
[27] Congo, *Disciplinary Regulations* (1986), Article 30.

29. Croatia's Commanders' Manual notes that "each State undertakes to respect and to ensure respect for the law of war in all circumstances".[28]
30. Ecuador's Naval Manual states that "during wartime or other periods of armed conflict, the rules of engagement reaffirm the right and responsibility of the operational commander to seek out, engage, and destroy enemy forces consistent with . . . the law of armed conflict".[29]
31. El Salvador's Human Rights Charter of the Armed Forces begins with the order to "respect and ensure respect for human rights".[30]
32. El Salvador's Soldiers' Manual begins by exhorting combatants to "always respect the rules stated in this manual".[31]
33. France's LOAC Teaching Note states that "combatants shall respect at any place and in all circumstances the rules of the law of armed conflicts. They may in no case release themselves from those rules, regardless of the framework and the mandate of their mission."[32]
34. France's LOAC Manual provides that "combatants shall respect the law of armed conflict in all circumstances".[33]
35. Germany's Military Manual provides that "the members of the Federal Armed Forces are obliged to comply and ensure compliance with all treaties of international humanitarian law binding upon the Federal Republic of Germany".[34] It further states that:

> It shall be a natural duty for a member of the Federal Armed Forces to follow the rules of international humanitarian law. With whatever means wars are being conducted, the soldier will always be obliged to respect and observe the rules of international law and take them as a basis for his actions.[35]

36. Israel's Manual on the Laws of War states that "the laws of war are binding on every IDF soldier, also by virtue of their legal validity *vis-à-vis* himself as an IDF soldier".[36] It further states that "it is incumbent on combatants to behave in compliance with the rules and customs of war. This is the most basic of conditions."[37] The manual also states that "GHQ regulations and the conduct code obligate IDF soldiers to observe the laws of war which Israel recognizes".[38]
37. Italy's LOAC Elementary Rules Manual notes that "each State undertakes to respect and to ensure respect for the law of war in all circumstances".[39]

[28] Croatia, *Commanders' Manual* (1992), Introduction.
[29] Ecuador, *Naval Manual* (1989), § 5.5.1.
[30] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 4.
[31] El Salvador, *Soldiers' Manual* (undated), p. 2.
[32] France, *LOAC Teaching Note* (2000), p. 7.
[33] France, *LOAC Manual* (2001), p. 14.
[34] Germany, *Military Manual* (1992), § 135.
[35] Germany, *Military Manual* (1992), § 139.
[36] Israel, *Manual on the Laws of War* (1998), p. 9.
[37] Israel, *Manual on the Laws of War* (1998), p. 48.
[38] Israel, *Manual on the Laws of War* (1998), p. 66.
[39] Italy, *LOAC Elementary Rules Manual* (1991), Introduction, p. 1.

38. Kenya's LOAC Manual states that:

> The States and the belligerent Parties have to undertake to respect the law of armed conflict in all circumstances and to give full implementation to its provisions. This means that it has to be respected by the government at strategic level, by the military at operational and tactical levels, and by the civilians.[40]

The manual also states that:

> The armed forces have to behave correctly, that means in accordance with the international rules ratified by their respective governments, when facing the double responsibility of accomplishing a military mission and of managing the results or consequence of their action or behaviour.[41]

The manual also provides the following rule for behaviour in combat: "Be a disciplined soldier. Disobedience of the law of war dishonours your Armed Forces and yourself and causes unnecessary suffering; far from weakening the enemy's will to fight, it often strengthens it."[42]

39. Madagascar's Military Manual states that "belligerent States and Parties undertake to respect and ensure respect for the law of war".[43] It also states that "military personnel . . . must strictly observe the rules and the laws established by the law of war".[44] It adds: "Be a disciplined soldier. Disobedience of the law of war dishonours your armed forces and yourself: it causes unnecessary suffering; far from weakening the enemy's will to fight, it often strengthens it."[45]

40. The Military Manual of the Netherlands states that "the rules of the law of war must be respected. They must be respected in all circumstances . . . States parties to law of war treaties must take all necessary measures to ensure respect for their obligations under these treaties."[46]

41. New Zealand's Military Manual states that "New Zealand is required to comply with the LOAC which is part of international law".[47] It further states that:

> The law of armed conflict, like other branches of international law, possesses no permanent means to secure its observance or enforcement. Observance is secured by the States which are bound by particular treaties both themselves acting and persuading other States to act in accordance with the terms of those treaties, and themselves giving effect to and persuading other States to give effect to the requirements of the customary law.[48]

[40] Kenya, *LOAC Manual* (1997), Précis No. 2, p. 7.
[41] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 1.
[42] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.
[43] Madagascar, *Military Manual* (1994), Fiche No. 1-T, § 24(4).
[44] Madagascar, *Military Manual* (1994), Presentation, p. 69, § 1.
[45] Madagascar, *Military Manual* (1994), Fiche No. 5-T, § 1.
[46] Netherlands, *Military Manual* (1993), p. IX-1.
[47] New Zealand, *Military Manual* (1992), Introduction, p. ii, § 2.
[48] New Zealand, *Military Manual* (1992), § 1601.1.

42. Nigeria's Operational Code of Conduct tells troops that: "We are in honor bound to observe the rules of the Geneva Convention in whatever action you will be taking against the rebel".[49]

43. The Rules for Combatants of the Philippines directs "all military personnel in the field [to] strictly observe and apply these humanitarian principles embodied in the aforementioned rules in the performance of their duties."[50]

44. The Soldier's Rules of the Philippines instruct: "Be a disciplined soldier. Disobedience of the laws of war dishonours your army and yourself and causes unnecessary suffering; far from weakening the enemy's will to fight, it often strengthens it."[51]

45. Russia's Military Manual provides that:

> Having declared that international law pre-empts national law and having ratified the Protocols additional to the Geneva Conventions on 4 August 1989, the Soviet Union has accepted the obligation to ensure respect for them by all State and public organisations and by its citizens, including the Armed Forces of the USSR.[52]

The manual further provides that the "armed forces shall be subject to a disciplinary regime that ensures respect for the rules of IHL".[53] It also states that, in time of war, commanders must "ensure the strict application of the rules of IHL by military personnel".[54]

46. Spain's LOAC Manual notes that "each State undertakes to respect and to ensure respect for the Law of War in all circumstances".[55]

47. Switzerland's Basic Military Manual states that "Switzerland has undertaken to respect the rules of the law [of armed conflict]".[56] It further states that "the laws and customs of war must be observed by Governments, the civilian and military authorities as well as by individuals, military or civilian".[57] The manual also provides that commanders "are responsible for ensuring that their troops respect the Conventions".[58]

48. Togo's Military Manual states that every combatant must "respect and ensure respect in all circumstances for the laws and customs of war, that means the law of the war".[59] It emphasises that "the commander of forces engaged in a military operation is responsible for ensuring respect for the law of war".[60] The manual further states that "if the duty of the commander is to ensure respect for and the application of the law of war in all circumstances, it is important for the soldier to know and to understand that this law aims to limit and alleviate to the greatest extent possible the calamities of war".[61]

[49] Nigeria, *Operational Code of Conduct* (1967), § 3.
[50] Philippines, *Rules for Combatants* (1989), § 2.
[51] Philippines, *Soldier's Rules* (1989), § 1.
[52] Russia, *Military Manual* (1990), § 3.
[53] Russia, *Military Manual* (1990), § 12.
[54] Russia, *Military Manual* (1990), § 14(b).
[55] Spain, *LOAC Manual* (1996), Vol. I, § 10.8, see also §§ 2.1, 10.1.a and 11.3.b.(1).
[56] Switzerland, *Basic Military Manual* (1987), p. III, § 1.
[57] Switzerland, *Basic Military Manual* (1987), Article 3.
[58] Switzerland, *Basic Military Manual* (1987), Article 196.
[59] Togo, *Military Manual* (1996), Fascicule I, preamble, p. 3.
[60] Togo, *Military Manual* (1996), Fascicule II, p. 14.
[61] Togo, *Military Manual* (1996), Fascicule II, p. 17.

49. The UK LOAC Manual contains Rules for Soldiers, which include: "I must . . . comply with military discipline and the laws of war which are made for my protection and to reduce unnecessary suffering."[62]

50. The US Field Manual states that "the treaty provisions quoted herein will be strictly observed and enforced by United States forces without regard to whether they are legally binding upon this country" and that "the unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces."[63]

51. The US Air Force Pamphlet states that "compliance [with the law of armed conflict] is important because states have reciprocal interests in the law's continued application".[64] It also recognises that "States have important customary and treaty obligations to observe the law of armed conflict, as a matter of national policy, and to insure its implementation, observance and enforcement by [their] own armed forces".[65] The Pamphlet further provides that "Article 1 [common to the 1949 Geneva Conventions] requires all parties to respect and insure respect for the Conventions in all circumstances".[66] It also states that "the US . . . ensures observance and enforcement through a variety of national means including close command control, military regulations, rules of engagement, the Uniform Code of Military Justice and other national enforcement techniques".[67]

52. The US Naval Handbook states that "during wartime or other periods of armed conflict, U.S. rules of engagement reaffirm the right and responsibility of the operational commander to seek out, engage, and destroy enemy forces consistent with . . . the law of armed conflict".[68] The Handbook quotes Navy Regulations which provide that "at all times, commanders shall observe, and require their commands to observe, the principles of international law". It adds that "it is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps . . . to ensure that: 1. The U.S. Navy and Marine Corps observe and enforce the law of armed conflict at all times."[69]

National Legislation

53. Russia's Law on Status of Members of Armed Forces as amended provides that:

> Protection of the State sovereignty and territorial integrity of the Russian Federation . . . constitutes the essence of the soldier's duty, which obliges military servicemen: . . . to observe universally recognised principles and legal regulations of international law and international treaties [ratified] by the Russian Federation.[70]

[62] UK, *LOAC Manual* (1981), Annex A, p. 44, § 1. [63] US, *Field Manual* (1956), § 7.
[64] US, *Air Force Pamphlet* (1976), § 1-4(d). [65] US, *Air Force Pamphlet* (1976), § 10-3.
[66] US, *Air Force Pamphlet* (1976), § 11-3, see also § 10-1(b).
[67] US, *Air Force Pamphlet* (1976), § 15-2(e).
[68] US, *Naval Handbook* (1995), § 5.5. [69] US, *Naval Handbook* (1995), § 6.1.2.
[70] Russia, *Law on Status of Members of Armed Forces as amended* (1993), Article 26.

54. Russia's Service Regulations of the Armed Forces provides that "a serviceman is obliged to know and pronouncedly observe international rules regarding the conduct of military operations and the treatment of the wounded, sick, shipwrecked and the civilian population in the military operations area, as well as prisoners of war".[71]

National Case-law

55. In its ruling in the *Jenin (Mortal Remains) case* in 2002 dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "of course, the rules of the law apply always and immediately... Even during combat one should uphold the laws that govern combat."[72]

Other National Practice

56. Many countries have created national commissions to assist them in ensuring respect for their obligations under IHL.[73]

57. A working paper prepared by the Colombian Ministry of Foreign Affairs in October 1996 for a meeting of experts on commissions and other bodies entrusted with proposing national measures for the application of IHL stated that:

> The Colombian Government reaffirms its inescapable commitment to respect and ensure respect for the rules of International Humanitarian Law, especially the norms of the four Geneva Conventions of 1949 and of their Additional Protocols of 1977 which are in force for Colombia.[74]

58. In comments on the text of the Declaration of Minimum Humanitarian Standards, submitted in 1995 to the UN Commission on Human Rights, Mexico mentioned "the principle that States parties to the Geneva Conventions are under an obligation to respect and ensure respect for international humanitarian law".[75]

[71] Russia, *Service Regulations of the Armed Forces* (1993), Article 19.
[72] Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 12.
[73] Examples include Albania, Argentina, Azerbaijan, Belarus, Belgium, Benin, Bolivia, Burkina Faso, Canada, Chad, Chile, Colombia, Côte d'Ivoire, Croatia, Dominican Republic, Egypt, El Salvador, Ethiopia, France, Gambia, Georgia, Guatemala, Hungary, Indonesia, Iran, Italy, Kazakhstan, Kyrgyzstan, Mali, Moldova, New Zealand, Panama, Paraguay, Poland, Portugal, Senegal, Slovenia, South Africa, Tajikistan, Togo, Ukraine, Uruguay, Uzbekistan, Venezuela, Yemen.
[74] Colombia, Ministry of Foreign Affairs, Working paper prepared for the meeting of experts on commissions and other bodies entrusted with developing national measures for the application of International Humanitarian Law, 19 October 1996, p. 4, § 2.
[75] Mexico, Comments of 15 November 1995 on the Declaration of Minimum Humanitarian Standards included in the Report of the UN Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, § 10.

59. At the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, Niger declared that:

We reiterate our determination to do everything in our power in order that our States and all parties to armed conflicts honour their duties as regards International Humanitarian Law and international instruments related to human rights and refugee law and respect, in all circumstances, the rights of the victims of armed conflicts and the dignity of the human person.[76]

60. In 1997, at a seminar on national implementation of IHL in Russia, a Russian Major-General of Justice and Deputy Chief for Training and Research Activities, stated that:

Given that the 1993 Constitution of the Russian Federation recognized that the commonly accepted principles and norms of international law and international treaties to which the Russian Federation is a party are an integral part of its legal system (Article 15, Part 4), we can assert that in Russia there is a constitutional guarantee of respect of rules of international humanitarian law.[77]

61. In 1999, during a debate on the UN Decade of International Law in the Sixth Committee of the UN General Assembly, South Africa stated that "the rules of international humanitarian law should also be subject to constant revision, in the sense not of making new laws but of ensuring compliance with existing ones. States should work to instil a culture of compliance."[78]

62. In a declaration adopted in 2002 with regard to respect for the Geneva Conventions in the context of the fight against terrorism, the Swiss National Council stated that:

The Swiss National Council calls upon all States to respect the Geneva Conventions, in particular today with regard to the "war against terrorism":

- in practical terms (treatment of combatants, of prisoners, of civilians);
- in legal terms (application *de jure*: unconditional and non-selective).

The Swiss National Council calls upon the authorities of all States in no way to question the legitimacy and legal force of the humanitarian rules which are established in the Geneva Conventions.[79]

[76] Niger, Declaration made at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18-20 February 2002, § 4.

[77] Russia, Mikhail Mikhailovich Korneev, Major-general of Justice, Deputy Chief for Training and Research Activities, cited in Ministry of Foreign Affairs of Russia and ICRC, *National seminar on the implementation of international humanitarian law in the Russian Federation*, Military University, Moscow, 2–3 December 1997, p. 84.

[78] South Africa, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/54/SR.10, 19 October 1999, § 76.

[79] Switzerland, National Council, Declaration concerning respect for the Geneva Conventions, 6 March 2002, Spring Session 2002, Third Session, *Official Bulletin*, No. 02.9100 (provisional version of the text).

63. In a resolution adopted in 2002 on the occasion of the 25th Anniversary of the Additional Protocols, the Swiss Conseil des Etats solemnly recalled "the importance to have and to respect universal humanitarian rules" and expressed its firm belief in "the essential role which the national Parliaments can play in order to protect the victims of armed conflicts".[80]

64. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that "it is the policy of the Department of Defense to ensure that: . . . the law of war and the obligations of the U.S. Government under that law are observed and enforced by the U.S. Armed Forces".[81] It also stated that "the Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized".[82]

65. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

> Common Article 1 of the four 1949 Geneva Conventions for the Protection of War Victims requires that parties to those treaties "respect and ensure respect" for each of those treaties. The obligation to "respect and ensure respect" was binding upon all parties to the Persian Gulf War. It is an affirmative requirement to take all reasonable and necessary steps to bring individuals responsible for war crimes to justice.[83]

Under "Observations", the report stated that:

> DOD-mandated instruction and training in the law of war were reflected in US operations, which were in keeping with historic US adherence to the precepts of the law of war. Adherence to the law of war impeded neither Coalition planning nor execution; Iraqi violations of the law of war provided Iraq no advantage.
> . . .
> The willingness of commanders to seek legal advice at every stage of operational planning ensured US respect for the law of war throughout Operations Desert Shield and Desert Storm.[84]

66. The 1998 version of the US Department of Defense Directive on the Law of War Program, which aimed "to ensure DoD compliance with the law of war obligations of the United States", stated that "it is the DoD policy to

[80] Switzerland, Council of States, Declaration concerning the Protocols additional to the Geneva Conventions, 12 June 2002, Summer Session 2002, Seventh Session, *Official Bulletin*, No. 02.048 (provisional version of the text).
[81] US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section C(1).
[82] US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E (1)(a).
[83] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.
[84] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 644.

ensure that: . . . the law of war obligations of the United States are observed and enforced by the DoD Components".[85] It further stated that:

The Heads of the DoD Components shall: . . . ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.[86]

67. In 1991, the Federal Executive Council of the SFRY (FRY), in a "Statement regarding the need for respect of the norms of international humanitarian law in the armed conflict in Yugoslavia", called on all the participants in the armed conflicts on the territory of Yugoslavia:

to respect the fundamental rules and principles of international humanitarian law in conformity with the international conventions signed by Yugoslavia and which constitute a part of its legal system . . . The Federal Executive Council wishes once again to underline the importance of the observance of international humanitarian law for all the participants in the armed conflicts.[87]

68. In the *Legality of Use of Force cases* in 1999, the FRY initiated proceedings before the ICJ against ten NATO member States (Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, UK and US) on the ground, *inter alia*, that:

- by taking part in attacks on civilian targets, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation to spare the civilian population, civilians and civilian objects;
- by taking part in destroying or damaging monasteries, monuments of culture, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;
- by taking part in the use of cluster bombs, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
- by taking part in the bombing of oil refineries and chemical plants, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation not to cause considerable environmental damage;
- by taking part in the use of weapons containing depleted uranium, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of

[85] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Sections 1(1) and 4(1).
[86] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(1).
[87] SFRY (FRY), Federal Executive Council, Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

[their] obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage.[88]

III. Practice of International Organisations and Conferences

United Nations

69. In a resolution on Liberia adopted in 1992, the UN Security Council called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law".[89]

70. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council reaffirmed that "all parties are bound to comply with the principles and rules of international humanitarian law".[90]

71. In a resolution on Angola adopted in 1993, the UN Security Council reiterated "its appeal to both parties strictly to abide by applicable rules of international humanitarian law".[91]

72. In a resolution adopted in 1993 "recalling the statement made by the President of the Security Council" regarding the conflict in Angola, the UN Security Council reiterated its appeal "to both parties to abide by applicable rules of international humanitarian law".[92]

73. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council reaffirmed that "all parties are bound to comply with the principles and rules of international humanitarian law".[93]

74. In a resolution adopted in 1993 concerning the conflict in Angola, the UN Security Council reiterated "its appeal to both parties [to the conflict] . . . strictly to abide by applicable rules of international humanitarian law".[94]

75. In a resolution adopted in 1994 following the massacre of Palestinians in a mosque in Hebron, the UN Security Council called upon Israel "to continue to take and implement measures, including, *inter alia*, confiscation of arms, with the aim of preventing illegal acts of violence by Israeli settlers". The Security Council called "for measures to be taken to guarantee the safety and protection of the Palestinian civilians throughout the occupied territory".[95]

76. In two resolutions adopted in 1995 on the situation in Liberia, the UN Security Council demanded that "all factions in Liberia . . . strictly abide by applicable rules of international humanitarian law".[96]

77. In a resolution on the former Yugoslavia adopted in 1995, the UN Security Council strongly condemned "all violations of international humanitarian law

[88] FRY, Applications instituting proceedings submitted to the ICJ, *Legality of Use of Force cases*, 29 April 1999.
[89] UN Security Council, Res. 788, 19 November 1992, § 5.
[90] UN Security Council, Res. 822, 30 April 1993, § 3.
[91] UN Security Council, Res. 834, 1 June 1993, § 13.
[92] UN Security Council, Res. 851, 15 July 1993, § 19.
[93] UN Security Council, Res. 853, 29 July 1993, § 11.
[94] UN Security Council, Res. 864, 15 September 1993, § 15.
[95] UN Security Council, Res. 904, 18 March 1994, preamble and §§ 2 and 3.
[96] UN Security Council, Res. 985, 13 April 1995, § 6; Res. 1001, 30 June 1995, § 13.

and of human rights in the territory of the former Yugoslavia" and demanded that "all concerned comply fully with their obligations in this regard".[97]

78. In a resolution on UNOMIL adopted in 1996, the UN Security Council demanded that all factions in Liberia "strictly abide by the relevant rules of international humanitarian law".[98] This demand was reiterated in another resolution adopted the same year.[99]

79. In a resolution on Liberia adopted in 1996, the UN Security Council demanded that "the factions and their leaders . . . strictly abide by the relevant principles and rules of international humanitarian law".[100]

80. In a resolution adopted in 1996 on the situation in Liberia, the UN Security Council demanded that the factions in the conflict in Liberia "strictly abide by the principles and rules of international humanitarian law".[101]

81. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council reaffirmed that "all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949".[102]

82. In a resolution adopted in 1998, the UN Security Council called on the government of Angola and in particular UNITA "to respect international humanitarian, refugee and human rights law".[103]

83. In 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council stated that "the ICRC had already repeatedly called on all parties to the conflict in the Republic of Bosnia and Herzegovina strictly to observe the provisions of international humanitarian law".[104]

84. In 1993, in a statement by its President regarding Angola, the UN Security Council strongly condemned an attack by UNITA on a train carrying civilians and urged "UNITA leaders to make sure that its forces abide by the rules of international humanitarian law".[105]

85. In 1993, in a statement by its President, the UN Security Council requested that the UN Secretary-General investigate the massacre of displaced civilians in Liberia and demanded that "the leaders of any faction responsible for such acts effectively control their forces and take decisive steps to ensure that such deplorable tragedies do not happen again".[106]

86. In 1993, in a statement by its President with respect to the situation in Bosnia and Herzegovina, the UN Security Council reiterated that "all the

[97] UN Security Council, Res. 1034, 21 December 1995, § 1.
[98] UN Security Council, Res. 1041, 29 January 1996, § 6.
[99] UN Security Council, Res. 1059, 31 May 1996, § 7.
[100] UN Security Council, Res. 1071, 30 August 1996, § 10.
[101] UN Security Council, Res. 1083, 27 November 1996, § 8.
[102] UN Security Council, Res. 1193, 28 August 1998, § 12.
[103] UN Security Council, Res. 1213, 3 December 1998, § 7.
[104] UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.
[105] UN Security Council, Statement by the President, UN Doc. S/25899, 8 June 1993.
[106] UN Security Council, Statement by the President, UN Doc. S/25918, 9 June 1993.

parties in the former Yugoslavia comply with their obligations under international humanitarian law".[107]

87. In November 1993, in a statement by its President on Angola, the UN Security Council called upon all the parties "strictly to abide by applicable rules of international humanitarian law".[108]

88. In 1997, in a statement by its President with respect to the situation in the Great Lakes region, the UN Security Council underlined "the obligation of all concerned to respect the relevant provisions of international humanitarian law".[109]

89. In 1998, in a statement by its President on the situation in the DRC, the UN Security Council urged all parties to "respect humanitarian law, in particular the Geneva Conventions of 1949 and the Additional Protocols of 1977, as applicable to them".[110]

90. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly considered that "the principles of the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949 should be strictly observed by all States and that States violating these international instruments should be condemned and held responsible to the world community".[111]

91. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to any armed conflict "to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925, the Geneva Conventions of 1949 and other humanitarian rules applicable in armed conflicts".[112]

92. In a resolution adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925, the Geneva Conventions of 1949 and other humanitarian rules applicable in armed conflicts". It also called upon "all States ... to take all the necessary measures to ensure full compliance by their armed forces of humanitarian rules applicable in armed conflicts".[113]

93. In a resolution adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly reiterated its call upon all parties to any armed conflict "to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925, the Geneva Conventions of 1949 and other humanitarian rules applicable in armed conflicts".[114]

[107] UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993.
[108] UN Security Council, Statement by the President, UN Doc. S/26677, 1 November 1993.
[109] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.
[110] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 1.
[111] UN General Assembly, Res. 2674 (XXV), 9 December 1970, § 3.
[112] UN General Assembly, Res. 2677 (XXV), 9 December 1970, § 1.
[113] UN General Assembly, Res. 2852 (XXVI), 20 December 1971, §§ 1 and 6.
[114] UN General Assembly, Res. 2853 (XXVI), 20 December 1971, § 1.

94. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts "to observe the international humanitarian rules which are applicable, in particular, the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949".[115]

95. In a resolution adopted in 1973 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts:

to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.[116]

96. In a resolution adopted in 1974 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts:

to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.[117]

97. In a resolution adopted in 1975 on respect for human rights in armed conflicts, the UN General Assembly called upon:

all parties to armed conflicts to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.[118]

98. In a resolution adopted in 1977 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts:

to acknowledge and to comply with their obligations under the existing instruments of international humanitarian law and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.[119]

99. In a resolution adopted in 1985 on the situation in Afghanistan, the UN General Assembly called upon the parties to the conflict "to apply fully the principles and rules of international humanitarian law".[120]

[115] UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2.
[116] UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 4.
[117] UN General Assembly, Res. 3319 (XXIX), 14 December 1974, § 3.
[118] UN General Assembly, Res. 3500 (XXX), 15 December 1975, § 1; see also Res. 31/19, 24 November 1976, § 1.
[119] UN General Assembly, Res. 32/44, 8 December 1977, § 6.
[120] UN General Assembly, Res. 40/137, 13 December 1985, § 8.

100. In a resolution adopted in 1992, the UN General Assembly urged "States to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict".[121]
101. In a resolution adopted in 1993 on the United Nations Decade of International Law, the UN General Assembly reminded "all States of their responsibility to respect and ensure respect for international humanitarian law in order to protect the victims of war".[122]
102. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly reaffirmed "the obligation of all to respect international humanitarian law".[123]
103. In a resolution adopted in 1991 on the situation of human rights in El Salvador, the UN Commission on Human Rights called upon the parties to the conflict:

> to guarantee respect for the humanitarian rules applicable to non-international armed conflicts such as that in El Salvador, particularly with regard to the evacuation of the war wounded and maimed ... and the non-use of explosive devices affecting the civilian population.[124]

104. In a resolution adopted in 1994, the UN Commission on Human Rights invited the government of Myanmar "to fully respect its obligations under the [1949] Geneva Conventions ... in particular their common article 3".[125]
105. In resolutions adopted in 1995 and 1996, the UN Commission on Human Rights invited the government of Myanmar "to respect fully its obligations under the [1949] Geneva Conventions".[126]
106. In a resolution adopted in 1998, the UN Commission on Human Rights urged all the parties to the conflict in Afghanistan "to respect fully international humanitarian law".[127]
107. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN Sub-Commission on Human Rights expressed:

> its deep concern at the continuing increase in the number of human rights violations being committed in El Salvador and at the persistent failure to observe the fundamental norms of humanitarian law proclaimed in the Geneva Conventions and in the Additional Protocols thereto.[128]

[121] UN General Assembly, Res. 47/37, 25 November 1992, § 1.
[122] UN General Assembly, Res. 48/30, 9 December 1993, § 4.
[123] UN General Assembly, Res. 50/193, 22 December 1995, preamble.
[124] UN Commission on Human Rights, Res. 1991/75, 6 March 1991, § 9.
[125] UN Commission on Human Rights, Res. 1994/85, 9 March 1994, § 17.
[126] UN Commission on Human Rights, Res. 1995/72, 8 March 1995, § 20; Res. 1996/80, 23 April 1996, § 18.
[127] UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(c); see also Res. 1990/53, 6 March 1990, § 5, Res. 1992/68, 4 March 1992, § 6, Res. 1995/74, 8 March 1995, § 6, Res. 1996/75, 23 April 1996, § 4 and Res. 1997/65, 16 April 1997, § 13.
[128] UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 1.

The Sub-Commission also strongly urged the government of El Salvador "to take all necessary measures to ensure . . . that human rights are respected by all military, paramilitary and police forces".[129]

108. In a resolution adopted in 2000 on the role of universal or extraterritorial competence in preventive action against impunity, the UN Sub-Commission on Human Rights recalled "the obligation of States parties to respect and to ensure respect for humanitarian law under the Geneva Conventions . . . an obligation explicitly provided for in common article 1 thereof".[130]

109. In 1998, in a report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the UN Secretary-General stated that "adherence to international humanitarian and human rights norms by all parties to a conflict must be insisted upon, and I intend to make this a priority in the work of the United Nations".[131]

110. In 1997, in his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights stated that:

> It would . . . be unfair to put the rebel groups, no matter what their role in the violence and massacres has been, on the same footing as a State which has ratified the major international instruments on human rights and international humanitarian law and is therefore bound by strict obligations. While these obligations are not, technically speaking, binding to the same extent for the rebels or armed gangs, these groups do, nevertheless, also have an obligation to respect certain humanitarian principles that are part of international customary law and are recognized by all civilized nations.[132]

Other International Organisations

111. In a resolution adopted in 1987, the Parliamentary Assembly of the Council of Europe invited "all sides in the conflict [in Sri Lanka] to respect the Geneva Conventions of 1949 and the international humanitarian law applicable to armed conflicts".[133]

112. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited "the governments of member states: . . . to launch an appeal to the conflicting parties to respect the four Geneva conventions of 1949 which provide protection to wounded military personnel, to prisoners of war and to civilian persons in time of war".[134]

113. In a resolution adopted in 1993 on the massive and flagrant violations of human rights in the territory of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe launched "a solemn appeal to all parties

[129] UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 5.
[130] UN Sub-Commission on Human Rights, Res. 2000/24, 18 August 2000, preamble.
[131] UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, UN Doc. A/52/871-S/1998/318, 13 April 1998, § 50.
[132] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 11.
[133] Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 16.
[134] Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 13(iii).

involved in the conflict in the territory of the former Yugoslavia to respect the Geneva conventions on humanitarian law".[135]

114. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited governments to "ensure that the Geneva Conventions of 1949, their 1977 protocols and other provisions of international humanitarian law are respected strictly and in all circumstances".[136]

115. In 2000, the Rapporteur of the Council of Europe on the human rights situation in Chechnya called on the Chechen fighters to respect IHL.[137]

116. In a resolution on respect for IHL adopted in 1996, the OAS General Assembly urged all members to "observe and fully enforce . . . the customary principles and norms contained in the 1977 Additional Protocols".[138]

International Conferences

117. The 20th International Conference of the Red Cross in 1965 adopted a resolution in which it recommended that "appropriate arrangements be made to ensure that armed forces placed at the disposal of the United Nations observe the provisions of the Geneva Conventions and be protected by them".[139]

118. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the application of GC IV "to the occupied territories in the Middle East" in which it called upon "the occupying power to acknowledge and comply with its obligations under the Fourth Geneva Convention, and to this effect cease forthwith all policies and practices in violation of any article of this Convention".[140]

119. The 24th International Conference of the Red Cross in 1981 adopted a resolution in which it solemnly appealed that "the rules of international humanitarian law and the universally recognized humanitarian principles be safeguarded at all times and in all circumstances".[141]

120. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it appealed to all parties involved in armed conflicts "to fully respect their obligations under international humanitarian law".[142]

121. In 1992, at the Helsinki Summit of the CSCE, the participating States declared that they would "in all circumstances respect and ensure respect for international humanitarian law including the protection of the civilian population".[143]

[135] Council of Europe, Parliamentary Assembly, Res. 994, 3 February 1993, § 5(i).
[136] Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(a).
[137] Council of Europe, Parliamentary Assembly, Opinion on Russia's request for membership in the light of the situation in Chechnya, Doc. 7231, 2 February 1995, § 75.
[138] OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, § 4.
[139] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 1.
[140] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. III, § 4.
[141] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. VI.
[142] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, § 2.
[143] CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 48.

122. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared that:

> We undertake to act in cooperation with the UN and in conformity with the UN Charter to ensure full compliance with international humanitarian law in the event of genocide and other serious violations of this law . . .
>
> We affirm our responsibility, in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war.[144]

123. In 1994, at the Budapest Summit of the CSCE, the participating States reaffirmed "their commitment to respect and ensure respect for general international humanitarian law and in particular for their obligations under the relevant international instruments, including the 1949 Geneva Conventions and their additional protocols, to which they are a party".[145]

124. In a resolution adopted in 1995 on challenges posed by calamities arising from armed conflict, the 93rd Inter-Parliamentary Conference stressed States' "obligation to respect and enforce international humanitarian law, in particular by strengthening mechanisms for its implementation".[146]

125. In the Maputo Declaration on the Use of Children as Soldiers, the African Conference on the Use of Children as Soldiers in 1999 called upon African States "to respect fully the provisions of international human rights and humanitarian law, in particular in the case of captured child soldiers".[147]

126. In a resolution adopted in 1999 on the contribution of parliaments to ensuring respect for and promoting IHL, the 102nd Inter-Parliamentary Conference urged the States concerned "to comply strictly and ensure compliance with their obligations under international humanitarian law".[148]

127. In 2001, the Conference of High Contracting Parties to the Fourth Geneva Convention adopted a declaration stating that:

> 4 The participating High Contracting Parties call upon all parties, directly involved in the conflict [between Israel and Palestinians] or not, to respect and to ensure respect for the Geneva Conventions in all circumstances . . .

[144] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, §§ I(6) and II.

[145] CSCE, Budapest Summit of Heads of State or Government, 5–6 December 1994, Budapest Document 1994: Towards a Genuine Partnership in a New Area, Decisions, Chapter VIII: The Human Dimension, § 33.

[146] 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1999, Resolution on the International Community in the Face of the Challenges posed by Calamities Arising from Armed Conflicts and by Natural or Man-made Disasters: The Need for a Coherent and Effective Response through Political and Humanitarian Assistance Means and Mechanisms Adapted to the Situation, § 13.

[147] African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 5.

[148] 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 2.

5 The participating High Contracting Parties stress that the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances.
...
12 The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention.
...
17 The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties, to follow up on the implementation of the present Declaration.[149]

128. In the Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, the participants stated that:

1. We pledge our commitment to further uphold humanitarian principles and to the respect for international humanitarian law.
2. To this end, we resolve to ensure that our parliaments fully play their role in the process of acceding to the instruments of International Humanitarian Law and adjust national legislation in order to ensure the effective application thereof.
3. We undertake also, as men and women elected by the people, to contribute to promote awareness of the relevant humanitarian values, norms and rules.
4. We reaffirm our determination to see to it that our States and all parties to an armed conflict honor their obligations under International Humanitarian Law, International Human Rights Law and International Refugee Law and respect, under all circumstances, the rights of the victims of armed conflict as well as the dignity of the human person.[150]

IV. Practice of International Judicial and Quasi-judicial Bodies

129. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ stated with respect to common Article 1 of the 1949 Geneva Conventions:

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.[151]

[149] Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, §§ 4–5, 12 and 17.
[150] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, §§ 1–4.
[151] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 220.

130. In its order in the *Application of the Genocide Convention case (Provisional Measures)* in 1993 concerning a case brought by Bosnia and Herzegovina against the FRY (Serbia and Montenegro), the ICJ stated that:

> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of direct and public incitement to commit genocide, or in complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.[152]

131. In its order in the *Armed Activities on the Territory of the DRC case (Provisional Measures)* in 2000, the ICJ unanimously stated that "both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for . . . the applicable provisions of humanitarian law".[153]

132. In a resolution adopted in 1993, the ACiHPR invited "all African States Parties to the African Charter on Human and Peoples' Rights to adopt appropriate measures at the national level to ensure the promotion of the provisions of international humanitarian law".[154]

133. In *Loizidou v. Turkey* in 1995, the ECtHR addressed the issue of whether a State party to the 1950 ECHR was obliged to ensure respect for the Convention even in territories that it was occupying. The Court held that:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control over an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through subordinate local administration.[155]

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

134. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the States and belligerent Parties undertake to respect the law of war and to ensure respect for it in all circumstances. The law of war must be respected by governments, by military and civilian authorities as well as by military and civilian persons."[156] Delegates

[152] ICJ, *Application of the Genocide Convention case (Provisional Measures)*, Order, 8 April 1993, § 52(A)(2).
[153] ICJ, *Armed Activities on the Territory of the DRC case (Provisional Measures)*, Order, 1 July 2000, § 47(3).
[154] ACiHPR, Addis Ababa, 1–10 December 1993, Res. 2 (XIV), § 1.
[155] ECtHR, *Loizidou v. Turkey*, Preliminary Objections, Judgement, 23 March 1995, § 62, see also IACiHR, *Case 11.589 (Cuba)*, 29 September 1999, §§ 24–25.
[156] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 25–26.

also teach that "as with order and discipline, the law of war must be respected and enforced in all circumstances".[157]

135. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC urged "the military and civilian authorities of the parties involved to take all necessary steps to ensure compliance with the obligations contained in the provisions of international humanitarian law".[158]

136. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and stated that they "consider it of utmost importance that the parties to the conflict respect the provisions of humanitarian law applicable in armed conflicts, especially in non-international armed conflicts".[159]

137. In a press release issued in 1992 with respect to the conflict in Bosnia and Herzegovina, the ICRC appealed "to the parties involved to take all necessary steps to ensure compliance with the basic rules of international humanitarian law".[160]

138. In a press release issued in 1992 with respect to the conflict in Afghanistan, the ICRC appealed "to all the parties to respect international humanitarian law and to ensure respect for its rules by everyone involved in the fighting".[161] This appeal was repeated later the same year.[162]

139. In a communication to the press issued in 1993 with respect to the conflict in Somalia, the ICRC appealed "to all forces involved to respect international humanitarian law and to ensure respect for its rules by all of their members".[163]

140. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the International Conference for the Protection of War Victims in which it welcomed "the reaffirmation by States of their responsibility under Article 1 common to the Geneva Conventions of 1949 to respect and ensure respect for international humanitarian law".[164]

141. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "the parties to the conflict must take all necessary steps to respect and ensure respect for international humanitarian law".[165]

[157] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 269.
[158] ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.
[159] Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.
[160] ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.
[161] ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992.
[162] ICRC, Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.
[163] ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.
[164] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 2, preamble.
[165] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, preamble, *IRRC*, No. 320, 1997, p. 502.

142. In a press release issued in 1994 in the context of the conflict in Bosnia and Herzegovina, the ICRC appealed to all parties involved in hostilities in and around Bihać "to respect international humanitarian law and to ensure that it is respected in all circumstances".[166]

143. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey's military operations in northern Iraq "to respect international humanitarian law" and stated that it had sent the Turkish government a note "reminding it of its obligation to comply with international humanitarian law".[167]

144. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC appealed "to all those involved in the violence or in a position to influence the situation to respect and to ensure respect for international humanitarian law and its underlying principles in all circumstances".[168]

145. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that:

> In view of the situation in and around the besieged town of Kunduz and in other parts of the country where fighting continues, the ICRC feels it necessary to impress upon all parties concerned that the rules governing armed conflict must be respected at all times and in all circumstances.[169]

VI. Other Practice

146. In 1979, an armed opposition group wrote to the ICRC to confirm its commitment to IHL in a letter entitled "Engagement . . . to comply with international humanitarian laws in times of armed conflict". It also asked the ICRC "to call upon the [enemy] and his allies . . . to respect the Geneva Conventions and international law applicable in case of armed conflicts".[170]

147. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

> All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations, and competent regional and other international organizations have the obligation to respect international humanitarian law as well as fundamental human rights. The application of such principles rules and does not affect the legal status of the parties to the conflict and is not dependent on their recognition as belligerents or insurgents.[171]

[166] ICRC, Press Release No. 1792, Bihać: Urgent ICRC Appeal, 26 November 1994.
[167] ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and northern Iraq, 22 March 1995.
[168] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.
[169] ICRC, Communication to the Press No. 01/58, Afghanistan: ICRC calls on all parties to comply with international humanitarian law, 23 November 2001.
[170] ICRC archive document.
[171] Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § II.

Orders and instructions to ensure respect for international humanitarian law

I. Treaties and Other Instruments

Treaties

148. Article 1 of the 1899 Hague Convention (II) provides that "the High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the 'Regulations respecting the laws and customs of war on land' annexed to the present Convention".

149. Article 1 of the 1907 Hague Convention (IV) provides that "the Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention".

150. Article II(17) of the 1953 Panmunjon Armistice Agreement provides that:

> Responsibility for compliance with and enforcement of the terms and provisions of this Armistice Agreement is that of signatories hereto and their successors in command. The Commanders of the opposing sides shall establish within their respective commands all measures and procedures necessary to insure complete compliance with all the provisions hereof by all elements of their commands.

151. Article 7(1) of the 1954 Hague Convention provides that:

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

152. Article 80(2) AP I provides that "the High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution". Article 80 AP I was adopted by consensus.[172]

153. Article 14(3) of the 1996 Amended Protocol II to the CCW provides that "each High Contracting Party shall . . . require that its armed forces issue relevant military instructions and operating procedures . . . to comply with the provisions of this Protocol".

Other Instruments

154. No practice was found.

II. National Practice

Military Manuals

155. Argentina's Law of War Manual provides that "the Geneva Conventions and Protocol I expressly oblige States not only to respect [those agreements], but also to ensure respect by issuing orders and instructions for that purpose".[173]

[172] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 256.
[173] Argentina, *Law of War Manual* (1989), § 8.01.

156. Australia's Defence Force Manual provides that "Rules of Engagement (ROE) provide authoritative guidance on the use of military force by the ADF . . . ROE will include legal considerations and so will comply with the law of armed conflict."[174]

157. Belgium's LOAC Teaching Directive provides that the General Staff of the Forces and the Medical Service "shall give the necessary instructions [to ensure in all circumstances full respect for the law of armed conflicts and the rules of engagement by all members of the Armed Forces]".[175]

158. Benin's Military Manual states that missions assigned to subordinates "shall contain the details necessary to ensure respect for the law of war".[176]

159. Cameroon's Instructors' Manual provides that "the main responsibility of members of the 'Etats-Majors' consists of verifying that their contribution to orders and instructions are in conformity with the Law of War".[177]

160. Canada's LOAC Manual defines the rules of engagement as "orders issued by competent military authority which delineate the circumstances and limitations within which force may be applied by the CF to achieve military objectives in furtherance of national policy".[178]

161. Canada's Code of Conduct provides that "the purpose of the Code . . . is to provide simple and understandable instructions to ensure that CF members apply as a minimum, the spirit and principles of the Law of Armed Conflict in all CF operations other than Canadian domestic operations".[179]

162. Colombia's Directive on IHL defines its own aim as "defining general principles and giving instructions towards the strict respect of the rules of International Humanitarian Law".[180] It also states that:

> The Ministry of National Defence gives instructions aimed at intensifying the development of capacity-building programmes of the members of the public force, on themes referring to the respect for Human Rights and the application of the rules of International Humanitarian Law, with a view to prevent and correct conduct which violates those rules . . .
>
> The General Command of the Military Forces and the Direction of the National Police [g]ive the Commanders of the public force the necessary instructions for each Force to intensify, develop and complete, in the corresponding formation and capacity-building courses of their personnel, the relevant studies on the respect for Human Rights and ensure the obligatory application of International Humanitarian Law.[181]

163. France's LOAC Manual defines rules of engagement as "instructions established by the competent political or military authority to determine the circumstances of and the limitations to the use of force by the armed

[174] Australia, *Defence Force Manual* (1994), § 211.
[175] Belgium, *LOAC Teaching Directive* (1996), Section 1.
[176] Benin, *Military Manual* (1995), Fascicule III, p. 10.
[177] Cameroon, *Instructors' Manual* (1992), p. 133, § 461.1.
[178] Canada, *LOAC Manual* (1999), Glossary, p. GL-17.
[179] Canada, *Code of Conduct* (2001), Introduction, § 5.
[180] Colombia, *Directive on IHL* (1993), Section I.(A).
[181] Colombia, *Directive on IHL* (1993), Sections IV.(A) and IV.(B)(1).

forces when, confronted with other forces, they undertake or continue armed engagement".[182]

164. Germany's Military Manual states that "superiors shall only issue orders which are in conformity with international law".[183]

165. Germany's IHL Manual, referring to common Article 1 of the 1949 Geneva Conventions and Article 1(1) AP I, states that "it necessarily follows that each soldier of the [German Armed Forces] must know the rules of international humanitarian law in armed conflicts. This is relevant especially for superiors who may give orders only by respecting the rules of public international law."[184]

166. Hungary's Military Manual emphasises that the commander of the forces engaged must provide "guidance to subordinates".[185] It also states that each mission "has to be consistent with the L.O.W. [law of war]".[186]

167. The Military Manual of the Netherlands states that "States parties to law of war treaties must take all necessary measures to ensure respect for their obligations under these treaties. They must give orders and instructions which ensure their respect and must supervise their execution."[187]

168. Nigeria's Operational Code of Conduct directs "all officers and men to observe strictly the following rules during operations. (These instructions must be read in conjunction with the Geneva Convention)".[188] It also states that "to be successful in our tasks as soldiers these rules must be carefully observed. I will not be proud of any member of the Armed Forces under my command who fails to observe them."[189]

169. The Joint Circular on Adherence to IHL and Human Rights of the Philippines was issued "to effectively pursue the intents and purposes of Presidential Memorandum Order No. 393 dated September 9, 1991, directing the Armed Forces and National Police to reaffirm their adherence to the Principles of Humanitarian Law and Human Rights in the conduct of security/police operations" and "for strict compliance of every member of the AFP and PNP in all levels of command/office".[190]

170. Spain's LOAC Manual states that:

> The 1907 Hague Convention IV already provided that "the high contracting parties shall issue instructions to their Armed Forces which shall be in conformity with the rules that have been adopted", rules that were contained in the [Hague] Conventions of 1899 and 1907. This obligation takes shape in the existence of military manuals which include the norms applicable to armed conflicts.[191]

[182] France, *LOAC Manual* (2001), p. 107.
[183] Germany, *Military Manual* (1992), § 141.
[184] Germany, *IHL Manual* (1996), §§ 107 and 108.
[185] Hungary, *Military Manual* (1992), p. 39.
[186] Hungary, *Military Manual* (1992), p. 49.
[187] Netherlands, *Military Manual* (1993), p. IX-1.
[188] Nigeria, *Operational Code of Conduct* (1967), § 4.
[189] Nigeria, *Operational Code of Conduct* (1967), § 5.
[190] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2.
[191] Spain, *LOAC Manual* (1996), Vol. I, Annex A.

171. Sweden's IHL Manual notes that "the [1907] IV Hague Convention ... provides that contracting powers shall give their land forces instructions that comply with the Convention".[192] It adds that "for the Swedish defence forces, the commander-in-chief has laid down eight servicemen's rules pointing out what every combatant must bear in mind in combat situations".[193]
172. Togo's Military Manual states that missions assigned to subordinates "shall contain the details necessary to ensure respect for the law of war".[194]
173. The US Air Force Pamphlet emphasises that "the US ... ensures observance and enforcement through a variety of national means including ... military regulations [and] rules of engagement".[195]

National Legislation
174. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "if [the] Azerbaijan Republic is one of the parties to the conflict, then necessary instruction is given to [the] civilian population in such a conflict area and to the personnel staff of the Armed Forces of [the] Azerbaijan Republic involved in the solution of this conflict".[196]
175. In its Order on the Publication of the Geneva Conventions and Protocols, the Russian Ministry of Defence required "the implementation of the instructions concerning the application of the rules of international humanitarian law by the armed forces of the USSR" annexed to the said order, i.e. Russia's Military Manual.[197]

National Case-law
176. No practice was found.

Other National Practice
177. During the Algerian war of independence, the leaders of the ALN emphasised that:

> The laws of war have always been respected by our side. Formal instructions have been given to the combatants during their political education already at the beginning of the Algerian Revolution and have been made the object of directives ... These directives have been repeated, clarified and codified since the Congress of 20 August 1956.[198]

178. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of

[192] Sweden, *IHL Manual* (1991), Section 4.1, p. 91.
[193] Sweden, *IHL Manual* (1991), Section 4.2, p. 95.
[194] Togo, *Military Manual* (1996), Fascicule III, p. 10.
[195] US, *Air Force Pamphlet* (1976), § 15-2(e).
[196] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 1 and 30.
[197] Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 1.
[198] *El Moudjahid*, Vol. 1, p. 440.

self-defence or a mandate of the UN Security Council, in a part dealing with the "eight fundamental rules of international humanitarian law", state that "the parties to the conflict shall give the necessary orders and instructions in order to insure the respect of these rules and will supervise the execution thereof".[199]

179. An Israeli Chief of Staff Order of 1982 refers to the Geneva Conventions and states that "IDF soldiers are obliged to conduct themselves in accordance with the directives contained in the above[-mentioned Geneva] Conventions".[200] The Order also refers to the 1954 Hague Convention and provides that "IDF soldiers are obliged to observe the directives of the said [1954 Hague] Convention, as well as the Regulations and attendant Protocols".[201]

180. In 1972, the General Counsel of the US Department of Defense considered that:

> Rules of engagement are directives issued by competent military authority which delineate the circumstances and limitations under which United States Forces will initiate and/or continue combat engagement with the enemy.
>
> These rules are the subject of constant review and command emphasis. They are changed from time to time to conform to changing situations and the demands of military necessity. One critical and unchanging factor is their conformity to existing international law as reflected in the Hague Conventions of 1907 and the Geneva Conventions of 1949, as well as with the principles of customary international law of which UNGA Resolution 2444 (XXIII) is deemed to be a correct restatement.[202]

181. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that "YPA units have the duty to secure in the area of their operations full and unconditional implementation of rules of international law of armed conflicts and suppress violations of those rules".[203]

182. In 1991, the YPA Chief of General Staff issued Order No. 579 aiming "to completely eliminate violations of international humanitarian law in armed conflicts in Croatia" according to which "YPA units shall ensure full and consistent respect of norms of international humanitarian law in all areas under its jurisdiction".[204]

[199] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1 June 1995, Section 6, § 67.

[200] Israel, IDF Order of the Chief of Staff No. 33.0133, Discipline – Conduct in accordance with the international conventions to which the State of Israel is a party, 20 July 1982, § 3.

[201] Israel, IDF Order of the Chief of Staff No. 33.0133, Discipline – Conduct in accordance with the international conventions to which the State of Israel is a party, 20 July 1982, § 8.

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

[203] SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 1.

[204] SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, preamble and § 1.

III. Practice of International Organisations and Conferences

United Nations

183. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights called upon States "to make possible respect for their obligations in situations of conflict by, inter alia: . . . adopting suitable instructions for and training of their armed forces so that they know that all forms of sexual violence and sexual slavery are criminal and will be prosecuted".[205]

184. In 1995, in his first report concerning the conflict in Guatemala, the Director of MINUGUA stated that:

> The Mission recommends to URNG that it should issue precise instructions to its combatants to refrain from placing at risk persons wounded in the armed conflict and from endangering ambulances and duly identified health workers who assist such wounded persons.[206]

185. In 1995, in his second report concerning the conflict in Guatemala, the Director of MINUGUA observed that:

> Verification has uncovered cases in which the Government failed to guarantee the right to integrity and security of person in terms of freedom from torture or cruel, inhuman or degrading treatment, or the threat of such treatment . . . The Mission reiterates its recommendation that the Government transmit specific instructions to military and police officers in order to prevent these acts, warning them that such acts are crimes subject to disciplinary, administrative and criminal penalties.[207]

He further stated that:

> The Mission recommends that URNG issue precise instructions to its combatants to refrain from causing unnecessary harm to individuals and property, to take due care not to create additional risks to life in attacking military targets and, in particular, to end the practice of laying mines or explosives in areas where civilians work, live or circulate.[208]

Other International Organisations

186. No practice was found.

International Conferences

187. The 20th International Conference of the Red Cross in 1965 adopted a resolution on application of the Geneva Conventions by the United Nations

[205] UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 11(a).
[206] MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, § 194.
[207] MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 179.
[208] MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 197.

Emergency Forces in which it recommended that "the Governments of countries making contingents available to the United Nations give their troops – in view of the paramount importance of the question – . . . orders to comply with [the 1949 Geneva Conventions]".[209]

188. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants urged all States to make every effort to "adopt and implement, at the national level, all appropriate regulations, laws and measures to ensure respect for international humanitarian law applicable in the event of armed conflict and to punish violations thereof".[210]

IV. Practice of International Judicial and Quasi-judicial Bodies

189. In 1980, in a report on the situation of human rights in Argentina, the IACiHR recommended that the Argentine government:

> instruct all the officials and agents responsible for the maintenance of public order, the security of the state, and the custody of detainees, with respect to the rights of detainees, particularly as regards the prohibition of all cruel, inhuman and degrading treatment, and . . . inform them of the sanctions to which they become liable in the event that they violate these rights.[211]

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

190. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that instructions and orders shall be given to ensure respect for the law of war including those for the supervision of its execution.[212]

191. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "it is extremely important for the members of the armed forces stationed in the Gulf to be aware of their obligations under international humanitarian law. Proper instructions must be issued to this effect."[213]

192. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that:

[209] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 2.
[210] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(5).
[211] IACiHR, Report on the Situation of Human Rights in Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19 corr.1, 11 April 1980, p. 265.
[212] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 154.
[213] ICRC, Memorandum on the Applicability of International Humanitarian Law, Geneva, 14 December 1990, § IV, *IRRC*, No. 280, 1991, p. 25

The parties to the conflict must ensure that the members of their armed forces as well as all military and paramilitary forces acting under their responsibility are aware of their obligations under international humanitarian law. To that effect, it is essential that specific instructions to ensure respect for such obligations be issued.[214]

193. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that:

The parties concerned must ensure that all the military and paramilitary forces and other militias for whose actions they are responsible are aware of their obligations under international humanitarian law. It is essential that instructions calculated to safeguard respect for those obligations are reiterated.[215]

VI. Other Practice

194. In 1989, in the context of the conflict in El Salvador, following a period of resurgence of violence marked by bomb explosions in a central market and attacks on political figures, military officers and municipal employees, the Chief of Staff of the FMLN publicly recognised that "numerous civilians had fallen victim to its actions and accordingly recommended to its officers and combatants measures to avoid these occurrences in the future".[216]

B. Principle of Reciprocity

I. Treaties and Other Instruments

Treaties

195. Common Article 1 of the 1949 Geneva Conventions requires parties to respect the provisions of the Geneva Conventions "in all circumstances".

196. Common Article 2(3) of the 1949 Geneva Conventions provides that:

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

197. Article 60(5) of the 1969 Vienna Convention on the Law of Treaties states that:

[214] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § V, *IRRC*, No. 320, 1997, p. 505.

[215] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § V, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

[216] IACiHR, *Annual Report 1988–1989*, Doc. OEA/Ser.L/V/II.76 Doc. 10, 18 September 1989, Chapter IV (El Salvador), p. 166.

Paragraphs 1 to 3 [laying down the principle of reciprocity] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

198. Article 1(1) AP I requires parties to respect the provisions of AP I "in all circumstances". Article 1 AP I was adopted by 87 votes in favour, one against and 11 abstentions.[217]

Other Instruments

199. No practice was found.

II. National Practice

Military Manuals

200. Australia's Commanders' Guide and Defence Force Manual note that "the ADF obligation to comply with LOAC is not conditional upon an enemy's compliance; unilateral compliance by the ADF is required".[218]

201. Belgium's Law of War Manual states that "the conventional law of war remains, in principle, obligatory between signatory parties, even if one of them violates it".[219]

202. Canada's LOAC Manual provides that "the principle of reciprocity refers to the premise that all should be treated as you would like to be treated. Compliance with the LOAC is not only required by law, it is also to our operational advantage."[220] It further states that "a party to an international armed conflict is bound to comply with the LOAC even if an adverse party breaches the law. Compliance with the law by one party is a strong inducement for the adverse party to comply with the law."[221]

203. Canada's Code of Conduct provides that "CF personnel will treat detained persons properly regardless of how CF personnel may have been treated while in the hands of opposing forces".[222] It further stresses that "there is no exception to your obligation to follow Canadian law even when confronted with an opposing force which refuses to comply with the Law of Armed Conflict".[223]

204. Colombia's Basic Military Manual states that "it is important to note that in IHL the principle of reciprocity does not exist, which means that none of the parties to the conflict can put forward the violations of the enemy as a reason to stop implementing humanitarian norms".[224]

[217] CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41.
[218] Australia, *Commanders' Guide* (1994), § 1209; *Defence Force Manual* (1994), § 1308.
[219] Belgium, *Law of War Manual* (1983), p. 18.
[220] Canada, *LOAC Manual* (1999), p. 2-3, § 18, see also Glossary, p. GL-16.
[221] Canada, *LOAC Manual* (1999), p. 15-1, § 5.
[222] Canada, *Code of Conduct* (2001), Rule 6, § 12.
[223] Canada, *Code of Conduct* (2001), Rule 11, § 8.
[224] Colombia, *Basic Military Manual* (1995), p. 35.

205. Ecuador's Naval Manual provides that:

Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to the rules of humanitarian law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions.[225]

206. Germany's Military Manual states that:

People complying with the provisions of international humanitarian law themselves can expect the adversary to observe the dictates of humanity in an armed conflict. No one shall be guided by the suspicion that soldiers of the other party to the conflict might not observe the rules. Soldiers must treat their opponents in the same manner as they themselves want to be treated.[226]

207. Germany's IHL Manual notes that "only those who respect themselves the regulations of international humanitarian law may expect that the adversary also respects them (so-called principle of reciprocity)".[227]

208. France's LOAC Teaching Note states that "combatants shall respect at any place and in all circumstances the rules of the law of armed conflict . . . They may in no case release themselves from those rules, regardless of the framework and the mandate of their mission, even if the enemy does not respect those rules."[228]

209. France's LOAC Manual provides that combatants must respect in all circumstances the rules of the law of armed conflict "even if the adversary does not respect these rules".[229]

210. Israel's Manual on the Laws of War states that "mutuality is the cardinal basis for the existence of the laws of war. The breakdown of rules anywhere would lead to a deterioration in which each side would respond to the acts of the other."[230]

211. The Military Manual of the Netherlands states that "the rules of the law of war must be respected. They must be respected under all circumstances. This means that respect must not be made conditional on the behaviour of the adverse party. In other words: reciprocity may not be used as a measure for respect."[231]

212. New Zealand's Military Manual states that "generally speaking, a Party to an international armed conflict is bound to comply with the customary law of armed conflict and with its treaty obligations even if an adverse Party breaches the law".[232]

[225] Ecuador, *Naval Manual* (1989), § 6.2.4.
[226] Germany, *Military Manual* (1992), § 1204.
[227] Germany, *IHL Manual* (1996), § 109.
[228] France, *LOAC Teaching Note* (2000), p. 7.
[229] France, *LOAC Manual* (2001), p. 14.
[230] Israel, *Manual on the Laws of War* (1998), p. 4.
[231] Netherlands, *Military Manual* (1993), p. IX-1.
[232] New Zealand, *Military Manual* (1992), § 1601.3

213. Spain's LOAC Manual notes that "international treaties and agreements are made up of imperative norms of law . . . They do not lose their validity because one of the opposing parties does not respect them."[233]

214. The UK Military Manual provides that "a belligerent is not justified in declaring itself freed altogether from the obligation to observe the laws of war or any of them on account of their suspected or ascertained violation by his adversary".[234]

215. The US Air Force Pamphlet notes that:

> The most important relevant treaties, the 1949 Geneva Conventions for the Protection of War Victims, are not formally conditioned on reciprocity. Parties to each Convention "undertake to respect and ensure respect for the present Convention in all circumstances" under Article 1 common to the Conventions. The Vienna Convention On the Law of Treaties, Article 60(5), also recognizes that the general law on material breaches, as a basis for suspending the operation of treaties, does not apply to provisions protecting persons in treaties of a humanitarian character. Yet reciprocity is an implied condition in other rules and obligations including generally the law of armed conflict. It is moreover a critical factor in actual *observance* of the law of armed conflict. Reciprocity is also explicitly the basis for the doctrine of reprisals. Additionally, a few obligations, such as those contained in the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, are even formally conditioned on reciprocal adherence.[235] [emphasis in original]

The Pamphlet further states that "the UN Resolutions and the Geneva Conventions set forth standards regardless of whether observance is reciprocated. Hence, reciprocity is neither a formal condition precedent qualifying the obligation to observe the Conventions, nor does lack of reciprocity excuse failures to comply."[236]

216. The US Naval Handbook states that:

> Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will be made by the [National Command Authorities].[237]

National Legislation

217. No practice was found.

[233] Spain, *LOAC Manual* (1996), Vol. I, § 1.1.d.(2).
[234] UK, *Military Manual* (1958), § 121.
[235] US, *Air Force Pamphlet* (1976), § 10-1(b).
[236] US, *Air Force Pamphlet* (1976), § 11-5.
[237] US, *Naval Handbook* (1995), § 6.2.4.

National Case-law

218. In the *Rauter case* in 1948, a Special Court in the Netherlands rejected the argument of the defence that the Dutch government in exile and the Dutch population had themselves, previously to the committing of the acts by the accused, violated the laws and customs of war and had thereby relieved the accused of the obligation to abide by such laws and rules.[238] On appeal by the accused, the Special Court of Cassation, in the relevant parts, confirmed the judgement of the trial of first instance and again rejected the defence, which had repeated its plea that the German Reich, and the accused as its executive organ, were relieved of the obligation of abiding by the laws and customs of war and were entitled to commit the acts because they were directed – as "reprisals" – against the Dutch civilian population by individuals of which, previously to the taking of the acts by the accused, violations of the laws of war would have been committed.[239]

219. In the *Von Leeb (The High Command Trial) case* in 1948, the US Military Tribunal at Nuremberg stated that "under general principles of law, an accused does not exculpate himself from a crime by showing that another committed a similar crime, either before or after the alleged commission of the crime by the accused".[240]

Other National Practice

220. In a report on a symposium on IHL held in Belgium in 1974, a representative of the Belgian Ministry of Justice noted that:

> The notion of reciprocity, which has recently again been rejected by the Committee of Experts on Human Rights of the Council of Europe, has several times been mentioned, which appears to be somewhat shocking. In fact, it is difficult to imagine how one could justify "inhumane treatments" under the pretext that the adversary has recourse to them.[241]

221. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India cited Fitzmaurice and stated that:

> Reprisals or retaliation under international law are also governed by certain specific principles . . . Reprisals could not involve acts which are *malum in se* such as certain violations of human rights, certain breaches of the laws of war and rules in the nature of *ius cogens*, that is to say obligations of an absolute character compliance with which is not dependent on corresponding compliance by others but is requisite in all circumstances unless under stress of literal *vis major* . . . In other words . . . even where a wrongful act involved the use of a nuclear weapon the reprisal

[238] Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.
[239] Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.
[240] US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 30 December 1947–28 October 1948.
[241] Belgium, Ministry of Justice, Note for the Minister of Justice, 18 December 1974, Report on the Practice of Belgium, 1997, Chapter 5.7.

action cannot involve [the] use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances.[242]

222. The Report on the Practice of Iraq states that "for the activities which constitute a violation of human rights or the humanitarian law, this can never be reciprocated". The report cites a speech by the Iraqi President during the Iran–Iraq War, in which he declared that "we do not react in the same way despite the bitterness of their behaviour. We stick to our values and let them stick to their methods, and as a result, history will record our special known values and record their heinous methods."[243]

223. At the CDDH, Mexico stated that "the mandatory nature of humanitarian law does not depend on the observance of its rules by the adverse Party, but stems from the inherently wrongful nature of the act prohibited by international humanitarian law".[244]

224. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands stated that:

> The rule elaborated in Art. 1 [common to the 1949 Geneva Conventions] also indicates that reciprocity has no place in the law of armed conflicts . . . The principle of non-reciprocity excludes *a fortiori* recourse to reprisals in relation to the use of nuclear weapons, even against combatants.[245]

225. On 21 January 1991, in the context of the Gulf War, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq's obligations under international law. According to a statement by an FCO spokesperson following the meeting, "the Ambassador said that Iraq would abide by the Convention and treat POWs well if the Allies avoided civilian targets. Mr Hogg said that we expected unconditional observance of the requirements of the Convention."[246]

226. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

> Central Command . . . forces adhered to . . . fundamental law of war proscriptions in conducting military operations during Operation Desert Storm through discriminating target selection and careful matching of available forces and weapons

[242] India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.
[243] Report on the Practice of Iraq, 1998, Chapter 2.9, referring to a speech of the President of Iraq, 4 January 1983.
[244] Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 449–450.
[245] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.78.
[246] UK, Statement by FCO spokesperson, 21 January 1991, *BYIL*, Vol. 62, 1991, p. 680.

systems to selected targets and Iraqi defenses, without regard to Iraqi violations of its law of war obligations toward the civilian population and civilian objects.[247]

227. In 1987, an official of a State party to a non-international armed conflict asserted that, as international law had been breached by all the parties to the conflict, it did not have any value.[248]

III. Practice of International Organisations and Conferences

United Nations

228. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that:

> The idea of a "linkage" between the provision of humanitarian aid to Srebrenica and the evacuation of Serbs from Tuzla is to be condemned. Compliance with human rights and humanitarian law obligations by one party is not conditional upon compliance by others with their obligations: such obligations are absolute for each party and do not depend on reciprocity.[249]

Other International Organisations

229. No practice was found.

International Conferences

230. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on activities of the ICRC in which it recalled that the Geneva Conventions "provide essential protection for the human person, constitute solemn commitments *vis-à-vis* the whole international community" and that "the application of the provisions contained therein cannot therefore be subject to reciprocity or to political or military considerations".[250]

IV. Practice of International Judicial and Quasi-judicial Bodies

231. In its advisory opinion in the *Namibia case* in 1971, the ICJ noted:

> the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the [1969] Vienna Convention [on the Law of Treaties].[251]

[247] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.
[248] ICRC archive document.
[249] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1994/3, 5 May 1993, § 91.
[250] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. I.
[251] ICJ, *Namibia case*, Advisory Opinion, 21 June 1971, § 96.

232. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber stated that:

The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of the other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 Common to all Geneva Conventions.[252]

233. In its judgement in the *Kupreškić case* in 2000, the ICTY held that:

515. Defence counsel have indirectly or implicitly relied upon the *tu quoque* principle, i.e. the argument whereby the fact that the adversary has also committed similar crimes offers a valid defence to the individuals accused. This is an argument resting on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. This argument may amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. Or it may amount to saying that such breaches, having been perpetrated by the adversary, legitimise similar breaches by a belligerent in response to, or in retaliation for, such violations by the enemy. Clearly, this second approach to a large extent coincides with the doctrine of reprisals, and is accordingly assessed below. Here the Trial Chamber will confine itself to briefly discussing the first meaning of the principle at issue.
516. It should first of all be pointed out that although *tu quoque* was raised as a defence in war crimes trials following the Second World War, it was universally rejected. The US Military Tribunal in the *High Command* trial, for instance, categorically stated that under general principles of law, an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused. Indeed, there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defence.
517. Secondly, the *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that "The High Contracting Parties undertake to respect . . . the present Convention *in all circumstances*" [emphasis added]. Furthermore, attention must be drawn to a common provision (respectively Articles 51, 52, 131 and 148) which provides that "No High Contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article (i.e. grave breaches)". Admittedly, this provision only refers to State responsibility for grave breaches committed by State agents or *de facto* State agents, or at any rate for grave breaches generating State responsibility (e.g. for an omission by the State to prevent or punish such breaches). Nevertheless, the general notion

[252] ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 15.

underpinning those provisions is that liability for grave breaches is absolute and may in no case be set aside by resort to any legal means such as derogating treaties or agreements. *A fortiori* such liability and, more generally, individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity.
518. The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called "humanisation" of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings. Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.[253]

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

234. The ICRC Commentary on the First Geneva Convention states that IHL treaties are not:

an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. [They are] rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations "vis-à-vis" itself and at the same time "vis-à-vis" the others.[254]

235. In a communication to the press in 2000, the ICRC condemned grave breaches of IHL in Colombia and stated that "international law expressly states that a violation committed by one party does not legitimize similar action by the adversary".[255]

VI. Other Practice

236. In 1992, when the issue of the protection of civilians was raised by an ICRC delegate, the representative of an armed opposition group replied: "We

[253] ICTY, *Kupreškić case*, Judgement, 14 January 2000, §§ 515–518.
[254] Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 25.
[255] ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

are not the first to start these violations of humanitarian law. It's simply our reply."[256]

237. In 1993, when the ICRC reminded the parties to an armed conflict that a violation of IHL could not be justified by invoking a violation committed by the enemy, the representative of the authorities of a separatist entity party to an armed conflict replied that it agreed that violations of the laws of war were unacceptable, even if the adversary had itself committed violations.[257]

C. Legal Advisers for Armed Forces

I. Treaties and Other Instruments

Treaties

238. Article 82 AP I provides that:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Article 82 AP I was adopted by consensus.[258]

Other Instruments

239. No practice was found.

II. National Practice

Military Manuals

240. Australia's Commanders' Guide states that:

> In some situations, legal advisers are available to assist commanders in ensuring compliance. In contrast, an aircraft pilot, a company commander or a commander of a RAN vessel does/may not have this direct access; consequently, it is essential that they be adequately trained in LOAC issues.[259]

The manual also states that "all operations plans and ROE should be reviewed by ADF legal advisers experienced in operations law. In addition, targeting lists and individual missions are to be carefully scrutinised by military planners and their operations law advisers."[260]

241. Australia's Defence Force Manual states that:

[256] ICRC archive document. [257] ICRC archive document.
[258] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 256.
[259] Australia, *Commanders' Guide* (1994), § 1206.
[260] Australia, *Commanders' Guide* (1994), § 1205.

As appropriate, legal advisers should be available to assist commanders in ensuring compliance. In contrast, an aircraft pilot, a company commander or a commander of a RAN vessel may not have this direct access; consequently, it is essential that they have a sound knowledge and understanding of LOAC issues.[261]

242. Australia's Defence Training Manual states that:

In accordance with the requirements of Article 82 of Additional Protocol One, the ADF is to ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the [Geneva] Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.[262]

It further states that:

The role of the legal adviser is to provide advice which will assist the commander to execute his mission in compliance with LOAC. It is concerned with the application and the respect for the rules of LOAC. The legal adviser will be called upon to:

a. actively participate in the preparation of exercises, the development of plans for military operations, to give his evaluation of the legal consequences of their execution, particularly with respect to the methods planned and the means to be used;
b. supervise the organisation of instruction in subordinate units, and to ensure that the levels of understanding are obtained;
c. ensure that instruction on the subject of LOAC is carried out on a continuous basis;
d. provide expertise on particular problems (for example, by developing a legal profile which will assist with weapons and target selection);
e. ensure the functioning of the procedure of legal consultation, particularly at subordinate levels; and
f. advise commanders of their obligations under the terms of Article 87 of Additional Protocol I.[263]

243. Belgium's Law of War Manual, referring to Articles 47 and 49 GC I, 48 and 50 GC II, 127 and 129 GC III, 144 and 146 GC IV and 82 AP I, provides that "the States signatory to the [Geneva] Conventions undertook to take a series of measures to promote respect thereof", among which it lists "the appointment of legal advisers to military commands".[264]

244. Cameroon's Instructors' Manual states that:

The profile of a legal adviser is defined as follows:

– having undergone thorough training in International Humanitarian Law and the Law of War for legal advisers,
– holding a degree in public law (or, as a minimum, be well versed in legal matters),
– possessing a sound knowledge of public international law,

[261] Australia, *Defence Force Manual* (1994), § 1305.
[262] Australia, *Defence Training Manual* (1994), § 16.
[263] Australia, *Defence Training Manual* (1994), § 17.
[264] Belgium, *Law of War Manual* (1983), p. 55.

– having undergone high-level military training and holding a senior military rank.

Within the General Staff, legal advisers provide high-level training for senior officers.

They may also carry out normal General Staff duties and, in particular, ensure the legality of orders related to property that enjoys special protection.

In addition to their General Staff duties, legal advisers may be assigned special tasks.[265]

245. Canada's LOAC Manual provides that:

As a party to AP I, Canada has the obligation to ensure that legal advisors are available to advise military commanders on the application of the LOAC and the appropriate instruction to be given to the CF. Legal officers with the Office of the Judge Advocate General fulfil this mandate.[266]

246. France's LOAC Manual provides that "legal advisers present in external areas of operations are required to assist the command in order to take into account these legal parameters [i.e. of the law of armed conflict] in the planning and conduct of operations".[267]

247. Germany's Military Manual states that:

A lawyer who is qualified to exercise the function of a judge is assigned to every military commander at the division level and above to perform the following tasks:
– to advise the commander (and his subordinate disciplinary superiors) in all matters pertinent to the military law and the international law;
– to examine military orders and instructions on the basis of legal criteria;
– to participate in military exercises (in his wartime assignment) as a legal officer whose duties include giving advice on matters pertinent to international law; and
– to give legal instruction to soldiers of all ranks, particularly including the further education of officers . . .

The Legal Adviser has direct access to the commander to whom he is assigned.[268]

248. Hungary's Military Manual provides for a series of administrative measures including translation of legal texts and the presence of legal advisers, because "everybody must know the rules".[269]

249. Italy's Peace Operations Manual states that the availability of a legal adviser is always necessary and useful in national detachments of peacekeeping operations in order to dissipate any doubt on the interpretation or applicability of international law.[270]

[265] Cameroon, *Instructors' Manual* (1992), p. 134, § 461.3.
[266] Canada, *LOAC Manual* (1999), p. 15-2, § 8.
[267] France, *LOAC Manual* (2001), preamble, p. 7.
[268] Germany, *Military Manual* (1992), §§ 146 and 147.
[269] Hungary, *Military Manual* (1992), p. 31.
[270] Italy, *Peace Operations Manual* (1994), Part III, No. 1a(4).

250. The Military Manual of the Netherlands notes that "States must ensure that legal advisers are available to advise military commanders concerning the application of the law of war".[271]

251. New Zealand's Military Manual states that "the purpose of this . . . Manual is to provide interim guidance to members of the New Zealand Defence Force, particularly to legal officers engaged in advising commanders, on the customary and treaty law applicable in armed conflict".[272] It also states that:

> Some armed forces have trained legal advisers attached to their higher echelons and these officers are competent to indicate what the law is as it affects a particular operation or whether a particular operation or whether a particular act is legally acceptable. By AP I Art. 82 the parties to the Protocol are obliged to ensure that such advisers are available . . .
>
> The Protocol does not indicate the level of command to which these advisers are to be attached, merely providing that, "when necessary", they will be available to advise "military commanders at the appropriate level". The requirement only relates to advice concerning the application of the Geneva Conventions and the Protocol. Art. 82 also provides for these legal advisers being employed to advise on "the appropriate instruction to be given to the armed forces" on these documents.[273]

252. Nigeria's Military Manual notes that Part V Section I of AP I "recommends for legal advisers to be assigned to Commanders at all time[s]".[274] It also states that "[Article 82] of Protocol I provides that Commanders may be assisted by special legal advisers . . . where there's need".[275]

253. Russia's Military Manual states that:

> As far as questions of application of the rules of IHL are concerned, the Commanders . . . shall, when necessary, turn to the assistance of legal advisers (art. 82 of Additional Protocol I). The officers of the Legal Service have been entrusted to perform this function by an order of the USSR Ministry of Defence.[276]

254. Spain's LOAC Manual, referring to Article 82 AP I, provides that "the State must ensure that Military Commanders, at the appropriate level, can count on the legal advice necessary for the application of the Law of War and its instruction to the Armed Forces".[277] It further states that "when legal advisers are available, they shall cooperate in the work of the Chiefs of Staff and, if necessary, perform specific tasks".[278] Annex A to the manual, referring to the 1907 Hague Convention IV and the Nuremberg trials, adds the following:

[271] Netherlands, *Military Manual* (1993), p. IX-1
[272] New Zealand, *Military Manual* (1992), Introduction, p. xxxiv.
[273] New Zealand, *Military Manual* (1992), § 1604, including footnote 11, see also § 1710.1, footnote 68.
[274] Nigeria, *Military Manual* (1994), p. 9, § 9e.
[275] Nigeria, *Military Manual* (1994), p. 31, § 4.
[276] Russia, *Military Manual* (1990), § 16.
[277] Spain, *LOAC Manual* (1996), Vol. I, § 11.3.b.(4).
[278] Spain, *LOAC Manual* (1996), Vol. I, § 10.4.c.(5).

Protocol I additional to the 1949 Geneva Conventions, specifically Article 82 thereof, provides that legal advisers shall be available to the Armed Forces. That obligation is binding at all times on the High Contracting Parties and in time of armed conflict on those involved in the conflict in particular.

This Article represents an innovation in terms of the previous conventions governing the law of armed conflicts. The origins of the obligation imposed in Article 82 can nevertheless be traced back to previous treaties.

...

As has been demonstrated... Article 82 [AP I] obliges the contracting parties to ensure that legal advisers are available within the Armed Forces with a view to the application of the Geneva Conventions and the Additional Protocols and to the instruction to be given in the Army on the subject. Although the article is vaguely worded, the competent authorities have discretion only with regard to the terms and conditions on which the advice is given, the hierarchical level of the advisers and the method by which they are recruited. As has been pointed out by one author, "the article in question creates the obligation for the high contracting parties to adopt the adequate rules to ensure that legal advisers are available to the armed forces".

...

In the case of Spain, the following formula has been adopted within the limits of the methods to implement the terms of Article 82:

1. Existence of a specific technical corps of legal experts specifically belonging to the Armed Forces.

   ...

3. The existence of a military legal corps has undeniable advantages, since advice is not provided only in the command decision-making phase but also with regard to the disciplinary and penal repression of violations of the Law of Armed Conflict.[279]

255. Sweden's IHL Manual states that:

A generally accepted opinion is that proper application of the humanitarian legal rules depends to a large degree on the states' genuinely following the rules laid down in Article 82 of Additional Protocol I.

Article 82 states that "The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the [Geneva] Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject". This is an obligation that Sweden through her ratification of the Protocol has undertaken to put into practice.

The legal advisers associated with the armed forces shall thus act both in peace and in war at appropriate military levels. They shall give general advice concerning instruction in international law within military defence. In this way they will also play a not unimportant part in such training within the civilian parts of the total defence system. Further, they shall give special guidance concerning the application of the rules of international law in both preparations for and the execution of military operations...

[279] Spain, *LOAC Manual* (1996), Vol. I, Annex A.

It is . . . crucial that legal advisers, even in peacetime, can ensure that international law is included in instruction and planning.[280]

The manual also quotes a decision of the Swedish government of 1990 concerning advisers on international law and the text of the Total Defence Ordinance relating to International Humanitarian Law, containing similar provisions, notably that:

The wartime organization of the armed forces shall have appointments for advisers on international law . . . They shall be stationed at high-level staffs and shall have the task of advising military leaders as to how the rules of international law in war . . . shall be applied . . .

The peacetime organization of the armed forces shall have an adviser on international law with the Supreme Commander and one with every General Officer commanding Military Command Area.

The advisers on international law shall participate in the instruction of personnel of the armed forces as to how the rules of international law in war . . . are to be applied.[281]

256. The US Operational Law Handbook states that "a successful deployment legal assistance program will generally involve: 1. Advance planning by the legal assistance officer(s) and other judge advocates that may become involved in providing assistance to deploying soldiers."[282] Appendix 4 to Annex E to CJTF Tandem Thrust-92 Explan 1-92 (U) Legal (U) states that:

The CJTF Staff Judge Advocate will:

(1) (U) Provide legal assistance to CJTF and his staff.
(2) (U) Serve as a single point of contact for operational law matters within the JTF AOR [Area of Responsibility].
(3) (U) Monitor foreign criminal jurisdiction matters with respect to U.S. personnel with the JTF AOR.
(4) (U) Ensure that all plans, policies, directives, rules of engagement, and targeting are consistent with the DoD Law of War Program and domestic international law.[283]

The document further states that "the CJTF SJA [Staff Judge Advocate] is the Commander's principle advisor in all matters pertaining to the LOAC".[284] The deployment checklist, dealing with "international law considerations" at the post-alert stage, states that "the International/Operational Law Officer should be the SJA office's point of contact at the EOC [Emergency Operations Center]

[280] Sweden, *IHL Manual* (1991), Section 9, pp. 163 and 164.
[281] Sweden, *IHL Manual* (1991), Section 9, p. 166 and Appendix (Sections 27 and 28), p. 185.
[282] US, *Operational Law Handbook* (1993), p. R-195.
[283] US, *Operational Law Handbook* (1993), Appendix 4 to Annex E to CJTF Tandem Thrust-92 Explan 1-92 (U), Legal (U), § 1(b).
[284] US, *Operational Law Handbook* (1993), Appendix 4 to Annex E to CJTF Tandem Thrust-92 Explan 1-92 (U) Legal (U), § 2(b)(3)(a).

and should keep the office advised at all times. He should attend all EOC briefings."[285] The post-deployment checklist states that:

The early stages of a deployment will usually have a multitude of issues of International/OPLAW [operational law] concern. Close coordination/contact must be maintained with the operational section . . . Trial counsel or legal advisers assigned to each subordinate unit (usually Brigade size units) should watch for potential International/OPLAW issues in their units.[286]

Regarding Special Operations Forces, the Handbook provides for the assignment of a Judge Advocate to each Special Forces Group, a Psychological Operations Group, a Ranger Regiment and a Special Operations Aviation Regiment, stating that "these attorneys are responsible for providing the legal advice a SO [Special Operations] unit commander requires to perform his assigned mission".[287] It adds that:

SO missions are politically sensitive, particularly in a peacetime or low-intensity conflict environment, and thus, the area of SO is fraught with potential legal pitfalls. The commander must consider not only the effect of traditional law of war requirements on his operation, but also the requirements of US law, such as security assistance and intelligence statutes, and international law in the form of mutual defence treaties and host nation support agreements.[288]

257. The US Naval Handbook provides that "Navy and Marine Corps judge advocates responsible for advising operational commanders are especially trained to provide officers in command with advice and assistance in the law of armed conflict on an independent and expeditious basis".[289]

National Legislation

258. The Order on Study and Dissemination of IHL of Belarus, with reference to Article 82 AP I, entrusts the military law section of the Ministry of Defence's legal department with the coordination of the activities of the legal advisers of the armed forces.[290]

259. Sweden's Total Defence Ordinance relating to IHL provides that:

The wartime organization of the Armed Forces shall have appointments for advisers on international law of the number decided by the Armed Forces. They shall be stationed at high-level staffs and shall have the task of advising military leaders as to how the rules of international law in war and during neutrality shall be applied. The advisers shall also take part in the planning work of the military staffs.

The Ordinance further states that "the peacetime organization of the Armed Forces shall have an adviser on international law within the Armed Forces and

[285] US, *Operational Law Handbook* (1993), p. Mc-12.
[286] US, *Operational Law Handbook* (1993), p. Mc-14.
[287] US, *Operational Law Handbook* (1993), p. N-146.
[288] US, *Operational Law Handbook* (1993), p. N-146.
[289] US, *Naval Handbook* (1995), § 6.1.2.
[290] Belarus, *Order on Study and Dissemination of IHL* (1997), § 4.

two with every Commander [and] Joint Command". Moreover, the Ordinance provides for two appointments of advisers on international law for the wartime organization of every director of a regional civil defence and for two appointments of advisers on international law for the wartime organization of every county administrative board. It stipulates that the advisers on international law shall be lawyers.[291]

260. Russia's Order on the Publication of the Geneva Conventions and Protocols requires that Vice-Ministers of Defence and commanders at several levels "charge the officers of the Legal Service of the Ministry of Defence with the duty of legal advisers foreseen by art. 82 of Protocol I".[292]

National Case-law

261. No practice was found.

Other National Practice

262. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Austria pledged to "strengthen and review the system of legal advisers established under Article 82 of [AP I] and to undertake to include such advisers in Austrian units participating in international peace-support operations".[293]

263. In 1999, the Ministry of Foreign Affairs of Burkina Faso and the ICRC, in cooperation with the Burkinabé Red Cross Society, held the first national seminar on implementation of IHL. The seminar, *inter alia*, urged Burkina Faso to appoint legal advisers to the armed forces.[294]

264. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Burkina Faso pledged to "appoint legal advisers in the armed forces".[295]

265. In 1999, at a seminar on national implementation of IHL, organised by the ICRC, the Gambia Red Cross Society and the Gambian Department of State for Justice, the participants encouraged the authorities, *inter alia*, to appoint legal advisers to the armed forces.[296]

266. The Report on the Practice of India states that:

> As regards the legal advice on matters regarding international humanitarian law, it is the responsibility of [the] Judge Advocate General. He is supposed to advise the higher military authorities on military, martial and international law related issues referred to him. The Army Rules also provide for reference of legal questions including questions involving [the] interpretation and application of humanitarian

[291] Sweden, *Total Defence Ordinance relating to IHL* (1990), Sections 27–32.
[292] Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 2.
[293] Austria, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[294] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 16.
[295] Burkina Faso, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[296] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 28.

law to Deputy Judges Advocate General as well as other subordinate legal personnel within the armed forces.[297]

267. According to the Report on the Practice of Israel, the International Law Department of the IDF is responsible for advising all military commanders on the application of the laws of war in the field.[298]

268. In 1999, at a seminar on implementation of IHL organised by the Kenyan Attorney-General's chambers and the ICRC, the participants encouraged the authorities, *inter alia*, to step up IHL training for legal advisers to the armed forces.[299]

269. In 1999, at a seminar on national implementation of IHL organised by Malawi's Ministry of Defence, the Law Commissioner, the ICRC and the National Red Cross Society, the participants urged the authorities, *inter alia*, to provide for the appointment and training of personnel qualified in IHL, including legal advisers to the armed forces.[300]

270. On the basis of an interview with high-ranking officers of the army of the Netherlands, the Report on the Practice of the Netherlands states that the Royal Netherlands Army has legal advisers at all levels higher than brigade level.[301]

271. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Niger pledged to "appoint legal advisers at all levels of the armed forces".[302]

272. The 1979 version of the US Department of Defense Directive on the Law of War Program states that:

> The DoD General Counsel shall provide overall legal guidance within the Department of Defense pertaining to the DoD law of war program, to include review of policies developed in connection with the program and coordination of special legislative proposals and other legal matters with other Federal departments and agencies.[303]

273. In 1987, a Deputy Legal Adviser of the US Department of State, referring to Articles 80–85 AP I, affirmed that "we support the principle that legal advisers be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles".[304]

[297] Report on the Practice of India, 1997, Chapter 6.11.
[298] Report on the Practice of Israel, 1997, Chapter 6.6.
[299] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 42.
[300] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 44.
[301] Report on the Practice of Netherlands, 1997, Interview with two high-ranking officers of the Royal Netherlands Army staff, both legal advisers, 15 April 1997, Chapter 6.6.
[302] Niger, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[303] US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E(2)(d).
[304] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols

274. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

> The Office of General Counsel of the Department of Defense (DOD), as the chief DOD legal office, provided advice to the Secretary of Defense, the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, other senior advisers to the Secretary and to the various components of the Defense legal community on all matters relating to Operations Desert Shield and Desert Storm, including the law of war. For example, the Secretary of Defense tasked the General Counsel to review and opine on such diverse issues as the means of collecting and obligating for defense purposes contributions from third countries; the War Powers Resolution; DOD targetting policies; the rules of engagement; the rules pertinent to maritime interception operations; issues relating to the treatment of prisoners of war; sensitive intelligence and special access matters; and similar matters of the highest priority to the Secretary and DOD. In addition, military judge advocates and civilian attorneys with international law expertise provided advice on the law of war and other legal issues at every level of command in all phases of Operations Desert Shield and Desert Storm. Particular attention was given to the review of target lists to ensure the consistency of targets selected for attack with United States law of war obligations.[305]

275. The 1998 version of the US Department of Defense Directive on the Law of War Program provides that the General Counsel of the Department of Defense shall "establish a DoD Law of War Working Group" which shall "provide advice to the General Counsel on legal matters covered by this Directive".[306] It also states that the Heads of the Department of Defense Components shall "ensure that qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations".[307] The Directive further provides that the Commanders of the Combatant Commands shall "designate the command legal adviser to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war".[308] Moreover, the Commanders of the Combatant Commands shall "ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war".[309]

Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

[305] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 617.

[306] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(1)(2).

[307] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(3).

[308] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(8)(3).

[309] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(8)(6).

276. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the UN programme of assistance in the teaching, study, dissemination and wider appreciation of international law, the representative of Trinidad and Tobago stated that "her delegation noted the growing interest in the legal aspects of peacekeeping operations. Legal advisers attached to such operations should be equipped to tackle the legal problems that might arise."[310]

III. Practice of International Organisations and Conferences

277. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

278. No practice was found.

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

279. The ICRC Commentary on the Additional Protocols states with respect to Article 82 AP I that:

The obligatory character of the present provision was maintained [at the adoption of the Article at the CDDH]. The word "ensure" is a term sometimes used in the Conventions; it means that the Party in question must make sure that the task is executed. There is therefore no justification for thinking that the task itself might be optional. To be more precise, Article 82 creates the obligation for the Parties to the Protocol to adopt all appropriate regulations to ensure that legal advisers are available to the armed forces. The fact that the conditions for the use and allocation of these advisers are regulated in particularly flexible terms ("when necessary", "at the appropriate level") does not in any way alter the fact that the creation of the post of legal adviser is obligatory.[311]

280. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that legal advisers shall be available, when necessary, to advise military commanders at the appropriate level on the application of the law of war.[312] They also teach that:

To solve specific problems, the superior can:

a) ask for legal advice;
b) seek the participation of a legal adviser in the theoretical training;

[310] Trinidad and Tobago, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.33, 19 November 1993, § 11.
[311] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3344.
[312] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 156.

c) make a legal adviser participate in normal staff work (e.g. for drafting and/or reviewing orders and instructions, for advice with regard to specifically protected objects).[313]

VI. Other Practice

281. No practice was found.

D. Instruction in International Humanitarian Law within Armed Forces

General

I. Treaties and Other Instruments

Treaties

282. Article 26 of the 1906 GC provides that "the signatory governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large".

283. Article 27 of the 1929 GC provides that "the High Contracting Parties shall take the necessary steps to instruct their troops, and in particular the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population".

284. Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV provide that:

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

285. Article 25 of the 1954 Hague Convention provides that:

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

286. Article 83 AP I provides that:

> The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction.

[313] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 285.

Article 83 AP I was adopted by consensus.[314]

287. Article 19 AP II provides that "this Protocol shall be disseminated as widely as possible". Article 19 AP II was adopted by consensus.[315]

288. Article 6 of the 1980 CCW provides that:

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

289. Article 14(3) of the 1996 Amended Protocol II to the CCW provides that:

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

290. Article 30 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

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

Other Instruments

291. Article 20 of the 1956 New Delhi Draft Rules provides that "all States or Parties concerned shall make the terms of the provisions of the present rules known to their armed forces".

292. Article 3(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, dealing with tasks of the National Red Cross and Red Crescent Societies, provides that the National Societies "disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect".

293. Article 5(2)(g) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, in the context of the tasks of the ICRC, provides that

[314] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 260.
[315] CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 151.

"the role of the International Committee, in accordance with its Statutes, is in particular: . . . to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof".

294. Paragraph 19 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

295. Paragraph 20 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

296. Paragraph 13 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence, and to paramilitary or irregular units not formally under their command, control or influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- via articles in the press, and radio and television programmes prepared also in cooperation with the ICRC and broadcast simultaneously;
- by distributing ICRC publications.

297. Paragraph 4 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that:

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- by distributing ICRC publications.

298. In Paragraph II(10) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina, the ICRC requested that the parties "undertake to ensure that the principles and rules of international humanitarian law and, in particular, [the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina] are known to all combatants".

299. Paragraph IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina states that "the ICRC considers it essential to launch a major *information campaign* without delay in order to ensure that all combat units are aware of the humanitarian rules governing the conduct of hostilities". (emphasis in original)

300. Paragraph 17 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that "States shall disseminate these rules, make them known as widely as possible in their respective countries and include them in their programmes of military . . . instruction".

301. Paragraph 29 of the 1994 CSCE Code of Conduct provides that "the participating States will make widely available in their respective countries the international humanitarian law of war. They will reflect, in accordance with national practice, their commitments in this field in their military training programmes and regulations".

302. Paragraph 30 of the 1994 CSCE Code of Conduct provides that "each participating State will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict".

303. Paragraph 34 of the 1994 CSCE Code of Conduct provides that:

> Each participating State will ensure that its armed forces are, in peace and in war, commanded, manned, trained and equipped in ways that are consistent with the provisions of international law and its respective obligations and commitments related to the use of armed forces in armed conflict, including as applicable the Hague Conventions of 1907 and 1954, the Geneva Conventions of 1949 and the 1977 Protocols Additional thereto, as well as the 1980 Convention on the Use of Certain Conventional Weapons.

304. Section 3 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments [principles and rules of the general conventions applicable to the conduct of military personnel]".

305. Paragraph 52 of the 2000 Cairo Plan of Action urges States "to implement international humanitarian law in full, in particular by . . . ensuring that international humanitarian law is fully integrated into the training programmes and operational procedures of armed forces and the police force".

II. National Practice

Military Manuals

306. Numerous States have issued military manuals as an educational tool for their armed forces, including Argentina, Australia, Belgium, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Canada, China, Colombia, Congo, Croatia, Dominican Republic, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, South Korea, Kuwait, Kyrgyzstan, Lebanon, Madagascar, Mali, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Peru, Philippines, Romania, Russia, Rwanda, Senegal, South Africa, Spain, Sweden, Switzerland, Tajikistan, Togo, Uganda, UK, Uruguay, US and SFRY (FRY).[316]

307. Argentina's Navy Regulations state that "an adequate knowledge of the relevant rules of international law, as well as of relevant conventions, must be demanded at all levels".[317]

308. Argentina's Law of War Manual states that its objectives include to:

1. Disseminate lawful methods and means of warfare.
2. Disseminate the rules regulating the conduct of the military forces in operation.
3. Disseminate the rules that the military forces must observe in their relations with the enemy populations and the occupied territories.[318]

The manual also points out that the duty to disseminate the Additional Protocols and to train qualified persons applies already in peacetime.[319]

309. Australia's Commanders' Guide stipulates that ADF members "are to be trained in [LOAC] basic principles and therefore avoid breaches of these laws".[320] It also states that "the training adviser for LOAC training in the ADF is the Director-General of Defence Force Legal Services".[321]

310. Australia's Defence Force Manual states that ADF members "are to be trained in [LOAC] basic principles and avoid breaches of these laws".[322]

316 The full references for the military manuals of these States can be found in the list of Military Manuals at the end of this publication.
317 Argentina, *Navy Regulations* (1986), Article 11.702.014.
318 Argentina, *Law of War Manual* (1989), Introduction, p. IX.
319 Argentina, *Law of War Manual* (1989), Annex 9, § 9.
320 Australia, *Commanders' Guide* (1994), § 1202.
321 Australia, *Commanders' Guide* (1994), § 109.
322 Australia, *Defence Force Manual* (1994), § 1302.

311. Australia's Defence Training Manual states that:

> 4. ... the Government of Australia is required to disseminate the text of the conventions [Geneva Conventions, AP I and AP II, and 1907 Hague Convention (IV)] as widely as possible, so that the principles become known to the members of the ADF ...
> 5. The aim of this Instruction is to set out LOAC training policy and objectives for the ADF ...
> 6. The training adviser for LOAC training is the Director-General of Defence Force Legal Services ...
> 7. The requirement for training in LOAC in the Australian Defence Force is based on the following considerations:
>   a. Australia is bound by the Hague and Geneva Conventions and their Additional Protocols to disseminate their texts for study by the military.[323]

312. Belgium's Law of War Manual states that "the study [of the law of war] is required for those who may be concerned by its provisions".[324] It further states that "States signatory to the [Geneva] Conventions undertook to take a series of measures to promote the respect thereof", among which it lists "the widest dissemination possible of the content of the Conventions ... among military personnel".[325]

313. Belgium's LOAC Teaching Directive states that "the dissemination of the LOAC is a legal obligation fulfilled by incorporating its instruction in military teaching programmes and by training the personnel".[326] The Directive refers to the teaching of the Geneva Conventions, AP I and AP II.[327]

314. Belgium's Teaching Manual for Soldiers states that "every soldier must know the essential rules of the law of war ... and their meaning in order to be able to apply them".[328] It further states that "since respect for humanitarian rules depends on the degree of discipline of a unit, their instruction is logically included in general military instruction".[329]

315. Benin's Military Manual provides that "the law of war must be incorporated in the military instruction programmes in the different military units".[330] It adds that "the instruction of individual combatants is a priority. The aim is to develop automatic behaviours. Such automatic behaviours shall: be obtained by an individual instruction and practice; be controlled during combat exercises."[331]

316. Cameroon's Disciplinary Regulations states that:

> The military commander must incorporate in his programmes the legal problems that shall permit all members of the Armed Forces not only to realistically complete

[323] Australia, *Defence Training Manual* (1994), §§ 4–7.
[324] Belgium, *Law of War Manual* (1983), p. 2.
[325] Belgium, *Law of War Manual* (1983), p. 55.
[326] Belgium, *LOAC Teaching Directive* (1996), Section 1.
[327] Belgium, *LOAC Teaching Directive* (1996), preamble.
[328] Belgium, *Teaching Manual for Soldiers* (undated), p. 1.
[329] Belgium, *Teaching Manual for Soldiers* (undated), p. 4.
[330] Benin, *Military Manual* (1995), Fascicule II, p. 15.
[331] Benin, *Military Manual* (1995), Fascicule II, p. 16.

their knowledge of the international law of war, but also to solve, in time of peace, problems he will face in case of armed conflict. This instruction, in addition to military training, must be the object of instruction sessions in all military units and schools.[332]

317. Cameroon's Instructors' Manual states that "the teaching and dissemination of the Law of War is of prime importance to Cameroon, in civilian as well as military circles".[333] It further states that "each member [of the armed forces] shall receive an instruction in accordance with . . . his function . . . Instruction in the law of war must be specific, simple and must refer to concrete situations."[334]

318. Canada's Unit Guide states that:

1. The aim of this manual is to acquaint all ranks with the principles of the Geneva Conventions for the Protection of War Victims signed on August 12, 1949.
2. Each of the 1949 Geneva Conventions contains a provision requiring participating nations to distribute the text of the Convention as widely as possible and, in particular, to include a study of these texts in programmes of military instruction.[335]

319. Canada's LOAC Manual notes that it is designed "to be used as the main source for the preparation of lesson plans required for the training of all members of the CF on the LOAC".[336] It also states that:

The most important factor in ensuring that the LOAC is applied by all parties to an armed conflict is knowledge of the law. Canada has the obligation, as a party to the Additional Protocol I to the Geneva Conventions (AP I), to instruct the CF on the LOAC, in time of peace as well as in time of armed conflict. Canada also has the obligation to include the study of LOAC in military instruction programmes.[337]

320. Canada's Code of Conduct states that:

CF members are not expected to know all the details of the various treaties and international customs that make up the Law of Armed Conflict. They are, however, expected to know at least the basic principles which, when followed, will ensure CF members carry out their duties in accordance with the spirit and principles of the Law of Armed Conflict. These principles of the Law of Armed Conflict are set out in the CF Code of Conduct.[338]

The Code of Conduct further states that "it is CF policy to respect and abide by the Law of Armed Conflict in all circumstances. To meet this commitment, every CF member must know and understand, as a minimum, the basic principles of the Law of Armed Conflict."[339]

[332] Cameroon, *Disciplinary Regulations* (1975), Article 35.
[333] Cameroon, *Instructors' Manual* (1992), p. 2.
[334] Cameroon, *Instructors' Manual* (1992), p. 71, §§ 251.2 and 253.
[335] Canada, *Unit Guide* (1990), § 101.
[336] Canada, *LOAC Manual* (1999), Introduction, p. i, § 5.
[337] Canada, *LOAC Manual* (1999), p. 15-1, § 6.
[338] Canada, *Code of Conduct* (2001), Introduction, § 8.
[339] Canada, *Code of Conduct* (2001), Rule 11, § 1.

321. Colombia's Directive on IHL issued in 1993 by the Colombian Ministry of National Defence stated that:

> The Ministry of National Defence is issuing instructions intended to intensify the development of training programmes for members of the police in subjects pertaining to respect for human rights and compliance with the rules of international humanitarian law, with the aim of preventing and rectifying conduct that violates those rules.[340]

322. In Colombia's Basic Military Manual, the Minister of National Defence defined various priorities, including:

> We are trying to firmly establish within the Armed Forces and the National Police a culture and an ethic of respect, and to this end, activities of dissemination, instruction and capacity building with respect to human rights and humanitarian law have been started and developed.[341]

He added that:

> The publication today of this Manual is intended to increase the dissemination and application of the instruments of international humanitarian law to which we are party. With it, we are fulfilling the obligation contained in the four Geneva Conventions and the Additional Protocols to disseminate their content as widely as possible, in time of peace as well as in time of war, and to incorporate their study in the programmes of military instruction.[342]

The manual stresses that, before conflicts occur, there is an obligation "to adopt plans and programmes of dissemination and capacity building through which IHL is made known to . . . the Armed Forces".[343] It further states that this obligation to instruct also binds organised armed opposition groups.[344] Lastly, in a chapter dealing with AP II, the manual states that "it is important to underline the obligation incumbent upon States to organise periodical and systematic instruction on the content of the Protocol, so that the Public Force . . . can apply and insist on respect for its norms".[345]

323. Colombia's Instructors' Manual states that it "aims to serve as a tool, as a guiding instrument by which the instructor presents in a simple form to the soldiers and seamen the minimum rules regarding persons, objects, the wounded and others, in times of peace, war and conflict".[346]

324. Croatia's Commanders' Manual states that "law of war training has to be integrated into normal military activity".[347]

[340] Colombia, *Directive on IHL* (1993), Section IV(A).
[341] Colombia, *Basic Military Manual* (1995), p. XIV.
[342] Colombia, *Basic Military Manual* (1995), pp. XIV and XV.
[343] Colombia, *Basic Military Manual* (1995), pp. 27 and 28.
[344] Colombia, *Basic Military Manual* (1995), p. 37.
[345] Colombia, *Basic Military Manual* (1995), p. 46.
[346] Colombia, *Instructors' Manual* (1999), p. 15.
[347] Croatia, *Commanders' Manual* (1992), § 22.

325. The Military Manual of the Dominican Republic notes that "although all [Dominicans] – soldiers, citizens, and leaders – have a legal obligation to know, understand and abide by these laws of war, soldiers must be especially aware of them . . . This publication is intended to help you, today's soldier, know and understand these laws."[348]

326. France's LOAC Teaching Note provides that "combatants . . . must be made aware of the rules of the law of armed conflicts, which essentially includes the Geneva Conventions and the Hague Conventions".[349]

327. France's LOAC Manual notes that it "is to be used for the instruction of any military personnel of the French armed forces, in the context of the instruction given in schools".[350]

328. Germany's Military Manual notes that it "shall serve soldiers and civilian personnel of all command levels in training courses, military exercises and in general training".[351] It also states that:

> The four Geneva Conventions and [AP I] oblige all contracting parties to disseminate the text of the conventions as widely as possible . . . This shall particularly be accomplished through programmes of instruction for the armed forces . . . Considering their responsibility in times of armed conflict, military . . . authorities shall be fully acquainted with the text of the Conventions and the Protocol Additional to them.[352]

It further states that:

> All soldiers of the Federal Armed Forces shall receive instruction in international law. It is conducted in the military units by the superiors and the legal advisers and at the armed forces schools by teachers of law . . . This instruction has the purpose not only of disseminating knowledge, but also and primarily of developing an awareness of what is right and what is wrong.[353]

Lastly, the manual stresses that:

> Effective implementation is depending on dissemination of humanitarian law. Providing information about it is the necessary basis to create common consciousness and to further the attitude of the peoples towards a greater acceptance of these principles as an achievement of the social and cultural development of mankind.[354]

329. Germany's IHL Manual states that "all enforcement methods of international humanitarian law are . . . incomplete without extensive dissemination of the basic principles of international humanitarian law and the personal sense of the individual to take responsibility for their respect".[355] Referring to common

[348] Dominican Republic, *Military Manual* (1980), p. 2.
[349] France, *LOAC Teaching Note* (2000), p. 1.
[350] France, *LOAC Manual* (2001), preamble, p. 7.
[351] Germany, *Military Manual* (1992), § 1.
[352] Germany, *Military Manual* (1992), § 136.
[353] Germany, *Military Manual* (1992), § 137.
[354] Germany, *Military Manual* (1992), § 1223.
[355] Germany, *IHL Manual* (1996), § 806.

Article 1 of the 1949 Geneva Conventions and Article 1(1) AP I, the manual states that:

> It necessarily follows that each soldier of the [German Armed Forces] must know the rules of international humanitarian law in armed conflicts . . . Therefore, the four Geneva Conventions and the Additional Protocols oblige all Contracting Parties to disseminate the content of the Conventions in their countries and to incorporate it in the programmes of military education.[356]

330. Hungary's Military Manual provides that "everybody must know the rules [of war]".[357]

331. India's Army Training Note states that its aim is "to educate all ranks in maintaining and upholding Human Dignity and protecting Human Rights in accordance with the law of the land and National and International conventions, during peace and war".[358] It also states that "a soldier is trained to do only the correct and proper things from the time he is enrolled into the Service. Any violation is strictly dealt with by the superior authorities."[359]

332. Israel's Manual on the Laws of War states that "there is room for and importance to being familiar with the laws of war and directing our conduct in accordance therewith".[360]

333. Italy's LOAC Elementary Rules Manual states that "law of war training has to be integrated into normal military activity".[361]

334. Kenya's LOAC Manual notes that:

> The need for dissemination is as old as International Humanitarian Law itself. The law can only be respected if it is known.
>
> To be effective, dissemination must take place in peacetime. It is too late for dissemination once a conflict has started since the authorities concerned have by then turned to questions of greater priority that may overwhelm any argument in favour of humanitarian conduct.
>
> It is not enough for States to ratify the Geneva Conventions and their Additional Protocols; besides the legal obligation for dissemination they contain, there must also be a genuine political will to apply them. Their content and "directions for use" must be known so that those responsible for their implementation take the appropriate steps at the proper time. For this reason, their dissemination is mandatory, as ignorance of International Humanitarian Law can cost human lives.[362]

The manual further explains that "behaviour is the reflection of training. This means that all members of a fighting force must undergo training such as to ensure the enforcement of the existing rules at all levels of the military hierarchy".[363]

[356] Germany, *IHL Manual* (1996), §§ 107 and 108.
[357] Hungary, *Military Manual* (1992), p. 31.
[358] India, *Army Training Note* (1995), p. 1/2.
[359] India, *Army Training Note* (1995), p. 5/1.
[360] Israel, *Manual on the Laws of War* (1998), p. 9.
[361] Italy, *LOAC Elementary Rules Manual* (1991), § 22.
[362] Kenya, *LOAC Manual* (1997), Précis No. 1, p. vi.
[363] Kenya, *LOAC Manual* (1997), Précis No. 3, p. 1.

335. South Korea's Military Regulation 187 provides that all members of the armed forces must have training in the laws of war.[364]

336. Madagascar's Military Manual notes that:

> Madagascar ratified the Geneva Conventions in 1963 and their two Additional Protocols [AP I and AP II] in 1992 and has the obligation to promote the instruction [and] dissemination of international humanitarian law, in particular within the Armed Forces, and to ensure their application, if needed . . .
>
> In the framework of dissemination of international humanitarian law (IHL), the law of armed conflict or law of war shall from now on be included in the general programme of instruction of the military personnel of the Armed Forces . . .
>
> The Geneva Conventions of 1949 and Additional Protocol I of 1977 stipulate in some of their articles that "all States parties to the conventions and/or to the Additional Protocols are obliged to disseminate IHL in their respective countries".
>
> The ultimate goal of the dissemination of International Humanitarian Law is to create through a wide knowledge of its principles, inherent rights and duties, a true humanitarian consciousness, imperatively guiding troops' behaviour in conflict situations.[365]

The manual also provides that "law of war training has to be integrated into normal military activity".[366]

337. The Military Manual of the Netherlands states that "States must disseminate the treaties as widely as possible in time of peace and include the law of war in their military training".[367]

338. New Zealand's Military Manual states that:

> 1. The first step to ensuring observance of the law is to make the law known to those whose conduct it is intended to regulate. With this in view, the various Conventions relating to the law of armed conflict impose an obligation upon their parties to disseminate the particular Convention among their armed forces.
> 2. The manner in which dissemination is effected is left to the various States, but is normally carried out by means of instruction courses or through the medium of commentaries upon particular Conventions or manuals devoted to the law of armed conflict.[368]

The manual further states that in the armed forces, in addition to courses conducted at various rank levels, "the publications of the International Committee of the Red Cross are available for reference".[369]

339. Nicaragua's Military Manual states that the objective of the manual is "to give Commanders, Officers, Troops, Soldiers and Seamen of the Army of Nicaragua knowledge of how to behave in situations of peace, war, internal disturbances . . . in the theatre of military operations and in their relations with

[364] South Korea, *Military Regulation 187* (1991), Article 5.1.
[365] Madagascar, *Military Manual* (1994), preamble, pp. 2–4, see also presentation, p. 9.
[366] Madagascar, *Military Manual* (1994), Fiche No. 4-O, § 22.
[367] Netherlands, *Military Manual* (1993), p. IX-1.
[368] New Zealand, *Military Manual* (1992), § 1602.
[369] New Zealand, *Military Manual* (1992), § 1602.2, footnote 6.

the civilian population".[370] It further states that "the study of and respect for the Constitution of the Republic, Military Laws, other Laws, Directives, Norms and Ordinances, especially those that regulate the actions of the Armed Forces in the fulfilment of their missions, are obligatory".[371]

340. Nigeria's Military Manual incorporates the content of Article 47 GC I and adds that "dissemination simply means that in the law of armed conflict, the obligation is that States make the principles of the law known to its armed forces ... by teaching them in military training programmes".[372] The manual further states that:

> [AP I] in its Article 6 further provides that the High Contracting Parties with the assistance of the various national Red Cross Societies and under the guidance and general superintendence of the International Committee of the Red Cross (ICRC), shall train qualified personnel to facilitate the application of the [Geneva] conventions and the protocols [AP I and AP II] ... Furthermore the ICRC shall hold at the disposal of the High Contracting Parties the lists of the persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.
> ...
> The dissemination of the [Geneva] conventions and the protocols therefore must be as orderly as possible in the respective countries and in particular to include the study thereof in their programmes of military instruction ... The purpose therefore is that any military ... authorities, who in time of armed conflict, assume responsibilities in respect of the application of the [Geneva] conventions and the protocols, shall be fully acquainted with the text thereof.[373]

In addition, the manual states that "the law of war training is aimed at ensuring full respect for the law of war by all members of the armed forces irrespective of their function, time, location and situation".[374]

341. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "these provisions [among which the relevant provisions of the Geneva Conventions] shall be integrated into the regular Program of Instructions for AFP and PNP troops/police information and education sessions in all levels of command/office".[375]

342. Russia's Military Manual states that, in time of peace, commanders must:

- promote among the members of the USSR Armed Forces knowledge of IHL, to study it within the system of military ... training, to distribute among subordinates texts of international legal instruments and legislative acts defining the conduct of the members of the army and the navy during an armed conflict.[376]

[370] Nicaragua, *Military Manual* (1996), Objetivo, p. 1.
[371] Nicaragua, *Military Manual* (1996), Article 5.
[372] Nigeria, *Military Manual* (1994), p. 29, § 1.
[373] Nigeria, *Military Manual* (1994), pp. 29–30, §§ 2–3.
[374] Nigeria, *Military Manual* (1994), p. 41, § 8.
[375] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(d).
[376] Russia, *Military Manual* (1990), § 14(a).

343. South Africa's LOAC Manual provides that it is "imperative that every member of the SANDF has a good knowledge of, and is able to apply, the law of armed conflict (LOAC)".[377] It also states that "in the circumstances of combat, soldiers may often not have time to consider the principles of the LOAC before acting. Soldiers must therefore not only know these principles but must be trained so that the proper response to specific situations is second nature."[378]

344. Spain's Order 60/1992 on Military Instruction for High-Ranking Officers includes the subjects "international law of war", "law of armed conflicts" and "humanitarian principles" in the instruction plan of high-ranking officers.[379]

345. Spain's Order 63/1993 on Military Instruction for Other Officers includes the subjects "the International Conventions of the Hague and Geneva" and "Public International Law" in the instruction plan of the Military Intervention Corps and of the specialised branches of the Army Medical Service, and the subject "International Law and the Law of War" and "the International Conventions of Geneva and the Hague" in the instruction plan of the Military Legal Corps.[380]

346. Spain's LOAC Manual states that "the instruction and dissemination of [IHL] are established as obligatory, so that the State has the duty to introduce it in its programmes of military . . . instruction".[381] Thus, the Ministry of Defence "shall programme courses on the Law regulating Armed Conflicts at different levels for the various Commanding Officers".[382] The manual also states that "law of war training has to be integrated into normal military activity".[383] A chapter of the manual devoted to "Dissemination of the Law of Armed Conflict" establishes a detailed programme including instructional methods, guidelines, priorities based on hierarchical levels within the military sector, a general framework for the instruction of the law of armed conflict, norms and models of instruction according to hierarchical levels, a summary of the law of armed conflict for non-commissioned officers, officers and superior officers, model curricula and a model course for the national and international levels.[384] The manual further stresses that "it is very important to include the Law of War in instruction courses for the military personnel who are going to take part in [peacekeeping] operations".[385]

347. Sweden's IHL Manual notes that:

The undertaking of the parties concerning information and instruction in international humanitarian law is stressed in Additional Protocol I to the 1949 Geneva

[377] South Africa, *LOAC Manual* (1996), § 4.
[378] South Africa, *LOAC Manual* (1996), § 14.
[379] Spain, *Order 60/1992 on Military Instruction for High-Ranking Officers* (1992), Article 1 and Annex.
[380] Spain, *Order 63/1993 on Military Instruction for Other Officers* (1993), Article 1 and Annex.
[381] Spain, *LOAC Manual* (1996), Vol. I, § 10.1.a, see also §§ 1.1.d.(7) and 11.3.b.(2) (which add that the instruction must take place in time of peace as well as in time of war) and § 6.2.a.(1).
[382] Spain, *LOAC Manual* (1996), Vol. I, § 6.2.a.(5).
[383] Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(2).
[384] Spain, *LOAC Manual* (1996), Vol. I, §§ 10.1–10.11.
[385] Spain, *LOAC Manual* (1996), Vol. I, Annex B.

Conventions (AP I, Art. 83), which, however, goes further than the earlier conventions. According to the Protocol, the military and civilian authorities responsible for their application during a conflict shall possess full knowledge of the texts both of the Protocol and of the Conventions. Thus a definite tightening of the demands has been introduced.[386]

The manual further states that "by its ratification in 1977 of the Additional Protocols to the Geneva 1949 Conventions, Sweden pledged herself to inform and instruct the authorities and personnel responsible for total defence . . . on the rules of international humanitarian law".[387]

348. In Order No. 148 on Law of Armed Conflict Courses, Tajikistan's Minister of Defence decided "to include in the curricula . . . of the S. Safarov Tajik Higher Military College and of the Military Lycees of the Republic of Tajikistan, the subject 'Law of Armed Conflict'".[388]

349. Togo's Military Manual provides that "the law of war must be incorporated in the military instruction programmes in the different military units".[389] It adds that "the instruction of individual combatants is a priority. The aim is to develop automatic behaviours. Such behaviours shall: be obtained by individual instruction and practice; be controlled during exercises of combat."[390] The manual also contains the text of a Note de Service of Togo's Armed Forces, which states that "the follow up committee of the ICRC activities within the FAT [Togo's Armed Forces], in charge of the instruction of [IHL], shall elaborate in collaboration with the ICRC delegation in Lomé programmes adapted to each training level of the personnel of the FAT".[391]

350. The UK Military Manual notes that:

> Violations of the law of war have often been shown to have been the deeds of subordinates who acted through ignorance or excess of zeal or the result of orders issued by superiors who acted either in ignorance or disregard of the laws of war. Care must therefore be taken that all ranks are acquainted with the laws of war and that they endeavour to observe them. Under the 1949 [Geneva] Conventions the parties are bound, both in time of peace and in war, to disseminate the text of the Conventions in their countries and to include the study of them in their programmes of military instruction.[392]

351. The UK LOAC Manual states that the manual "is designed for use by personnel of all ranks who need to study or give instruction in the law of armed conflict".[393]

352. The US Field Manual states that "the purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law

[386] Sweden, *IHL Manual* (1991), Section 4.1, pp. 91 and 92.
[387] Sweden, *IHL Manual* (1991), Section 10.1, p. 168.
[388] Tajikistan, *Order No. 148 on Law of Armed Conflict Courses* (1997), § II.
[389] Togo, *Military Manual* (1996), Fascicule II, p. 15.
[390] Togo, *Military Manual* (1996), Fascicule II, p. 16.
[391] Togo, *Military Manual* (1996), Fascicule I, p. 24, Fascicule II, p. 23 and Fascicule III, p. 23.
[392] UK, *Military Manual* (1958), § 120.
[393] UK, *LOAC Manual* (1981), p. iii, § 1.

applicable to the conduct of warfare on land".[394] It further incorporates the content of Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV.[395]

353. The US Air Force Pamphlet quotes a directive of the Department of Defense which provides that:

> The Armed Forces of the United States will insure that programs to prevent violations of the law of war to include training and dissemination as required by the Geneva Conventions . . . and by [the 1907] Hague Convention IV . . . are instituted and implemented . . .
>
> The Secretaries of the Military Departments will develop internal policies and procedures consistent with this Directive in support of the [Department of Defense] law of war program in order to:
>
> 1. Provide publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities.[396]

The Pamphlet also stipulates that "all states must include the text of the Conventions in programs of military . . . instruction".[397]

354. The US Soldier's Manual notes that "although all Americans – soldiers, citizens, and leaders – have a legal obligation to know and abide by these laws of war, soldiers must be especially aware of them . . . This publication is intended to help you, today's soldier, know and understand these laws of war."[398]

355. The US Instructor's Guide states that "all soldiers must know about [the 1907 Hague Conventions and the 1949 Geneva Conventions] and customary laws and understand how they work".[399] It also specifies that "this circular provides guidance, lesson outlines, and courses for required training in the law of war which includes the Hague Convention Number IV of 1907, the Geneva Conventions of 1949, and the customary law of war".[400]

356. The US Naval Handbook provides that:

> It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps . . . to ensure that:
>
> . . .
>
> All service members of the Department of the Navy, commensurate with their duties and responsibilities, receive, through publications, instructions, training programs and exercises, training and education in the law of armed conflict.[401]

National Legislation

357. Argentina's National Committee on the Implementation of International Humanitarian Law (CADIH) was established by a national decree to undertake studies on the teaching and dissemination of the rules of IHL.[402]

[394] US, *Field Manual* (1956), § 1. [395] US, *Field Manual* (1956), § 14.
[396] US, *Air Force Pamphlet* (1976), § 1-4(c).
[397] US, *Air Force Pamphlet* (1976), § 15-2(b).
[398] US, *Soldier's Manual* (1984), p. 3. [399] US, *Instructor's Guide* (1985), p. 5.
[400] US, *Instructor's Guide* (1985), p. ii. [401] US, *Naval Handbook* (1995), § 6.1.2.
[402] Argentina, *Decree on the Creation of the National Committee on IHL* (1994), Article 1(b).

358. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War states that:

> The appropriate authorities and governmental bodies of [the] Azerbaijan Republic insure . . . [the] preparation of the military servicemen of all categories within the framework of training programmes.
>
> If [the] Azerbaijan Republic is one of the parties to the conflict, then necessary instruction is given . . . to the personnel staff of the Armed Forces of [the] Azerbaijan Republic involved in the solution of this conflict.[403]

359. The Order on Study and Dissemination of IHL of Belarus, whose aim is "the implementation of international obligations of the Republic of Belarus with respect to the study and dissemination of international humanitarian law", provides for the adoption of an annexed "Regulation on the application of the rules of international humanitarian law for the officers of the Belarussian armed forces".[404] It further provides for the establishment, within the Ministry of Defence, of a commission on the study and the dissemination of IHL in charge of, *inter alia*, the preparation of measures for the study of IHL within the armed forces.[405] The Order also provides for the preparation of manuals on IHL designed for the armed forces.[406]

360. By a decree in 1999, Côte d'Ivoire set up a national IHL bureau in charge of dissemination and training for the armed forces.[407]

361. Croatia's Emblem Law provides that:

> In accordance with the commitments made on [the] international level concerning the promotion of [the] Geneva Conventions, it is necessary to elaborate adequate programmes and ensure their implementation among:
>
> . . .
>
> – members of [the] armed forces of the Republic of Croatia – Ministry of Defence.[408]

362. Germany's Law on the Legal Status of Military Personnel provides that "soldiers are to be instructed with regard to their duties and rights under . . . public international law in times of peace and in times of war".[409]

363. Peru's Law on Compulsory Human Rights Education, provides for the establishment of a national plan on the teaching of human rights and IHL in establishments for military and police training. It states that "the duty to teach human rights and international humanitarian law must aim at full implementation and strict compliance with the international treaties and conventions as

[403] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 1 and 30.
[404] Belarus, *Order on Study and Dissemination of IHL* (1997), preamble and Article 1.
[405] Belarus, *Order on Study and Dissemination of IHL* (1997), Articles 2 and 3(d).
[406] Belarus, *Order on Study and Dissemination of IHL* (1997), Article 4(b).
[407] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 22, referring to Côte d'Ivoire, *Decree on Dissemination and Training for the Armed Forces* (1999).
[408] Croatia, *Emblem Law* (1993), Article 14.
[409] Germany, *Law on the Legal Status of Military Personnel* (1995), § 33(2).

well as the protection of fundamental rights in the national and international arena".[410]

364. Russia's Order on the Publication of the Geneva Conventions and Protocols requires the Vice-Ministers of Defence and commanders at several levels

- to ensure, in the context of the legal preparation of the personnel, the study of the Geneva Conventions . . . the Protocols and the instructions on the application of the rules of international humanitarian law by the armed forces of the USSR;
- to take into account the provisions of the [above-]mentioned documents during studies and teaching.[411]

365. Russia's Draft Law on the Red Cross Society and Emblem states that:

Familiarisation of the members of the federal bodies of executive power, where military service is provided for by the legislation of the Russian Federation, with the norms of international humanitarian law (including the texts of the Geneva Conventions) shall be carried out by the competent bodies of the appropriate organisations.[412]

366. Sweden's Total Defence Ordinance relating to IHL states that:

The [Armed Forces and the authorities having functional responsibilities under the Emergency Preparedness Ordinance] shall ensure that the personnel in this field receive satisfactory instruction and information about the rules of international humanitarian law in war and during neutrality. The Swedish Agency for Civil Emergency Planning shall co-ordinate the training in the civil part of the Total Defence.[413]

367. Uruguay's Law on the National Armed Forces provides that "the personnel of the National Armed Forces shall know and strictly comply with all the principles and rules provided for in the Conventions and Conferences on the International Law of War which have been ratified by the Republic".[414]

National Case-law

368. No practice was found.

Other National Practice

369. Many countries have created national committees to assist them in ensuring respect for the obligations of IHL, among which are the following: Argentina, Belarus, Belgium, Benin, Bolivia, Canada, Cape Verde, Chile, Colombia, Côte d'Ivoire, Croatia, Denmark, Dominican Republic, Egypt, El Salvador, Finland, France, Gambia, Georgia, Germany, Guatemala, Hungary, Indonesia, Iran, Italy, Japan, Jordan, Kazakhstan, Kenya, South Korea, Kyrgyzstan,

[410] Peru, *Law on Compulsory Human Rights Education* (2002), Article 3.
[411] Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 2.
[412] Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 5.
[413] Sweden, *Total Defence Ordinance relating to IHL* (1990), Section 20.
[414] Uruguay, *Law on the National Armed Forces* (1983), Article 362, see also Article 363.

Lesotho, Lithuania, Malawi, Mali, Mauritius, Moldova, Namibia, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Seychelles, Slovakia, Slovenia, Sri Lanka, Sweden, Tajikistan, Togo, Trinidad and Tobago, Ukraine, UK, Uruguay and Yemen.[415] The tasks of these committees usually include dissemination of IHL or the promotion of such dissemination.

370. According to the Report on the Practice of Algeria, introductory lectures in IHL are given at the largest military academies for the armed forces. The teaching is based on the study of the Geneva Conventions and their Additional Protocols.[416]

371. Article 10 of the Internal Rules of Procedure of the Argentine National Committee on the Implementation of International Humanitarian Law (CADIH) states that "the CADIH will establish its working methods with regard to legal measures of application and teaching and dissemination, in the civil and military fields respectively".[417]

372. In 1997, at the first meeting of the Argentine and Chilean national committees on the implementation of IHL, a legal adviser of the Argentine Ministry of Foreign Affairs stated that Argentina recognised the importance of efforts made by States to disseminate IHL in peacetime and that persons be trained to apply the law in situations described in the Geneva Conventions and Additional Protocols.[418]

373. The Report on the Practice of Argentina contains, as annexes, documents which aim to provide teaching material for the armed forces in which rules of IHL have been incorporated.[419]

374. In 1984, in an assessment of the military implications of AP I and AP II, Australia's Joint Military Operations and Plans Division of the ADF stated that:

> In recognition of the requirement for training in the laws of armed conflict, COSC [Chiefs of Staff Committee], in February 1983, agreed to the introduction of a formal training programme in the laws of armed conflict in the ADF to meet the provisions of The Hague and Geneva Conventions, Protocols I and II and customary law ...
>
> However, the requirement for the Convention and Protocols to be disseminated "as widely as possible in respective countries" has not been addressed by Defence, as this is not a Defence responsibility.[420]

[415] ICRC, Advisory Service, Table of National Committees on International Humanitarian Law, 30 June 2002.

[416] Report on the Practice of Algeria, 1998, Chapter 6.6.

[417] Argentina, Committee on the Implementation of International Humanitarian Law (CADIH), Internal Rules of Procedure, Article 10.

[418] Argentina, Ministry of Foreign Affairs, International Trade and Religion, Statement by a Legal Adviser, First Meeting of the Argentine and Chilean Committees on the Implementation of International Humanitarian Law, Buenos Aires, 17–18 April 1997, p. 5.

[419] Argentina, Model curriculum for instruction in the law of war for the armed forces (undated); Curriculum for Senior Officers at the Escuela Superior de Guerra (Higher College of War), 1997; Curriculum for the course on international law applicable in armed conflicts, Escuela Superior de Guerra (Higher College of War), 1996; Programme on International Law, Escuela de Guerra Naval (Naval War College), 1996; Report on the Practice of Algeria, 1997, Chapter 6.6.

[420] Australia, Joint Military Operations and Plans Division of the ADF, Assessment of the Military Implications of the Protocols Additional to the Geneva Conventions of 1949, September 1984, Series No. AA-A1838/376, File No. AA-1710/10/3/1 Pt 2, §§ 12 and 15, see also § 23.

375. Enumerating the matters which Australia believed must receive priority attention in the outcomes of the 26th International Conference of the Red Cross and Red Crescent in 1995, the head of the Australian delegation noted that:

All States must take effective action to disseminate the law [of armed conflict] within their armed forces . . . States and relevant international organizations must work together to ensure that dissemination programs are given the highest priority in terms of funding and materials.[421]

376. In 2000, during a debate in the UN Security Council concerning the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Australia stated that:

Practical measures can be taken by Governments to promote understanding and observance of international humanitarian law within their own communities, especially among military and security forces . . . including by disseminating information about international humanitarian law.[422]

377. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Austria pledged to "strengthen its efforts to provide internationally deployed members of the armed forces with training in international humanitarian law".[423]

378. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belarus pledged to "continue the dissemination of information on the fundamental norms and principles of [IHL] among the population of the Republic of Belarus as well as among military forces personnel and attached to them medical and religious staff".[424]

379. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belgium, jointly with the Belgian Red Cross, pledged to:

implement training programmes in international humanitarian law targeted at those who are most directly concerned by the application of and respect for this body of law, namely . . . the armed forces:

. . .

2. The armed forces not only have advisers in the law of armed conflict, but training in international humanitarian law is given at every level. Because of the increasing number of international operations under way, in particular those relating to peace-keeping and peace-making, it has become necessary to supplement the training already given with practical experience in applying international humanitarian law and improved knowledge of relations between

[421] Australia, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, reprinted in *Australian Year Book of International Law*, Vol. 17, 1996, p. 787.

[422] Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.

[423] Austria, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

[424] Belarus, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

> the military and humanitarian workers. Accordingly, instruction in this subject will be given as part of the preparations for each departure on such an operation, and exercises on this material will be systematically included in training and manoeuvres.[425]

380. In 1987, Benin's Ministry of Defence and Popular Armed Forces established a committee for the supervision of the dissemination of IHL in the armed forces, the task of which being "the promotion and supervision of the dissemination of the principles of the law of war in the units of the Popular Armed Forces".[426]

381. In 1991, by way of a service note, the Ministry of National Defence of Benin instituted the teaching of IHL in the school and training centres of the armed forces of Benin.[427]

382. In 1999, the Bolivian military authorities began to provide instruction in IHL for the armed forces as part of the teaching programmes at military academies and other institutions.[428]

383. It is reported that in 1993 the new Herzegovinan Chief of Staff, in response to international criticism of the destruction of the Mostar Bridge by the Bosnian Croat forces, distributed to his officers and soldiers a brochure describing international provisions regarding IHL, war crimes and the protection of cultural heritage and POWs.[429]

384. According to the Report on the Practice of Bosnia and Herzegovina, the "training of all members of armed forces should be organized on a regular basis in order to disseminate the rules of international law of war".[430]

385. According to the Report on the Practice of Brazil, the government of Brazil has distributed an ICRC booklet on the essential rules of IHL to the members of its armed forces.[431]

386. In a decree in 1994, Burkina Faso's Ministry of State and of Defence stated that "the teaching of international humanitarian law (IHL) in the Armed Forces is mandatory. It is disseminated at all levels of military hierarchy and forms an integral part of every programme of instruction, training or instruction."[432]

[425] Belgium, Pledge made together with the Belgian Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[426] Benin, Ministry of Defence and Popular Armed Forces, Service Note No. 468/MDFAP/DGM/DEP, 13 July 1987.
[427] Benin, Ministry of National Defence, Service Note No. 91-0034/EMA/BESS, 22 February 1991.
[428] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 15.
[429] Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Fourth information report on war damage to the cultural heritage in Croatia and Bosnia-Herzegovina, Doc. 6999, 19 January 1994, p. 23, § 71.
[430] Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.6.
[431] Report on the Practice of Brazil, 1997, Chapter 6.6, referring to Folheto de difusão das normas essenciais do direito internacional humanitário (DIH) entre as Forcas Armadas, 30 March 1995.
[432] Burkina Faso, Ministry of State and of Defence, Decree No. 94-0125/DEF/CAB, 26 December 1994.

387. In a decree in 1995, Burkina Faso's Ministry of State and of Defence established a unit for the dissemination of IHL with the task, *inter alia*, of teaching and disseminating IHL within the armed forces.[433]

388. In 1999, Burkina Faso's Ministry of Foreign Affairs and the ICRC, in co-operation with the Burkinabé Red Cross Society, held the first national seminar on implementation of IHL. The seminar, *inter alia*, urged Burkina Faso to step up IHL training for the armed forces. A workshop was also held by the ICRC Advisory Service and the Ministry of Foreign Affairs for government officials on specific issues, such as the application of IHL to non-international armed conflict, the 1997 Ottawa Convention and the 1998 ICC Statute. Another workshop organised the same year by the ICRC and the Ministry of Foreign Affairs was held on the obligation of States to adopt legislation giving effect to the Geneva Conventions, their Additional Protocols and the 1997 Ottawa Convention.[434]

389. In a directive in 1994, Cameroon's Ministry of Defence stated that:

> Military instruction must . . . fully integrate this new topic [IHL and LOAC] which it is imperative to teach . . . This instruction must figure . . . on the table of jobs of the units. A wider dissemination of the [Instructors' Manual] will be carried out so that every unit possesses it.[435]

390. The 1997 Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia stated that:

> The training plan for Operation Cordon did not adequately provide for sufficient and appropriate training in relation to several non-combat skills that are essential for peacekeeping, including: . . . the Law of Armed Conflict, including arrest and detention procedures . . . The failure of the training plan to provide adequately for these non-combat skills arose primarily from the lack of any doctrine recognizing the need for such training, and the lack of supporting training materials and standards.[436]

The report also stated that:

> The CF is obliged under international law to provide training in the LOAC . . . Documents that we have received indicate that in the mid-1980s, individual non-commissioned members within the CF were expected to have a "basic knowledge" of the Geneva Conventions, including treatment of prisoners of war and civilian detainees. Field officers attending the Command and Staff College would have received three hours of training in the LOAC in the mid-1980s, and some majors and most lieutenant-colonels would receive a full day session on the LOAC and ROE.

[433] Burkina Faso, Ministry of State and of Defence, Decree No. 95-0026/DEF/CAB, Articles 1 and 3, 1 March 1995.
[434] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 16.
[435] Cameroon, Ministry of Defence, Directive No. 00280/DV/MINDEF/1043, 14 February 1994.
[436] Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 586 and ES-27.

According to the CF, there is considerable LOAC training taking place within the CF but it is not well co-ordinated.

...

- In 1992, there was insufficient training in the CF generally on the Law of Armed Conflict (LOAC). This in turn resulted from a lack of institutional commitment within the CF regarding a systematic and thorough dissemination of the LOAC to all its members...
- There was a serious lack of training on the LOAC during the pre-deployment training for Somalia, as evidenced by the soldier's confusion in theatre over how to treat detainees once they were captured.
- The lack of attention to the LOAC and its dissemination demonstrates a profound failure of the CF leadership, both in adequate preparation of Canadian troops sent to Somalia, and in Canada's obligation to respect the elementary principles of international law in the field of armed conflict.[437]

However, the report further stated that:

In making recommendations on training, we are mindful of the developments that have occurred in the Canadian Forces since the incidents in Somalia in March 1993... We... certainly endorse the specific attention being given to the Law of Armed Conflict and rules of engagement, and the increased emphasis on humanitarian and legal aspects of operations.[438]

391. The Commission of Inquiry into the Deployment of Canadian Forces to Somalia, recommended with respect to the training of the armed forces for peacekeeping missions, *inter alia*, that:

21.8 The Chief of the Defence Staff oversee the development of specialist expertise within the Canadian Forces in training in the Law of Armed Conflict and the rules of engagement...
21.9 The Chief of the Defence Staff ensure that the time and resources necessary for training a unit to a state of operational readiness be assessed before committing that unit's participation in a peace support operation.
...
21.14 The Chief of the Defence Staff establish mechanisms to ensure that all members of units preparing for deployment on peace support operations receive sufficient and appropriate training on the local culture, history, and politics of the theatre of operations, together with refresher training on negotiation and conflict resolution and the Law of Armed Conflict.
21.15 The Chief of the Defence Staff establish in doctrine and policy that no unit be declared operationally ready unless all its members have received sufficient and appropriate training on mission-specific rules of engagement and steps have been taken to establish that the rules of engagement are fully understood.

[437] Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 613–615.

[438] Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 625–626.

21.16 The Chief of Defence Staff ensure that training standards and programs provide that training in the Law of Armed Conflict, rules of engagement, cross-cultural relations, and negotiation and conflict resolution be scenario-based and integrated into training exercises, in addition to classroom instruction or briefings, to permit the practice of skills and to provide a mechanism for confirming that instructions have been fully understood.[439]

392. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Chile pledged to "maintain and develop the study of international humanitarian law as part of regular armed forces instruction".[440]

393. In 1999, training in IHL was provided to the Chilean armed forces as part of the curricula at military academies and other institutions.[441]

394. According to the Report on the Practice of Chile, official correspondence was exchanged in the 1990s between Chile's National Committee on Humanitarian Law, an interministerial committee established with the aim of studying and proposing measures for the concrete application of the Geneva Conventions and Additional Protocols, and the Ministry of National Defence reporting on the teaching of IHL within the armed forces.[442]

395. The Report on the Practice of China notes that the PLA has published manuals and collections since 1954 compiling the main international conventions relative to the law of war and has distributed them to the armed forces. According to the report, regulations and orders of the PLA in China provide that officers and soldiers must be organised to study international law and the Geneva Conventions and must be familiar with the principles and rules of the Geneva Conventions.[443]

396. A directive issued in 1995 by the Colombian Ministry of National Defence stated, under the heading "Initial measures", that "to achieve these objectives the Ministry of National Defence has taken the following action: . . . Training and instruction in human rights and international humanitarian law within the Armed Forces and the National Police are being substantially increased."[444] It further stated that:

The Armed Forces and the National Police shall draw up, by 30 September 1995, a national programme of training and instruction in human rights and international humanitarian law for all their members, for civilian personnel attached to them and

[439] Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 628–631, Recommendations No. 21(8), 21(9), 21(14), 21(15) and 21(16).

[440] Chile, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

[441] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 20.

[442] Report on the Practice of Chile, 1997, Chapter 6.6.

[443] Report on the Practice of China, 1997, Chapter 6.6.

[444] Colombia, Ministry of National Defence, Permanent Directive No. 024, Development of Government Policy relating to Human Rights and International Humanitarian Law at the Ministry of National Defence, 5 July 1995, Section 3(C)(5).

for military Judge Advocates, in coordination with the Human Rights Secretariat of this Ministry.[445]

In addition, the directive stated that:

Directors of training schools for the Armed Forces and National Police shall be responsible for the education of their students in human rights and international humanitarian law and shall conduct all the activities necessary for implementation of the national training programme referred to in [Section 4(B)(1) above].[446]

397. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Congo pledged to "promote the basic principles of international humanitarian law in the training of military personnel (in partnership)".[447]
398. In 1999, the Croatian Ministry of Defence, in conjunction with the ICRC, held a seminar on the law of armed conflict for senior officers.[448]
399. According to the Report on the Practice of Croatia, training in IHL is provided in the Military Academy and during military service.[449]
400. According to the Report on the Practice of Cuba, the Centre for International Humanitarian Law Studies was established in November 1994. Since then, the Ministry of the Armed Forces has supported its operations by providing graduates of the IIHL in San Remo as instructors and by authorising and requiring senior officers to take part in the courses. IHL is also taught in military academies for officers and cadets and is the subject of courses for privates and sergeants. The Ministry of Internal Order sends officials to these courses systematically.[450]
401. In 1999, the Egyptian government, in cooperation with the National Red Crescent Society, the League of Arab States and the ICRC, organised a regional seminar commemorating the 50th anniversary of the Geneva Conventions. The seminar adopted the Cairo Declaration, which urges Arab countries to implement IHL and set up national committees on IHL.[451]
402. According to the Report on the Practice of Egypt, IHL is taught in military camps and military institutions in cooperation with the ICRC. The report also notes that in 1991, the Egyptian Ministry of Defence published a manual entitled "Basic Principles of the Law of War and International Humanitarian Law".[452]

[445] Colombia, Ministry of National Defence, Permanent Directive No. 024, Development of Government Policy relating to Human Rights and International Humanitarian Law at the Ministry of National Defence, 5 July 1995, Section 4(B)(1).
[446] Colombia, Ministry of National Defence, Permanent Directive No. 024, Development of Government Policy relating to Human Rights and International Humanitarian Law at the Ministry of National Defence, 5 July 1995, Section 4(C)(4).
[447] Congo, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[448] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 23.
[449] Report on the Practice of Croatia, 1997, Chapter 6.6.
[450] Report on the Practice of Cuba, 1998, Chapter 6.6.
[451] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 24.
[452] Report on the Practice of Egypt, 1997, Chapter 6.6.

403. In 1999, efforts were made by El Salvador to encourage the inclusion of IHL in training programmes for the armed and security forces of El Salvador.[453]
404. According to the Report on the Practice of El Salvador, a small handbook on basic rules of IHL was distributed by the National Red Cross Society to members of the armed forces of El Salvador.[454]
405. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Estonia pledged to "continue dissemination of IHL in armed forces".[455]
406. In 1996, in a report on the implementation of IHL in Ethiopia, the Ethiopian Ministry of Foreign Affairs stated that:

> After the formation of a Federal Government the Federal army had taken steps to disseminate and educate the rules of International Humanitarian Laws to its members on a regular basis. To this effect the preparation of a new army training curriculum has been finalized and is in the implementation phase, with rules of international humanitarian law at its centrepiece.[456]

407. In a note in 1992, the French Ministry of Defence highlighted its cooperation with the ICRC in the production of an audio-visual document on the Geneva Conventions intended for distribution among the armed forces.[457]
408. In a directive issued in 2000 on the dissemination of the law of armed conflict within the armed forces, the French Ministry of Defence stated that "since . . . 1991, significant efforts have been made. The fundamental basics of the law of armed conflict figure systematically in the cursus of military education, during both initial training and advanced courses". The directive also provides that further measures, such as the production of videos and CD-Roms and training at the IIHL in San Remo, must be taken in order to reinforce the implementation of IHL within the framework of the armed forces. In the same instrument, the Ministry of Defence, with respect to the LOAC Teaching Note (2000) attached to the directive, asks that it be disseminated within the French armed forces, as widely as possible and down to the most basic level.[458]
409. In 1999, at a seminar on national implementation of IHL, organised by the ICRC, the Gambia Red Cross Society and the Gambian Department of State for Justice, the participants encouraged the authorities to increase IHL training for the armed forces.[459]
410. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, the FRG

[453] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 25.
[454] Report on the Practice of El Salvador, 1997, Chapter 6.6.
[455] Estonia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[456] Ethiopia, Ministry of Foreign Affairs, General Information on Measures Taken at National Level to Implement International Humanitarian Law Instruments in Ethiopia, 1996, p. 19.
[457] France, Ministry of Defence, Note No. 432/DEF/EMA/OL.2/NP, 16 March 1992.
[458] France, Ministry of Defence, Directive No. 147, 4 January 2000.
[459] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 28.

stated that it thought "it necessary to promote the wider dissemination of international humanitarian law".[460]

411. At the CDDH, the FRG stated that:

> The development of international humanitarian law would be merely theoretical unless vigorous efforts for a better dissemination, application and enforcement of international humanitarian law were undertaken at the same time. His government believed that it was by no means unrealistic to demand that armed forces and civil defence organizations should be thoroughly familiar with the rules of international law applicable in armed conflicts.[461]

412. At the International Conference for the Protection of War Victims in 1993, Germany stated that "international humanitarian law must become the basis for the training of all members of armed forces".[462]

413. In reply to a formal question from a member of parliament in 1996, a German Minister of State, referring to Article 83(1) AP I and Article 19 AP II, stated that:

> The Federal Government supports the dissemination of International Humanitarian Law in all areas and at all levels of state. It hereby fulfils its duties resulting from international public law. The four Geneva Conventions and the two Additional Protocols oblige all contracting parties to disseminate the wording of the Conventions as widely as possible ... This shall be done in particular by [providing] training programmes for the armed forces ... Military and civil offices shall, in times of an armed conflict [and] with regard to their responsibilit[ies], be entirely familiar with the wording of the Conventions and the Additional Protocols ... Since the [coming into] existence of the *Bundeswehr* [the Federal armed forces], the transmission of knowledge about International Humanitarian Law has formed an integral part of the training and further education of all soldiers.[463]

The Minister went on to outline the different levels of training provided for the armed forces: troops received instructions as laid down in the Military Manual; trainee sergeants and officers received IHL education as one of the main parts of their training; special training was given to members of the armed forces who participated in UN contingents, conducted immediately before the deployment of the troops; and teachers of law and legal advisers also participated in seminars on IHL, often held in cooperation with international partners. The Minister also listed a number of official regulations and teaching materials used for the education of soldiers.[464]

[460] FRG, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/28/SR.1452, 3 December 1973, § 43.
[461] FRG, Statement at the CDDH, *Official Records*, Vol. V, CDDH/SR.13, 6 March 1974, § 28.
[462] Germany, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August 1–September 1993, *Bulletin*, No. 69, Presse- und Informationsamt der Bundesregierung, Bonn, 4 September 1993, p. 733.
[463] Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, p. 2.
[464] Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, pp. 2–4.

414. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Greece pledged:

To enhance dissemination of international humanitarian law:
- by reviewing existing educational and training curricula so as to integrate international humanitarian law into the Hellenic armed forces, security forces, universities, schools, media and public administration.
- by providing training in international humanitarian law, the role and the mandate of the humanitarian organizations to military and security forces, administration and member[s] of NGO's or volunteers participating in international missions.[465]

415. In 1999, various national Greek authorities, including the Hellenic Armed Forces and the Ministries of Foreign Affairs, of Justice and of Education, made commitments to enhance awareness and knowledge of IHL among various groups (the military, diplomats, judges, lawyers, detention personnel, students and youth in general).[466]

416. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Guatemala pledged to "pursue its policy to train armed forces members in international humanitarian law, with the help of the ICRC's training guidelines and material".[467]

417. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Honduras stated that "equally important [was Resolution] 21 . . . of the [CDDH], relating to the dissemination of knowledge of international humanitarian law".[468]

418. The Report on the Practice of India notes that a Military Law Institute was established in 1996 and states that:

The members of the armed forces are adequately trained in humanitarian law and human rights law at the time of recruitment as well as while in service. The Geneva Conventions form part of training manuals. In addition, they are trained in human rights norms especially in view of the fact that they may be required to deal with civilians in times of internal conflicts . . . The police personnel are trained in human rights while undergoing training in police academies . . . The police personnel are not specifically trained in humanitarian law.[469]

419. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Indonesia pledged to "intensify the dissemination and education in

[465] Greece, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[466] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 32.
[467] Guatemala, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[468] Honduras, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/32/SR.16, 13 October 1977, § 60.
[469] Report on the Practice of India, 1997, Chapter 6.6.

International Humanitarian Law and the works of humanitarian organizations to . . . military forces".[470]

420. According to the Report on the Practice of Indonesia, teaching of IHL is offered at all levels of training and education of the Indonesian armed forces.[471]

421. According to the Report on the Practice of Iraq, IHL is taught in Iraqi military colleges.[472]

422. In 1999, during a debate in the UN Security Council, Israel stated that:

> There are practical steps that every signatory to the Fourth Geneva Convention can adopt in order to ensure greater respect and adherence to its provisions. First, States have a responsibility to educate their peoples regarding the importance of international humanitarian law in general. This should not be confined to the small community of legal experts in foreign ministries and universities who write on this subject. States should disseminate information about the Fourth Geneva Convention even before they became involved in armed conflicts. For example, the Fourth Geneva Convention should be included in military training. In fact, the provisions of the Convention should be included in the staff orders of every soldier, which is the practice of the Israel Defence Forces.[473]

423. According to the Report on the Practice of Israel, the IDF carries out extensive training of military personnel in the field of the laws of war, with the aim of ensuring that "all IDF personnel have at least a basic understanding of the humanitarian principles and other principles governing armed conflict". All such instruction is the responsibility of the IDF's Military Advocate-General's Corps and is carried out by the IDF's International Law Department and the International Law Section of the IDF Military Law School. The report also notes that "the IDF has a policy of cooperating with the ICRC in the dissemination of the Laws of War. In this context, the IDF enables representatives of the ICRC to present lectures in various IDF schools and courses."[474]

424. In 1997, in its final report on the events in Somalia, the Italian Government Commission of Inquiry emphasised the need for special training in IHL and human rights law for the forces participating in peacekeeping operations.[475]

425. According to the Report on the Practice of Jordan, IHL is taught to the Jordanian armed forces and to the Jordanian contingents engaged in UN peacekeeping missions.[476]

426. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Korea pledged to "continue and enhance our International

[470] Indonesia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[471] Report on the Practice of Indonesia, 1997, Chapter 6.6.
[472] Report on the Practice of Iraq, 1998, Chapter 6.6.
[473] Israel, Statement before the UN Security Council, UN Doc. S/PV.3980 (Resumption 1) (Provisional), 22 February 1999, p. 11.
[474] Report on the Practice of Israel, 1997, Chapter 6.6.
[475] Italy, Government Commission of Inquiry, Final Report on the Events in Somalia, 8 August 1997, pp. 44–45.
[476] Report on the Practice of Jordan, 1997, Chapter 6.6.

Humanitarian Law education of military forces, especially those being sent on missions abroad".[477]

427. According to the Report on the Practice of Kuwait, the Kuwaiti armed forces have allowed the ICRC to organise several seminars and conferences on IHL. The report, which refers to a notice of the National Guard General Headquarters (Military Authority) and a note of the Kuwaiti Ministry of Defence, also states that brochures on IHL have been disseminated within the armed forces of Kuwait.[478]

428. The Report on the Practice of Kuwait refers to a commentary on the draft Final Declaration of the International Conference for the Protection of War Victims made in 1993 by the Kuwaiti Ministry of Justice which states that "instruction of IHL should be comprehensive, not restricted to the fundamental or essential rules only".[479]

429. At the 27th International Conference of the Red Cross and Red Crescent in 1999, the government of Laos, jointly with the Lao Red Cross Society, pledged "to conduct National workshop/seminars in giving orientation/dissemination on International Humanitarian Law".[480]

430. According to the Report on the Practice of Lebanon, which refers to a speech of the Director General of the Lebanese Ministry of Justice made at a regional meeting in 1997, IHL is taught in Lebanese military schools.[481]

431. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Madagascar pledged "to use all means available to improve dissemination of international humanitarian law at the national level".[482]

432. In 1999, Malawi's Ministry of Defence, the Law Commissioner, the ICRC and the National Red Cross Society held a seminar on national implementation of IHL. Among other things, the seminar encouraged Malawi to intensify IHL instruction for members of the Malawi Defence Force and include the subject in training programmes for the police, prison and immigration services and in university curricula.[483]

433. According to the Report on the Practice of Malaysia, no national legislation imposes a duty on the Malaysian authorities to teach IHL to every member of the security forces. However, the report, referring to an interview with the

[477] South Korea, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[478] Report on the Practice of Kuwait, 1997, Chapter 6.6.
[479] Report on the Practice of Kuwait, 1997, Chapter 6.6, referring to Remarks and proposals of the Ministry of Justice concerning the Project of the Final Declaration of the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.
[480] Laos, Pledge made together with the Lao Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[481] Report on the Practice of Lebanon, 1998, Chapter 6.6, referring to a Speech of the Director General of the Ministry of Justice, Regional meeting on the implementation of IHL, Amman, 21–22 December 1997.
[482] Madagascar, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[483] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 44.

Ministry of Home Affairs, states that efforts have been made by the armed forces to disseminate knowledge of the Geneva Conventions, that the armed forces organise courses on the LOAC to train "selected members of the Armed Forces to enable these members to brief or give lectures to other members of the Armed Forces" and that selected members of the armed forces are sent to attend courses in IHL in international institutions such as the IIHL in San Remo. The report further states that some dissemination activities are also carried out by the Malaysian National Red Crescent Society and that Malaysian officers of the armed forces sent on peacekeeping operations are taught the principles of the Geneva Conventions at a Malaysian Armed Forces Peacekeeping Centre.[484]

434. In 1999, IHL training was included in the programmes of Mali's military academies, and a Military Code of Conduct adopted by the Ministry of Defence was distributed to members of the armed forces.[485]

435. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged to "undertake efforts aimed at disseminating and promoting the International Humanitarian Law in the Army, Security Forces [and] Police".[486]

436. According to high-ranking officers of the army of the Netherlands, soldiers are required to study IHL in theory and in practice during their entire career. During operational training, attention is devoted to IHL and theory is repeated. Courses are given to senior personnel of all units of the armed forces (army, air force and navy) at brigade level. The courses consist of case studies. Considerable attention is devoted to the study of norms and ethics, as it is supposed that IHL should be instinctive.[487]

437. In an explanatory memorandum submitted to the Dutch Parliament in the context of the ratification procedure of the CCW, the government of the Netherlands stated that every soldier in the Netherlands received training in IHL.[488]

438. In 1999, during a debate in the UN Security Council, New Zealand noted that "the dissemination of international humanitarian law needs our fullest support, so that the knowledge of the basic rules governing armed conflict and human rights spreads to all those who bear arms" and stressed that this was of "fundamental importance".[489]

439. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Niger pledged to "ensure that armed forces taking part in international

[484] Report on the Practice of Malaysia, 1997, Chapter 6.6.
[485] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 45.
[486] Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[487] Report on the Practice of Netherlands, 1997, Interview with two high-ranking officers of the Royal Netherlands Army staff, both legal advisors, Chapter 6.6.
[488] Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the CCW, 1983–1984 Session, Doc. 18 278 (R 1248), Nos. 1–3, p. 9.
[489] New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3980 (Provisional), 22 February 1999, p. 15.

missions receive instruction in international humanitarian law and the activities of humanitarian organizations".[490]

440. In 1999, the ICRC and the Ministry of Justice of Niger held a training seminar for government officials on IHL and its implementation.[491]

441. According to an academic report on the level of implementation of IHL in Nigeria, the Directorate of Legal Services of the army is responsible for dissemination, education and advice on matters relating to IHL. This report also states that, in 1996, the Nigerian army was in the process of producing a series of instruction manuals on various aspects of IHL intended to be incorporated and used at the training courses of officers at various levels. It also notes that the Nigerian army sponsors officers to participate in courses in IHL abroad, such as at the IIHL in San Remo.[492]

442. The Report on the Practice of Nigeria states that no normative practice relative to the duty to instruct members of the armed forces in IHL was found. However, it mentions brochures/manuals on IHL published by the Nigerian armed forces.[493]

443. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Norway and the Norwegian Red Cross pledged:

> to co-operate on the development of new IHL training programmes for the Norwegian Armed Forces . . . with the aim to:
> – Further motivate the integration of IHL as an obligatory component in military exercises, maneuvers, and training programs on all levels
> – Ensure that the Norwegian armed forces hold the highest possible standards with regard to respect for and integration of IHL and
> – Contribute to the development of model IHL training concepts with potential international applications.[494]

444. According to the Report on the Practice of Pakistan, IHL is taught in Pakistani military colleges. The report also states that cooperation has been established between the ICRC local mission and the Pakistani Army General Headquarters for the dissemination of IHL.[495]

445. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Peru pledged to "strengthen and gradually expand the incorporation of international humanitarian law into the instruction provided to armed and police forces members".[496]

[490] Niger, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[491] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 51.
[492] Itse E. Sagay, Evaluation/Assessment of the Level of Implementation of International Humanitarian Law in Nigeria, Paper presented at the National Seminar on the implementation of humanitarian law in Nigeria, Lagos, 13 August 1996, pp. 20–21.
[493] Report on the Practice of Nigeria, 1997, Chapter 6.6.
[494] Norway, Pledge made together with the Norwegian Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[495] Report on the Practice of Pakistan, 1998, Chapter 6.6.
[496] Peru, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

446. According to the Report on the Practice of Peru, which refers to Peru's military manuals and other teaching materials for the armed forces produced by the Peruvian Ministry of Defence in the 1990s, principles of IHL applicable to international and non-international conflicts are taught to the Peruvian armed forces.[497]

447. The Guidelines on Human Rights and Improvement of Discipline in the AFP, issued in 1989 by the Office of the Chief of Staff of the armed forces of the Philippines, states that:

> The nature of human rights violations including its legal implications and consequences should be inculcated repeatedly to the troops. The rule of law and respect for the dignity of man which are the foundations of human rights should be emphasized in conferences, seminars, dialogues, troop information sessions, and regular training courses.[498]

448. An order issued in 1995 by the President of the Philippines provides that:

> The Department of Interior and Local Government, the Department of Justice and the Department of National Defence are hereby directed to include, as an integral part of the continuing education and training of their personnel, the study of human rights as conducted by the Commission on Human Rights. Said human rights education and training shall also include the various international treaties and conventions on human rights to which the Philippines is a party.[499]

449. According to the Report on the Practice of the Philippines, which refers to a publication of 1996, subjects or courses dealing with international conventions, agreements, declarations or covenants on human rights and IHL ratified by the Philippines or of which the Philippines is a signatory are to be included in the curriculum of the armed forces of the Philippines and of the Philippine National Police.[500]

450. In 1999, Poland held several seminars and courses for military officers. The Polish Ministry of Defence issued new material for teaching the international law of armed conflict to non-commissioned officers and private soldiers. In addition, an agreement on dissemination of IHL was signed between the Ministry of Defence of Poland and the ICRC.[501]

451. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Russia pledged to "broaden the campaign of dissemination of the

[497] Report on the Practice of Peru, 1998, Chapter 6.6.

[498] Philippines, Ministry of National Defence, Office of the Chief of Staff, Guidelines on Human Rights and Improvement of Discipline in the AFP, 2 January 1989, § 2(3).

[499] Philippines, The President, Memorandum Order No. 259, Requiring Human Rights Education and Training of Law Enforcement, Police, Military and Prison Personnel, 7 February 1995.

[500] Report on the Practice of the Philippines, 1997, Chapter 6.6, referring to Human Rights Curriculum for AFP/PNP, Unit 2 Course No. 8: Your Rights and the Rights of Others in Times of Armed Conflict, cited in R. P. Claude, *Educating for Human Rights: The Philippines and Beyond*, 1996, p. 256.

[501] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 54.

International Humanitarian Law and, in particular, among the military who participate in the international peace-keeping operations".[502]

452. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda, states that, during the period 1990–1994, soldiers of the RPF received basic instruction in IHL, and a military manual was issued. The report also notes that, with the agreement of the Rwandan authorities, training of officers of the armed forces in IHL is carried out by the ICRC.[503]

453. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Slovenia pledged "support to the dissemination of the Geneva Conventions with Additional Protocols and other instruments of International Humanitarian Law within armed and security forces".[504]

454. In 1999, a course on IHL was organised in Slovenia, in cooperation with the ICRC's regional delegation, for officers and instructors of the Centre for Military Academies and the Staff College of the Republic of Slovenia.[505]

455. South Africa's White Paper on National Defence of 1996, which presents the defence policy of the Government of National Unity, provides that:

> 31. Education and training programmes within the SANDF are a cardinal means of building and maintaining a high level of professionalism. In this regard, the [interim] Constitution [of 1994] provides that all members of the SANDF "shall be properly trained in order to comply with international standards of competency".
> ...
> 35. Education and training will also play an essential role in developing the political and ethical dimensions of military professionalism. To this end, the Minister will oversee the design and implementation of a civic education programme on "defence in a democracy" ...
> 36. The mission of the civic education programme is to instil respect amongst military personnel and other members of the DOD for the core values of a democratic South Africa through appropriate education and training. These values derive principally from the Constitution. They include respect for human rights, the rights and duties of soldiers, the rule of law, international law, non-partisanship, non-discrimination, and civil supremacy over the armed forces.
> 37. The programme will cover the following subjects: ... international law on armed conflicts ...
> 38. This programme will extend to all members of the DOD but will necessarily be tailored according to function and rank ...
> ...

[502] Russia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[503] Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 6.6.
[504] Slovenia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[505] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 57.

41. The SANDF, together with the International Committee of the Red Cross, is currently developing a comprehensive curriculum on international humanitarian law and international law on armed conflict.[506]

456. In a paper entitled "Presentation of the South African Approach to International Humanitarian Law" produced in the late 1990s, the South African government emphasised that:

It is acknowledged today that the armed formations which now comprise the South African National Defence Force (SANDF) were all guilty, to a greater or lesser extent, of human rights abuses during the apartheid era. None of these forces were trained and orientated to serve a democracy, nor to apply International Humanitarian Law in their operations . . .

One of the major initiatives was a clear commitment by the Government in its White Paper on Defence . . . [One of the statements therein] was the Government's undertaking . . . that it was prepared to institutionalise International Humanitarian Law in the military's training.

The other initiative was the process to ensure that the SANDF incorporated International Humanitarian Law into its training. This initiative was in fact launched during the transitional period just prior to the April 1994 elections . . .

The SA Army has . . . held a successful instructor's course during August 1997 where 55 instructors were qualified, using material supplied originally by the ICRC. This was followed by an instruction for all Commanders and formations to start training in IHL. Furthermore, the SA Army has drawn up curricula for all the personnel development courses, starting from the basic military course up to the senior staff course. Training has already commenced on most of these courses.[507]

457. In a training order issued in 1997, the South African Department of Defence stated that:

In September 1997, the Minister of Defence authorised the Civic Education Guidelines and programme, after the Parliamentary Standing Committee on Defence had reviewed the contents and provided their approval . . . All members of the Department of Defence are to receive training in civic education as contained in the Guidelines, as approved by Parliament . . . The introduction of [the LOAC Manual (1996)] has already been commenced with under separate instruction and with the assistance of the representative of the International Committee of the Red Cross (ICRC). The training in International Humanitarian Law/Law of Armed Conflict which has already been introduced is to be harmonized with the complete civic education programme . . . Arms of the Service are also to introduce International Humanitarian Law/Law of Armed Conflict on those courses, other than formative courses, where it is appropriate, such as operational courses.[508]

[506] South Africa, Minister of Defence, Defence in a Democracy, White Paper on National Defence for the Republic of South Africa, 8 May 1996, Chapter 3, §§ 31, 35–38 and 41.

[507] South Africa, SANDF, Presentation on the South African Approach to International Humanitarian Law, CPERS/DPD/103/1/B (undated), Report on the Practice of South Africa, 1997, Chapter 6.6, Annex.

[508] South Africa, Department of Defence, Training Order 1/1/97: Introduction of Civic Education in the Department of Defence, C PERS/DPD/R/103/1/B, C PERS/DPD/R/103/2, September 1997, §§ 2–3 and 7–8.

458. In a speech in 1998, the South African Minister of Defence stated that "[1998] sees the implementation of our Civic Education Programme. The programme will assist our members in becoming familiar with: . . . International Humanitarian Law".[509]

459. In 1999, during a debate in the Sixth Committee of the UN General Assembly on the UN Decade of International Law, South Africa stated that "States should work to instil a culture of compliance [with rules of IHL], in particular by training soldiers in humanitarian law".[510]

460. The Report on the Practice of South Africa refers to an opening address at a UN human rights seminar by the South African Deputy Minister of Defence in which he emphasised that training for the armed forces should cover both international human rights standards as well as IHL, since the armed forces were likely to intervene in situations not covered by the Geneva Conventions or the Additional Protocols. He referred to the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[511]

461. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Spain pledged to "continue organising training courses in international humanitarian law, in cooperation with the Committee of the Spanish Red Cross, for the leaders and officers of the armed forces of Iberoamerican, African and eastern European countries".[512]

462. The Report on the Practice of Spain notes that IHL disseminated and taught in the Spanish armed forces includes the rules applicable in both international and internal armed conflicts.[513]

463. In 1999, members of the Swedish Defence Force received thorough instruction in IHL.[514]

464. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Switzerland pledged to "produce learning materials (CD-ROMs) on the law of armed conflicts, with the aim of facilitating instruction carried out by armed-forces commanders, whether of army corps, battalions or brigades" and to "improve the defence ministry's Website on the international law of armed conflict, in order to disseminate international humanitarian law more broadly".[515]

[509] South Africa, Minister of Defence, Speech delivered during the Parliamentary Media Briefing Week, 12 February 1998, Part III.

[510] South Africa, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/54/SR.10, 19 October 1999, § 76.

[511] Report on the Practice of South Africa, 1997, Chapter 6.6, referring to Deputy Minister of Defence, Presentation at the opening of a UN Human Rights Seminar, p. 3.

[512] Spain, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

[513] Report on the Practice of Spain, 1998, Chapter 6.6.

[514] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 61.

[515] Switzerland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

465. The Report on the Practice of Syria states that Syria has cooperated with the National Red Crescent Society on a programme of intensive IHL courses for the armed forces since 1994.[516]

466. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand pledged "to ensure that International Humanitarian Law and its Principles are integrated into the educational and training programme of armed forces".[517]

467. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the UN programme of assistance in the teaching, study, dissemination and wider appreciation of international law, the representative of Trinidad and Tobago stated that:

> 11. Her delegation noted the growing interest in the legal aspects of peace-keeping operations . . . International humanitarian law had not yet been fully developed and greater emphasis should be placed on that issue during training programmes. Other issues, such as procurement of goods and services, privileges and immunities of members of the peace-keeping operations, personal injury, deaths and damage to property, could also be considered.
> 12. . . . She agreed that instead of codifying [the rules on the protection of the environment in times of armed conflict], it would be more productive to ensure increased compliance with and wider dissemination of existing rules on the subject. Accordingly lectures and seminars had been organised in Trinidad and Tobago to familiarize members of the armed forces with the relevant provisions of the Geneva Conventions of 1949.[518]

468. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Turkey pledged to "provide training in International Humanitarian Law and the work of humanitarian organisations to the Turkish Military Forces and through the 'Partnership for peace (PFP) Training Center' in Ankara to the other countries' armed forces participating in PFP".[519]

469. The UK Ministry of Defence has produced a training video for UK soldiers containing a summary of basic principles of IHL.[520]

470. In a decree issued in 1992, the government of Uruguay entrusted the administration of IHL courses, in coordination with the National Committee on Humanitarian Law of the Ministry of National Defence, to the country's main military academy, Instituto Militar de Estudios Superiores, and in coordination with the Ministry of Foreign Affairs, to the Instituto Artigas de

[516] Report on the Practice of Syria, 1997, Chapter 6.6.
[517] Thailand, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[518] Trinidad and Tobago, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.33, 19 November 1993, §§ 11–12.
[519] Turkey, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[520] UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 6.6.

Relaciones Exteriores – Escuela Diplomática.[521] Courses on the law of war and public international law (including the law of armed conflict) are taught at the Instituto Militar de Estudios Superiores (courses for first-year students in the programme that trains officers), at the Escuela de Armas y Servicios (training and finishing programme for officers) and at the Escuela Militar (courses for future officers).[522] IHL instruction is also included in the law programme of the Escuela de Policía.[523]

471. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that "the Armed Forces of the U.S. shall institute and implement programs to prevent violations of the law of war to include training and dissemination, as required, by the Geneva Conventions".[524]

472. In 1987, a Deputy Legal Adviser of the US Department of State, referring to Articles 80–85 AP I, affirmed that "we support the principle that their study be included in programs of military instruction".[525]

473. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that "the U.S. strongly supports [dissemination of IHL]. DoD Directive 5100.77, in implementation of U.S. law of war obligations, requires that all military personnel receive law of war training commensurate with their duties and responsibilities."[526]

474. The 1998 version of the US Department of Defense Directive on the Law of War Program, reissuing the one of 1979 and aiming "to ensure DoD compliance with the law of war obligations of the United States", provided that "the Heads of the DoD Components shall: . . . institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination, as required by [the 1907 Hague Convention (IV) and the 1949 Geneva Conventions]".[527]

475. In an Order of 1988, on the basis of which the YPA Military Manual was issued, the Presidency of the SFRY stated that:

[521] Uruguay, Executive Decree No. 678 del PEN, Cométesa la instrumentación de Cursos en coordinación con la Comisión Nacional de Derecho Humanitario, 24 November 1992, *Diario Oficial*, 1 March 1993, pp. 498-A and 499-A.

[522] Uruguay, Instituto Militar de Estudios Superiores, Law of War Syllabus; Escuela de Armas y Servicios del Ejército, Public International Law Syllabus; Escuela Militar, Public International Law Syllabus; Report on the Practice of Uruguay, 1997, Chapter 6.6.

[523] Uruguay, Escuela de Policía Juan Carlos Gómez Folle, Human Rights Syllabus, Report on the Practice of Uruguay, 1997, Chapter 6.6.

[524] US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, p. 2, Section E(1)(b).

[525] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

[526] US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(S), Report on US Practice, 1997, Chapter 6.6.

[527] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(2).

Regular training of all personnel of the armed forces should be organised with the aim of learning the rules of international humanitarian law.

Plans for exercises, manoeuvres and other activities of the armed forces, the objective of which is to prepare them for combat action, should include activities and behaviour related to the implementation of rules of international humanitarian law.[528]

476. According to an academic report on the implementation of IHL in Zaire (DRC), in 1996, officers of the armed forces of Zaire (DRC) were trained in IHL within the framework of the training programme established in military training centres and schools or in seminars. Security seminars had also been provided by the FAZ for officers who operated in refugee camps.[529]

477. A ministerial directive of Zimbabwe requires the inclusion of IHL in all the Zimbabwean armed forces' training courses.[530]

478. In 1980 and again in 1994, the Ministry of Foreign Affairs of a State formally committed itself to support the efforts of the ICRC in the dissemination of IHL among the armed forces. ICRC delegates had several meetings with governmental authorities on the means and methods of dissemination of IHL to the armed forces and to the civilian population.[531]

479. In 1990, an officer of a peacekeeping force undertook to introduce the "Rules for combatants" to his troops in an area concerned with an armed conflict. He added that he preferred using "Rules for peacekeeping forces". He did not, however, accept the organisation of dissemination sessions.[532]

480. In 1994, in the context of a military operation authorised by the UN, a high-ranking official of a State participating in the operation confirmed that its troops would respect IHL and stated that training in IHL, in cooperation with the ICRC, was provided for officers.[533]

481. In 1995, a spokesman for the General Staff of the Armed Forces of a State party to a non-international armed conflict acknowledged that field commanders did not have the time to teach IHL to the troops under their command. He emphasised that it was also difficult to change entrenched reflexes. The ICRC proposed setting up basic courses for new recruits, a proposal that was well received. Another officer considered that a series of simple rules posted in barracks and repeated each morning should be enough.[534]

482. In 1995, an official of the Ministry of Interior of a State stated – with respect to an armed conflict to which his country was a party – that he was not in favour of more or less permanent dissemination in the region of the conflict.

[528] SFRY (FRY), Presidency, Order on the implementation of the rules of international humanitarian law in the armed forces of the Socialist Federal Republic of Yugoslavia, 13 April 1988, § 4.
[529] Mavungu Mvumbi-di-Ngoma, Report on the Promotion and Implementation of International Humanitarian Law in the Republic of Zaire, September 1996, p. 20.
[530] ICRC, Advisory Service, *2001 Annual Report*, Geneva, 2002, p. 137.
[531] ICRC archive documents.
[532] ICRC archive document.
[533] ICRC archive document.
[534] ICRC archive documents.

He would rather favour dissemination only to security forces of a certain level, and not to operational units.[535]

483. In 1996, the government of a State concerned by an internal armed conflict agreed to introduce IHL teaching in schools and among police forces.[536]

III. Practice of International Organisations and Conferences

United Nations

484. In a resolution adopted in 1998 on the protection of refugees, the UN Security Council requested that the UN Secretary-General:

> respond, as appropriate, to requests from African States, the OAU and subregional organizations for advice and technical assistance in the implementation of international refugee, human rights and humanitarian law relevant to the present resolution, including through appropriate training programmes and seminars.[537]

The Security Council also encouraged the Secretary-General and member States involved in efforts to enhance Africa's peacekeeping capacity:

> to continue to ensure that training gives due emphasis to international refugee, human rights and humanitarian law and in particular to the security of refugees and the maintenance of the civilian and humanitarian character of refugee camps and settlements.[538]

485. In a resolution adopted in 1999, the UN Security Council underlined:

> the importance of the widest possible dissemination of international humanitarian, human rights and refugee law and of relevant training for, inter alia, civilian police, armed forces, members of the judicial and legal professions, civil society and personnel of international and regional organizations.[539]

486. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reiterated "the importance . . . of providing appropriate training in [IHL], including child and gender-related provisions, . . . to personnel involved in peacemaking, peacekeeping and peace-building activities". It also requested the UN Secretary-General "to disseminate appropriate guidance and to ensure that such United Nations personnel have the appropriate training" and urged "relevant Member States, as necessary and feasible, to disseminate appropriate instructions and to ensure that appropriate training is included in their programmes for personnel involved in similar activities".[540]

487. In a resolution adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly called upon all States "to disseminate widely

[535] ICRC archive document. [536] ICRC archive document.
[537] UN Security Council, Res. 1208, 19 November 1998, § 8.
[538] UN Security Council, Res. 1208, 19 November 1998, § 10.
[539] UN Security Council, Res. 1265, 17 September 1999, preamble.
[540] UN Security Council, Res. 1296, 19 April 2000, § 19.

information and to provide instruction concerning human rights in armed conflicts" and requested that the UN Secretary-General "encourage the study and teaching of principles of respect for human rights applicable in armed conflicts by the means at his disposal".[541]

488. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts "to provide instruction concerning [the international humanitarian rules which are applicable] to their armed forces". It requested that the UN Secretary-General "encourage the study and teaching of principles of respect for international humanitarian law applicable in armed conflict".[542]

489. In a resolution adopted in 1973 on respect for human rights in armed conflicts, the UN General Assembly urged that "instruction concerning [international humanitarian] rules be provided to armed forces . . . with a view to securing their strict observance" and requested that the UN Secretary-General "encourage the study and teaching of principles of international humanitarian rules applicable in armed conflicts".[543]

490. In a resolution adopted in 1975 on respect for human rights in armed conflicts, the UN General Assembly called "the attention of the [CDDH], and of the Governments and organizations participating in it, to the need for measures to promote on a universal basis the dissemination of and instruction in the rules of international humanitarian law applicable in armed conflicts".[544]

491. In a resolution adopted in 1977 on respect for human rights in armed conflicts, the UN General Assembly called upon all States "to take effective steps for the dissemination of humanitarian rules applicable in armed conflicts".[545]

492. In a resolution adopted in 1992 on protection of the environment in times of armed conflict, the UN General Assembly urged States "to take steps to incorporate the provisions of international law applicable to the protection of the environment into their military manuals and to ensure that they are effectively disseminated".[546]

493. In a resolution adopted in 1994, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict and invited:

> all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.[547]

[541] UN General Assembly, Res. 2852 (XXVI), 20 December 1971, §§ 6 and 7.
[542] UN General Assembly, Res. 3032 (XXVII), 18 December 1972, §§ 2–3.
[543] UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, §§ 5 and 6.
[544] UN General Assembly, Res. 3500 (XXX), 15 December 1975, § 2; see also Res. 31/19, 24 November 1976, § 2.
[545] UN General Assembly, Res. 32/44, 8 December 1977, § 7.
[546] UN General Assembly, Res. 47/37, 25 November 1992, § 3.
[547] UN General Assembly, Res. 49/50, 9 December 1994, § 11.

494. In a resolution adopted in 1987, the UN Commission on Human Rights invited the government of Sri Lanka to "intensify its co-operation with the International Committee of the Red Cross in the fields of dissemination and promotion of international humanitarian law".[548]

495. In a resolution adopted in 1994, the UN Commission on Human Rights encouraged the government of Guatemala to include in the curricula and training programmes for personnel of the armed forces and security forces the international commitments of Guatemala in the field of human rights.[549]

496. In resolutions adopted in 1994, 1995 and 1996 on the situation of human rights in Myanmar, the UN Commission on Human Rights welcomed "the first measures taken by the Government of Myanmar to provide for the training of military personnel in international humanitarian law" and requested it "to intensify its efforts in that regard and to extend them to police and prison personnel".[550]

497. In a resolution adopted in 1995, the UN Commission on Human Rights encouraged:

> Governments, United Nations bodies and organs, the specialized agencies and intergovernmental and non-governmental organizations, as appropriate, to initiate, coordinate or support programmes designed to train and educate military forces, law enforcement officers and government officials, as well as members of the United Nations peace-keeping or observer missions, on human rights and humanitarian law issues connected with their work.

It appealed "to the international community to support endeavours to that end".[551]

498. In a resolution adopted in 2000 concerning the situation in Chechnya, the UN Commission on Human Rights requested that the Russian government "disseminate, and ensure that the military at all levels has a knowledge of basic principles of human rights and international humanitarian law".[552]

499. In a resolution adopted in 1989 on human rights in times of armed conflict, the UN Sub-Commission on Human Rights recommended that the UN Commission on Human Rights adopt a resolution calling upon all governments "to give particular attention to the education of all members of security and other armed forces, and all law enforcement agencies, in the international law of human rights and of humanitarian law applicable in armed conflicts".[553]

500. In a resolution adopted in 1997 on respect for humanitarian and human rights law provisions in United Nations peacekeeping operations, the UN

[548] UN Commission on Human Rights, Res. 1987/61, 12 March 1987, § 3.
[549] UN Commission on Human Rights, Res. 1994/58, 4 March 1994, § 8.
[550] UN Commission on Human Rights, Res. 1994/85, 9 March 1994, § 19; Res. 1995/72, 8 March 1995, § 22; Res. 1996/80, 23 April 1996, § 20.
[551] UN Commission on Human Rights, Res. 1995/73, 8 March 1995, § 13.
[552] UN Commission on Human Rights, Res. 2000/58, 25 April 2000, § 5.
[553] UN Sub-Commission on Human Rights, Res. 1989/24, 31 August 1989, § 1.

Sub-Commission on Human Rights requested "the Secretary-General to disseminate the Guidelines for United Nations Forces Regarding Respect for International Humanitarian Law of 1996 drafted by the United Nations in consultation with the International Committee of the Red Cross".[554]

501. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights called upon States "to make possible respect for their obligations in situations of conflict by, inter alia: . . . adopting suitable instructions for and training of their armed forces so that they know that all forms of sexual violence and sexual slavery are criminal and will be prosecuted".[555]

502. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General, referring, *inter alia*, to the Geneva Conventions and Additional Protocols, stated that:

> In order to promote a "climate of compliance", Member States should take advantage of the technical services of United Nations bodies and other appropriate organizations, including the International Committee of the Red Cross, . . . to develop strong national institutions charged with the dissemination, monitoring and enforcement of these instruments and to establish systematic training programmes for armed forces and police in international humanitarian, human rights and refugee law, including child rights and gender related provisions.[556]

The Secretary-General recommended that the UN Security Council:

> underscore the importance of compliance with international humanitarian and human rights law in the conduct of all peacekeeping operations by urging that Member States disseminate instructions among their personnel serving in United Nations peacekeeping operations and among those participating in authorized operations conducted under national or regional command and control.[557]

503. In 1999, in a report on the United Nations Decade of International Law, the UN Secretary-General stated that:

> The guidelines for United Nations forces regarding respect for international humanitarian law proposed by ICRC contain fundamental principles of humanitarian law and, as such, constitute a very good training tool for forces engaged in peacekeeping and enforcement missions.[558]

504. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General urged Member States and donors "to support efforts to disseminate information on international humanitarian and human rights law

[554] UN Sub-Commission on Human Rights, Res. 1997/34, 28 August 1997, § 3.
[555] UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 11(a).
[556] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 36.
[557] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 61, Recommendation 30.
[558] UN Secretary-General, Report on the United Nations Decade of International Law, UN Doc. A/54/362, 21 September 1999, § 48.

to armed groups and initiatives to enhance their practical understanding of the implications of those rules".[559]

505. In 1997, in a report on the question of human rights in Myanmar, the Special Rapporteur of the UN Commission on Human Rights recommended that in Myanmar:

> military and law enforcement personnel, including prison guards, should be thoroughly informed and trained as to their responsibilities towards all persons in full accord with international human rights norms and humanitarian law. Such standards should be incorporated into Myanmar law, including the new constitution to be drafted.[560]

A similar recommendation had already been made in 1996.[561]

506. In 2000, in a report on the situation of human rights in Rwanda, the Special Representative of the UN Commission on Human Rights stated that:

> The Prosecutor [of Rwanda] has held seminars for officers on the promotion of humanitarian law and human rights with the help of the ICRC. He would like to hold more, but is constrained by a lack of funds. His office also publishes a monthly bulletin, Military Justice Gazette, six issues of which had appeared by June 2000 with all Articles in three languages . . . These important initiatives help to ensure the accountability of the armed forces.[562]

507. In 1996, in a report entitled "Making human rights a reality", the UN High Commissioner on Human Rights reported that in 1995, the UN Human Rights Field Operation in Rwanda (HRFOR) set up several programmes of dissemination, such as a consulting service for the administration of justice, human rights seminars and training in human rights and IHL for military and police forces.[563]

Other International Organisations

508. In a recommendation adopted in 1982, the Parliamentary Assembly of the Council of Europe stressed that "past experience in armed conflict has established the need for the Geneva Conventions and the two protocols to be disseminated as widely as possible in the armed forces". It recommended that the Committee of Ministers invite the governments of member States "to ensure that international humanitarian law becomes known by disseminating

[559] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 10.

[560] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Myanmar, Report, UN Doc. E/CN.4/1997/64, 6 February 1997, § 108, Recommendation 17.

[561] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Myanmar, Report, UN Doc. E/CN.4/1996/65, 5 February 1996, § 180, Recommendation (o).

[562] UN Commission on Human Rights, Special Representative on the Situation of Human Rights in Rwanda, Report, UN Doc. A/55/269, 4 August 2000, Annex, § 155.

[563] UN High Commissioner for Human Rights, Report entitled "Making human rights a reality", UN Doc. E/CN.4/1996/103, 18 March 1996, §§ 125–137.

and teaching the Geneva Conventions . . . and their protocols among the armed forces".[564]

509. In a resolution adopted in 1989, the Parliamentary Assembly of the Council of Europe stressed "the importance, as laid down in the Geneva Conventions, of making known as widely as possible, within states involved in conflict and most notably in their armed forces, the basic provisions and fundamental principles of international humanitarian law".[565]

510. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited governments to "promote the dissemination of international humanitarian law in their own countries, particularly among the armed forces and police".[566]

511. The Final Declaration of the Second Summit of Heads of State and Government of the Council of Europe in 1997 recalled "the protection due to victims of conflicts, as well as the importance of the respect for humanitarian international law and the knowledge of its rules at national level, in particular among the armed forces and the police".[567]

512. In a recommendation adopted in 1999 on respect for IHL in Europe, the Parliamentary Assembly of the Council of Europe affirmed that States were responsible for disseminating the principles of IHL. It further pointed out that "those which have not yet done so should establish national interministerial commissions responsible for monitoring and implementing international humanitarian law, a task in which they are ably assisted by the ICRC". The Assembly recommended that the Committee of Ministers "invite the governments of the member states . . . to increase resources devoted to the dissemination of the principles of international humanitarian law, particularly among the armed forces, police and prison staff".[568]

513. The first OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1994, concluded that:

1. It is necessary to make an important effort in order to provide NGO's and soldiers in the armed forces of OAU Member States with appropriate teaching, many countries having already integrated the teaching of IHL in their programmes at officers level. This effort should not await the outbreak of hostilities.
2. There is need to ensure that the teaching of IHL is extended to all combatants, including the guerilla movements.[569]

The OAU Council of Ministers took note of the recommendations of the seminar.[570]

[564] Council of Europe, Parliamentary Assembly, Rec. 945, 2 July 1982, §§ 10 and 11(b).
[565] Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 18.
[566] Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(h).
[567] Council of Europe, Second Summit of Heads of State and Government, Strasbourg, 10–11 October 1997, Final Declaration.
[568] Council of Europe, Parliamentary Assembly, Rec. 1427, 23 September 1999, §§ 4 and 8.
[569] OAU/ICRC, First seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 7 April 1994, Conclusions and Recommendations, §§ 1 and 2.
[570] OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 1.

514. In a resolution adopted in 1995, the OAU Conference of African Ministers of Health called upon member States "to implement the educational and information programmes intended to popularize the International Humanitarian Law and the specific problems of armed conflicts".[571]

515. In a resolution adopted in 1995 on refugees, returnees and displaced persons, the OAU Council of Ministers urged member States "to uphold principles of good governance and promote the teaching and dissemination of International Humanitarian Law".[572]

516. The third OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1996, recommended "compilations, study and application of African traditional humanitarian norms especially through education and the adoption of legislations at national level" and "translation and popularization of the Geneva Conventions and their Additional Protocols into local languages".[573] The OAU Council of Ministers took note of the recommendations of the seminar.[574]

517. In the recommendations of the fourth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1997, the participants reiterated:

> the need for the teaching of International Humanitarian Law and its wide dissemination more especially as the principles which subtended that IHL were the same as those which constitute the basis of the values of the African societies. In this connection, the need for a sustained action for the youths and culture of peace was unanimously stressed. The "culture of peace" and the dissemination of the IHL should be carried out.[575]

518. In the recommendations of the fifth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1998, the participants:

> stressed the need for the teaching of International Humanitarian Law, for its widespread dissemination and implementation, notably since this could facilitate conflict prevention. Special emphasis was placed on the need to promote education at all levels taking due account of traditional African humanitarian norms and values.[576]

519. In 1999, speaking on behalf of the OAU during a UN Security Council debate on the distinction between combatants and non-combatants, Burkina Faso emphasised that the OAU, as a possible solution "to avoid the growing recurrence of violations of international humanitarian law", had formulated, *inter*

[571] OAU, Conference of African Ministers of Health, 26–28 April 1995, Res. 14 (V), § 5.
[572] OAU, Council of Ministers, 21–23 June 1995, Res. 1588 (LXII), § 9.
[573] OAU/ICRC, Third seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 2–3 May 1996, Recommendations, § 1(e) and (f).
[574] OAU, Council of Ministers, 1–5 July 1996, Res. 1662 (LXIV), § 1.
[575] OAU/ICRC, Fourth seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 29–30 April 1997, Recommendations, § 1.
[576] OAU/ICRC, Fifth seminar on IHL for diplomats accredited to the OAU, 30–31 March 1998, Recommendations, § 2.

alia, "the need to teach, publicize and implement international humanitarian law".[577]

520. In 2001, the OSCE Supplementary Human Dimension Meeting recommended to the OSCE institutions and field operations that "training on humanitarian law and human rights should be organised".[578]

International Conferences

521. The 4th International Conference of the Red Cross in 1887 adopted a resolution on measures which have been or should be taken by the Societies in order to spread knowledge of the 1864 Geneva Convention in the army, in circles especially interested in its implementation and among the general public. The resolution stated that:

> It falls within the competence of Governments to spread knowledge of the [1864] Geneva Convention within the army. The Government must ensure that the Convention is taught to all military personnel, like all other military laws and rules . . . One of the best means of bringing the Convention to the knowledge of the army seems to be its reproduction in the service booklet of each soldier.[579]

522. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the implementation and dissemination of the Geneva Conventions stating that it considered that the application of Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV was "of the greatest importance in ensuring the observance of these Conventions" and that "it is essential that all members of the armed forces have adequate knowledge of the Geneva Conventions". The Conference appealed "to all States parties to the Geneva Conventions to make increased efforts to disseminate and apply these Conventions, in particular by including the essential principles of the Conventions in the instruction given to officers and troops".[580]

523. The 20th International Conference of the Red Cross in 1965 adopted a resolution on application of the Geneva Conventions by the United Nations Emergency Forces in which it recommended that "the Governments of countries making contingents available to the United Nations give their troops – in view of the paramount importance of the question – adequate instruction in the Geneva Conventions before they leave the country of origin".[581]

524. The 21st International Conference of the Red Cross in 1969 adopted a resolution on dissemination of the Geneva Conventions in which it made reference to Resolution 2412 (XXIII) of 17 December 1968 by which the UN General Assembly had declared that 1970 would be "International Education Year".

[577] OAU, Statement by Burkina Faso on behalf of the OAU before the UN Security Council, UN Doc. S/PV.3980 (Provisional), 22 February 1999, p. 6.
[578] OSCE, Supplementary Human Dimension Meeting, Human Rights: Advocacy and Defenders, Vienna, 22–23 October 2001, Final report, p. 8.
[579] 4th International Conference of the Red Cross, Karlsruhe, 22–27 September 1887, Res. VIII.
[580] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXI.
[581] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 2.

The Conference expressed its hope that "the United Nations and in particular [UNESCO] will provide for events devoted to education and the dissemination of the Geneva Conventions during 1970" and requested "for that purpose, that a World Day be devoted to such events, with the use of the audio-visual aids made available by the most modern techniques".[582]

525. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the implementation and dissemination of the Geneva Conventions in which it called "upon governments and National Societies to intensify their efforts with a view . . . to imparting clear concepts regarding the Geneva Conventions to specialized spheres such as the armed forces". It requested that the ICRC "support the efforts of governments and National Societies in their dissemination of and instruction in the Geneva Conventions".[583]

526. In a resolution adopted in 1977 on dissemination of knowledge of international humanitarian law applicable in armed conflicts, the CDDH invited:

> the signatory States to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed conflicts, and of the fundamental principles on which that law is based, is effectively disseminated, particularly by:
>
> . . . encouraging the authorities concerned to plan and give effect, if necessary with the assistance and advice of the International Committee of the Red Cross, to arrangements to teach international humanitarian law, particularly to the armed forces and to appropriate administrative authorities, in a manner suited to national circumstances.[584]

The resolution was adopted by 63 votes in favour, 2 against and 21 abstentions.[585]

527. The 23rd International Conference of the Red Cross in 1977 adopted a resolution in which it noted with interest "the *Red Cross Teaching Guide* prepared jointly by the [ICRC] and the League of Red Cross Societies in consultation with National Societies, mainly for the use of school teachers" and urged "the appropriate authorities to support their respective National Society's efforts to disseminate the *Teaching Guide*". The Conference further called upon:

> the League and the ICRC to help National Societies to make the *Teaching Guide* a success in particular by:
>
> (a) assisting with the training of persons responsible for disseminating the *Teaching Guide* in their respective countries,
> (b) co-operating with National Societies and with the competent authorities in adapting the *Teaching Guide* to the sections of the population to be reached.[586]

[582] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. IX.
[583] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. XII.
[584] CDDH, *Official Records*, Vol. I, CDDH/446, 7 June 1977, Res. 21, Dissemination of knowledge of international humanitarian law applicable in armed conflicts, Article 2(a).
[585] CDDH, *Official Records*, Vol. VII, CDDH/SR.55, 7 June 1977, § 48.
[586] 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. XVIII.

528. In 1992, at the Helsinki Summit of the CSCE, the participating States committed themselves "to fulfilling their obligation to teach and disseminate information about their obligations under international humanitarian law".[587]

529. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to make every effort to:

> Organise the teaching of international humanitarian law in the public administrations responsible for its application and incorporate the fundamental rules in military training programmes, as well as military code books, handbooks and regulations, so that each combatant is aware of his or her obligation to observe and help enforce these rules.[588]

530. In 1993, the 90th Inter-Parliamentary Conference adopted a resolution in which it called on governments "to promote awareness of international humanitarian law among the armed forces".[589]

531. In 1994, at the Budapest Summit of Heads of State or Government, CSCE participating States committed themselves "to ensure adequate information and training within their military services with regard to the provisions of international humanitarian law" and considered, in this context, "that relevant information should be made available".[590]

532. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on international humanitarian law in which it endorsed:

> the Final Declaration of the [1993] International Conference for the Protection of War Victims . . . [and] the recommendations drawn up by the Intergovernmental Group of Experts . . . which aim at translating the Final Declaration of the Conference into concrete and effective measures.

It also encouraged States and National Red Cross and Red Crescent Societies "to organize meetings, workshops and other activities on a regional basis to enhance the understanding and implementation of international humanitarian law".[591]

533. In 1999, the Report on the Outcome of the Celebrations of the Centennial of the First International Peace Conference, drafted on the basis of an expert meeting and the international conference entitled "Centennial of the Russian Initiative: from the First Peace Conference, 1899 – to the Third, 1999", was

[587] CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 52.

[588] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(2), *ILM*, Vol. 33, 1994, pp. 299–300.

[589] 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(d).

[590] CSCE, Budapest Summit of Heads of State or Government, 5–6 December 1994, Budapest Document 1994: Towards a Genuine Partnership in a New Area, Decisions, Chapter VIII: The Human Dimension, § 34.

[591] 26th International Conference of the Red Cross, Geneva, 3–7 December 1995, Res. I, preamble and §§ 3, 4 and 6.

presented to the UN General Assembly by the governments of the Netherlands and Russia. The report concluded that:

> Important practical steps which would contribute to enhancing compliance with international humanitarian law and which all states and other relevant entities should be encouraged to take included the following [in discussions during the meetings]:
> 1. Measures of education and training designed to ensure that the principles of international humanitarian law are widely understood and to create a "culture of compliance" with international law.[592]

534. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that "States examine their educational and training curricula to ensure that international humanitarian law is integrated in an appropriate manner in their programmes for armed and security forces".[593]

535. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "all parties, directly involved in the conflict [between Israel and Palestinians] or not, to ... disseminate and take measures necessary for the prevention and suppression of breaches of the [1949 Geneva] Conventions".[594]

536. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the participants underlined "the importance of the High Contracting Parties' obligation to disseminate this Convention and its annexed Protocols, and, in particular to include the content in their programmes of military instruction at all levels".[595]

IV. Practice of International Judicial and Quasi-judicial Bodies

537. In a resolution adopted in 1993, the ACiHPR stressed "the need for specific instruction of military personnel and the training of the forces of law and order in international humanitarian law and human and peoples' rights respectively".[596]

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[592] Outcome of the Celebrations of the Centennial of the First International Peace Conference: Report on the Conclusions of the expert discussions on the three "Centennial themes", The Hague, 18–19 May 1999 and St. Petersburg, 22–25 June 1999, annexed to Letter dated 10 September 1999 from the Netherlands and Russia to the UN Secretary-General, UN Doc. A/54/381, 21 September 1999.

[593] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.4, § 16.

[594] Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 4.

[595] Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 25 January 2002, p. 15.

[596] ACiHPR, Addis Ababa, 1–10 December 1993, Res. 2 (XIV), § 2.

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

538. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

> 274. The overall aim of law of war training is to ensure full respect for the law of war by all members of the armed forces, irrespective of their function, time, location and situation . . .
> 275. The law of war has to be included in the programmes for military instruction . . .
> 276. It is not possible to teach everything to everybody. The trainer must only teach what the trainees need to know for their function. *Need to know* comes before *nice to know* . . .
> 277. Law of war problems shall be integrated into the normal exercise of military activities. Integrated training requires no time and no special material, but it does require the active participation of the trainees . . .
> 278. Combat reality requires automatic responses resulting in instinctively correct behaviour. Thus law of war training is part of the basic training . . .
> 279. Lectures, which leave the audience passive, should be delivered only as an introduction and given at times when trainees are receptive (e.g. not after training in the field or after lunch).[597] [emphasis in original]

Delegates also teach that:

> As commanders hold full responsibility for the respect of the law of war in their sphere of authority, they shall be trained so that they, in turn, can train their subordinates. Emphasis shall be put on conduct of combat and, as far as necessary, also on logistics and rear-area problems related to the law of war.[598]

539. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC appealed "to all the parties that they: . . . disseminate, or allow the ICRC to disseminate, to their armed forces the basic humanitarian rules for conduct of warfare".[599]

540. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on information and dissemination of IHL in which it encouraged National Societies:

> which have not already done so to appoint officers to disseminate international humanitarian law and the Fundamental Principles and to make approaches to the authorities with a view to setting up joint committees composed of representatives of the relevant ministries and National Societies.

The Council of Delegates also invited the entire Movement "to continue and expand its activities for the dissemination of knowledge of international

[597] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 274–279.
[598] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 288.
[599] ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.

humanitarian law and the Fundamental Principles in various circles, ... nationally, regionally and internationally".[600]

541. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that:

> It is extremely important for the members of the armed forces stationed in the Gulf to be aware of their obligations under international humanitarian law ... The teaching of the law to the armed forces is, moreover, an obligation expressly stipulated by the Geneva Conventions and their Additional Protocols.[601]

542. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC appealed to the parties in the former Yugoslavia "to ensure that combat units are aware of the humanitarian rules governing the conduct of hostilities and to facilitate ICRC efforts in that respect".[602]

543. In a press release issued in 1992 with respect to the conflict in Bosnia and Herzegovina, the ICRC enjoined the parties involved in the conflict "to ensure that combat units are aware of the humanitarian rules governing the conduct of hostilities".[603]

544. In 1993, in a report to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

> 45. The treaties of international humanitarian law provide various mechanisms ... for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following: ... (c) the obligation of States to ensure that the provisions of the Geneva Conventions and their Additional Protocols are known as widely as possible.
> ...
> 51. Each State Party to the Geneva Conventions or to their Additional Protocols must ensure that the text of these treaties is disseminated as widely as possible throughout its territory in both peacetime and wartime. The States must, *inter alia*, incorporate study of the subject into their programmes of military ... instruction.[604]

545. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on dissemination of international humanitarian law and of the principles and ideals of the Movement in which it stressed that "responsibility for the dissemination and teaching of international humanitarian law lies mainly

[600] International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro Session, 27 November 1987, Res. 4, §§ 1 and 2.

[601] ICRC, Memorandum on the Applicability of International Humanitarian Law, Geneva, 14 December 1990, § IV, *IRRC*, No. 280, 1991, p. 25

[602] ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

[603] ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

[604] ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the 48th Session of the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 51.

with the States, by virtue of the obligations set out in the four Geneva Conventions of 1949 and their two Additional Protocols". It also urged States "fully to discharge their treaty obligations so that international humanitarian law may be known, understood and respected at all times". The Council of Delegates further reiterated its earlier recommendation that "National Societies appoint and train dissemination experts, and cooperate with their countries' authorities, particularly within the framework of joint dissemination committees".[605]

546. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the International Conference for the Protection of War Victims in which it underlined "in particular the States' determination: to disseminate systematically international humanitarian law, especially among the armed forces".[606]

547. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on armed protection of humanitarian assistance in which it appealed to "the United Nations and governments when employing military forces in order to ensure the implementation of United Nations Resolutions to employ military personnel which have as part of their training been properly educated in international humanitarian law".[607]

548. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on respect for and dissemination of the Fundamental Principles in which it requested "the National Societies, in cooperation with the ICRC and the Federation, to intensify and develop their activities to spread knowledge of the Fundamental Principles at the national, regional and international levels".[608]

549. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "the parties to the conflict must ensure that the members of their armed forces as well as all military and paramilitary forces acting under their responsibility are aware of their obligations under international humanitarian law".[609]

550. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "the parties concerned must ensure that all the military and paramilitary forces and other militias for whose actions they

[605] International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 8, preamble and §§ 2 and 3.
[606] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 2, preamble.
[607] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 5, § 1.
[608] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 9, § 3.
[609] ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § V, *IRRC*, No. 320, 1997, p. 505.

are responsible are aware of their obligations under international humanitarian law".[610]

551. In 2001, in Zimbabwe, the ICRC continued to contribute to the UN Military Observer Course at the Regional Peacekeeping Training Centre in Harare.[611]

VI. Other Practice

552. In a resolution adopted at its Zagreb Session in 1971, the Institute of International Law stated that:

In order to secure effective compliance with the humanitarian rules of armed conflict by United Nations Forces, it is necessary that the individuals who may be called upon to participate in such Forces receive adequate and previous instruction on the law of armed conflict in its entirety, and especially on the meaning and the scope of the Geneva Conventions of 12 August 1949.

It is desirable that the United Nations, as well as those of its specialized agencies which are concerned with furthering education and health, take all steps within their power in order to co-ordinate the measures which the states parties to the Geneva Conventions have been invited to take in this field by the International Committee of the Red Cross.[612]

553. In 1979, an armed opposition group agreed with the ICRC to take steps to educate its armed forces pursuant to its intention to respect the rules of IHL.[613]

554. In 1980, an armed opposition group agreed with the ICRC to educate its combatants in the rules of IHL as part of its obligation to respect and ensure respect for that law.[614]

555. According to the Report on SPLM/A Practice, following a national convention of the SPLM/A in 1994, at which resolutions calling for a human rights awareness campaign were adopted, a campaign led by local NGOs to disseminate principles of IHL was launched.[615]

556. In 1995, the IIHL, commenting on the Declaration of Minimum Humanitarian Standards, stated that:

The importance of making known, disseminating and teaching these minimum humanitarian standards should be underlined. A clause on that subject could form a special article at the end of the declaration, which could read:

[610] ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § V, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.
[611] ICRC, Advisory Service, *2001 Annual Report*, Geneva, 2002, p. 137.
[612] Institute of International Law, Zagreb Session, Resolution on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged, 3 September 1971, Article 4.
[613] ICRC archive document.
[614] ICRC archive document.
[615] Report on SPLM/A Practice, 1998, Chapter 6.6.

"The minimum humanitarian standards, defined in this Declaration, should be made known and disseminated to all the authorities concerned, and to individuals who may be potential victims".[616]

557. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that "all States and non-State entities must disseminate the principles and rules of humanitarian law and fundamental human rights which are applicable in internal armed conflicts".[617]

Obligation of commanders to instruct the armed forces under their command

I. Treaties and Other Instruments

Treaties

558. Article 87(2) AP I provides that:

In order to prevent and suppress breaches, High Contracting Parties and the Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

Article 87 AP I was adopted by consensus.[618]

Other Instruments

559. No practice was found.

II. National Practice

Military Manuals

560. Australia's Commanders' Guide provides that "military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with LOAC".[619]

561. Australia's Defence Force Manual states that "military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with LOAC".[620]

562. Australia's Defence Training Manual states that one of the tasks of the legal adviser of the armed forces is to "supervise the organisation of instruction

[616] IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, § 23, reprinted in Report of the UN Secretary-General prepared pursuant to Commission resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 11.
[617] Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § XII.
[618] CDDH, *Official Records*, Vol. VI, CDDH/SR. 45, 30 May 1977, p. 307.
[619] Australia, *Commanders' Guide* (1994), § 1204.
[620] Australia, *Defence Force Manual* (1994), § 1304.

in subordinate units, and to ensure that the levels of understanding are obtained".[621]

563. Belgium's LOAC Teaching Directive states that "each commander is responsible for ensuring that the personnel placed under his authority have sufficient knowledge of their obligations [under the law of armed conflict] and that they have . . . received appropriate instruction and training".[622]

564. Belgium's Teaching Manual for Soldiers states that "every soldier must know the essential rules of the law of war . . . and their meaning in order to be able to apply them. The command must ensure this knowledge by means of an appropriate instruction."[623]

565. Benin's Military Manual states that:

> Each military commander is responsible for respect for the law of war within his sphere of command. Within his unit, he is in particular responsible for the instruction of the law of war in order to induce his troops to adopt a behaviour in conformity with the law and above all *vis-à-vis* specifically protected persons and objects.[624]

The manual adds that "the military commander must take all measures so that: the subordinates know their obligations arising from the law of war and respect them".[625]

566. Cameroon's Disciplinary Regulations states that:

> The military commander must incorporate in his programmes the legal problems that shall permit all members of the Armed Forces not only to realistically complete their knowledge of the international law of war, but also to solve, in time of peace, problems he will face in case of armed conflict. This instruction, in addition to military training, must be the object of instruction sessions in all military units and schools.[626]

567. Cameroon's Instructors' Manual states that "in the Armed Forces, every Commander is responsible for the instruction of his soldiers and their behaviour in action".[627] It adds that "instruction in the Law of War constitutes an essential part of the activity of commanding".[628]

568. Canada's LOAC Manual provides that "commanders have a responsibility to ensure that forces under their command are aware of their responsibilities related to the LOAC and that they behave in a manner consistent with the LOAC".[629] It further notes that "in order to prevent and suppress breaches,

621 Australia, *Defence Training Manual* (1994), § 17.
622 Belgium, *LOAC Teaching Directive* (1996), Section 1.
623 Belgium, *Teaching Manual for Soldiers* (undated), p. 1.
624 Benin, *Military Manual* (1995), Fascicule II, p. 14, see also p. 15.
625 Benin, *Military Manual* (1995), Fascicule II, pp. 14 and 15.
626 Cameroon, *Disciplinary Regulations* (1975), Article 35.
627 Cameroon, *Instructors' Manual* (1992), p. 15, § 14.
628 Cameroon, *Instructors' Manual* (1992), p. 133, see also p. 86, § 13.
629 Canada, *LOAC Manual* (1999), p. 15-1, § 7.

commanders are responsible for ensuring that members of the armed forces under their command are aware of their obligations under the LOAC".[630]

569. Canada's Code of Conduct states that "a military unit that obeys the Law of Armed Conflict is one that demonstrates discipline and leadership. This requires training. The responsibility for this training rests with leaders at all levels."[631]

570. Colombia's Directive on IHL states that:

> The Ministry of National Defence gives instructions aimed at intensifying the development of capacity-building programmes of the members of the public force, on themes referring to respect for Human Rights and the application of the rules of International Humanitarian Law, with the view to prevent and correct conduct which violates those rules ...
>
> The General Command of the Military Forces and the Directorate of the National Police [g]ive the commanders of the public force the necessary instructions for each force to intensify, develop and complete, in the corresponding courses of training and capacity-building of their personnel, the relevant studies on respect for Human Rights and ensure the obligatory application of International Humanitarian Law.[632]

571. Colombia's Soldiers' Manual states that it is useful for commanders, especially officers in charge of the instruction of troops, to be able to "count on an efficient instrument of practical and daily use to educate and train Colombian soldiers".[633]

572. Croatia's Commanders' Manual states that "the commander himself ensures that his subordinates are aware of their obligations under the law of war and respect them".[634] It adds that "the commander is responsible for proper law of war training" and that "the superior is the normal instructor of his subordinates also for law of war training".[635]

573. France's LOAC Summary Note provides that "the commander must ensure that subordinates know their obligations [under IHL] and respect them. He is ... responsible for their instruction."[636]

574. France's LOAC Teaching Note states that "the commander ... must ensure that members of the armed forces know their rights, but also their obligations under the law of armed conflicts. As such, he is responsible for their instruction."[637]

575. France's LOAC Manual, referring to respect for IHL, provides that "the commander ... must ensure that the members of the armed forces know their rights and discharge the corresponding obligations. As such, he is responsible for their instruction."[638]

[630] Canada, *LOAC Manual* (1999), p. 16-7, § 50.
[631] Canada, *Code of Conduct* (2001), Introduction, § 15.
[632] Colombia, *Directive on IHL* (1993), Sections IV.(A) and IV.(B)(1).
[633] Colombia, *Soldiers' Manual* (1999), p. i.
[634] Croatia, *Commanders' Manual* (1992), § 19.
[635] Croatia, *Commanders' Manual* (1992), §§ 21 and 23.
[636] France, *LOAC Summary Note* (1992), § 5.1.
[637] France, *LOAC Teaching Note* (2000), p. 7.
[638] France, *LOAC Manual* (2001), p. 14.

576. Germany's Military Manual provides that "the superior has to ensure that his subordinates are aware of their duties and rights under international law".[639]

577. Hungary's Military Manual provides that it is the "responsibility of every commander . . . [to] ensure knowledge of [the law of war]".[640] It further provides that, in order to ensure respect for the law of war, every commander shall organise training on the law of war for all members of the armed forces.[641]

578. Italy's LOAC Elementary Rules Manual states that "the commander himself ensures that his subordinates are aware of their obligations under the law of war and respect them".[642] It further states that "the commander is responsible for proper training" and that "the superior is the normal instructor of his subordinates also for law of war training".[643]

579. South Korea's Military Regulation 187 provides that it is a duty of the commander to teach the principles and rules of the laws of war.[644]

580. Madagascar's Military Manual states that "the commander himself shall ensure that his subordinates know their obligations arising from the law of war and respect them".[645] It further provides that "the commander is responsible for proper law of war training" and that "the superior is the normal instructor of his subordinates also for law of war training".[646] In addition, the manual states that "the aim of instruction is: . . . to ensure true respect for this law of war by all combatants".[647]

581. The Military Manual of the Netherlands, referring to Article 87 AP I, states that "commanders must first of all ensure that their people know the rules of the law of war".[648]

582. The Military Handbook of the Netherlands states that "commanders must ensure that their people know the rules of the law of war".[649]

583. New Zealand's Military Manual states that "it is incumbent upon a commanding officer to ensure that the forces under his command behave in a manner consistent with the laws and customs of war . . . and it is part of his responsibility to ensure that the troops under his command are aware of their obligations".[650]

584. Nigeria's Military Manual recalls that "commanders are . . . enjoined to ensure that members of the armed forces under their command are aware of

639 Germany, *Military Manual* (1992), § 138.
640 Hungary, *Military Manual* (1992), p. 40.
641 Hungary, *Military Manual* (1992), p. 41.
642 Italy, *LOAC Elementary Rules Manual* (1991), § 19.
643 Italy, *LOAC Elementary Rules Manual* (1991), §§ 21 and 23.
644 South Korea, *Military Regulation 187* (1991), Article 6.6.1.
645 Madagascar, *Military Manual* (1994), Fiche No. 4-O, § 19, see also Presentation, p. 9 and p. 69, § 1.
646 Madagascar, *Military Manual* (1994), Fiche No. 4-O, §§ 21 and 23.
647 Madagascar, *Military Manual* (1994), Fiche No. 4-O, § I.
648 Netherlands, *Military Manual* (1993), p. IX-7.
649 Netherlands, *Military Handbook* (1995), p. 7-44.
650 New Zealand, *Military Manual* (1992), § 1603.2, see also § 1710.1, footnote 68.

their obligations under the [Geneva] conventions and the Protocols [AP I and AP II]".[651] In addition, it states that "every commander . . . holds full responsibility for proper law of war training within his sphere of authority and it is his duty to determine the needs of his subordinate which shall be integrated into the normal exercise of military activities".[652]

585. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "commanders shall ensure that all participants in security/police operations shall be briefed and de-briefed before and after every operation to insure proper behavior of personnel and understanding of their mission"[653] It adds that "commanders shall ensure that . . . pertinent provisions of . . . the Geneva Conventions and United Nations declarations on Humanitarian Law and Human Rights . . . are understood by every member of the AFP and PNP personnel".[654]

586. Spain's LOAC Manual states that "the commander himself ensures that his subordinates are aware of their obligations under the law of war and respect them".[655] It also states that "the commander is responsible for proper law of war training" and that "the superior is the normal instructor of his subordinates also for law of war training".[656]

587. Sweden's IHL Manual provides that "there is . . . a clear responsibility for a senior commander to check his subordinates' knowledge of the Conventions".[657]

588. Switzerland's Basic Military Manual states that "commanders must inform the troops of their obligations under the Conventions".[658]

589. Togo's Military Manual provides that:

> Each military commander is responsible for respect for the law of war within his sphere of command. Within his unit, he is in particular responsible for the instruction of the law of war in order to induce his troops to adopt a behaviour in conformity with the law and above all *vis-à-vis* specifically protected persons and objects.[659]

The manual adds that "the military commander must take all measures so that: the subordinates know their obligations arising from the law of war and respect them".[660]

[651] Nigeria, *Military Manual* (1994), p. 30, § 3.
[652] Nigeria, *Military Manual* (1994), p. 41, § 8.
[653] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(b).
[654] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(d).
[655] Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(1), see also § 2.2.b.
[656] Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(2), see also § 11.4.b.
[657] Sweden, *IHL Manual* (1991), Section 4.2, p. 94.
[658] Switzerland, *Basic Military Manual* (1987), Article 196.
[659] Togo, *Military Manual* (1996), Fascicule II, p. 14, see also p. 15.
[660] Togo, *Military Manual* (1996), Fascicule II, pp. 14 and 15.

590. The US Instructor's Guide states that, as a commander, "you must ensure your troops receive instruction in the law of war. You should ensure that they know and follow the applicable rules of engagement."[661]
591. The US Naval Handbook provides that "officers in command of operational units are encouraged to utilize this publication as a training aid for assigned personnel".[662]

National Legislation
592. The Order on Study and Dissemination of IHL of Belarus provides that the Vice-Ministers of Defence as well as commanders must, within the framework of the training of commanders, guarantee the study of the Geneva Conventions, the Additional Protocols and Belarussian regulations on the application of IHL and that they must take into account these instruments and documents during military training.[663]
593. Spain's Royal Ordinance for the Armed Forces provides that a soldier "shall know the rights and duties incumbent on him and the penal laws affecting him, which shall be read out and periodically explained at unit level with a view to guiding his conduct and preventing him from committing faults or offences".[664]

National Case-law
594. No practice was found.

Other National Practice
595. According to the Report on the Practice of Bosnia and Herzegovina, it is the *opinio juris* of Bosnia and Herzegovina that "commanders of units and each individual member of armed forces are responsible for the implementation of the international law of war".[665]
596. The 1997 Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia stated that:

> Training is one of the fundamental elements of preparing troops for operations . . . It is therefore to be expected that commanders at all levels of the chain of command, even the highest, pay particular attention to the training of a contingent, both to supervise and assess the preparations and, through their presence, to demonstrate their personal interest in and commitment to the operation that their troops are about to undertake.

[661] US, *Instructor's Guide* (1985), p. 19.
[662] US, *Naval Handbook* (1995), Preface, p. 21
[663] Belarus, *Order on Study and Dissemination of IHL* (1997), Article 5.
[664] Spain, *Royal Ordinance for the Armed Forces* (1978), Article 57.
[665] Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.6.

In its findings with respect to this statement, the Commission noted that "leaders at all levels of the chain of command, with the notable exception of the Brigade Commander during the initial stages of training, failed to provide adequate supervision of the training preparations undertaken by the CAR for Operation Cordon".[666] Regarding the Rules of Engagement (ROE) established with respect to the Somalia mission, the Commission further noted that:

The ... briefing provided by LCol Watkin on December 10th [1992] included information on the ROE ... The officers were then supposed to pass the information on to their subordinates. However, there were no efforts made to ensure that this information was properly understood before being passed down the chain of command to the troops, nor even that it was in fact passed down ... While the need to systematically reinforce the ROE training once in theatre was recognized by senior commanders who testified before us, this did not translate into effective ROE training throughout the deployment period. Maj Pommet showed great concern for the understanding of the ROE by his commando and took steps to train his soldiers, but he did so on his own initiative. On several occasions he verified his troops' knowledge of the ROE by presenting them with scenarios and asking them to respond. Although there may have been some discussion and briefings on the ROE, there was no organized and structured scenario-based training done in theatre. In our view, and notwithstanding the obvious need for it, the leaders failed to ensure that all of the soldiers had a comprehensive understanding of the use of force in Somalia through accessible and systematic training.[667]

597. The Commission of Inquiry into the Deployment of Canadian Forces to Somalia, in its recommendations with respect to training of the armed forces, stated that:

We recommend that: ... Canadian Forces doctrine recognize the personal supervision of training by commanders, including the most senior, as an irreducible responsibility and an essential expression of good leadership. Canadian Forces should also recognize that training provides the best opportunity, short of operations, for commanders to assess the attitude of troops and gauge the readiness of a unit and affords a unique occasion for commanders to impress upon their troops, through their presence, the standards expected of them, as well as their own commitment to the mission on which the troops are about to be sent.[668]

[666] Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 592–593, see also p. ES-28.

[667] Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 616–617.

[668] Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, p. 631, Recommendation No. 21(18).

598. An Order of the Israeli Chief of Staff requires that "all operational directive or order which precedes action by the soldiers has to include a directive requiring that the provisions of the Conventions be taught to the soldiers". The Order refers to the Geneva Conventions and the 1954 Hague Convention.[669]

599. On the basis of an interview with high-ranking officers of the army of the Netherlands, the Report on the Practice of the Netherlands states that commanders are responsible for training in IHL.[670]

600. The 1979 version of the US Department of Defense Directive on the Law of War Program provided that:

> The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD law of war program in order to:
>
> (1) Provide publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities.[671]

601. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that "[IHL] training is a command responsibility".[672]

602. The 1998 version of the US Department of Defense Directive on the Law of War Program provided that the Secretaries of the Military Departments shall "provide directives, publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities". Furthermore, they shall "ensure that programs are implemented in their respective Military Departments to prevent violations of the law of war, emphasizing any types of violations that have been reported".[673]

603. According to the Report on the Practice of Zimbabwe, an official of the armed forces of Zimbabwe stated that he was of the view that "Zimbabwe accepts the practice that commanders [should] ensure that their [subordinates] are aware of their obligations".[674]

669 Israel, IDF Order of the Chief of Staff No. 33.0133, Discipline – Conduct in accordance with the international conventions to which the State of Israel is a party, 20 July 1982, § 10.

670 Report on the Practice of the Netherlands, 1997, Interview with two high-ranking officers of the Royal Netherlands Army staff, both legal advisors, Chapter 6.6.

671 US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E(2)(e)(1).

672 US, Letter from the Department of the Army to the legal adviser of the US Army deployed in the Gulf region, 11 January 1991, § 8(S), Report on US Practice, 1997, Chapter 6.6.

673 US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Sections 5(5)(1) and 5(5)(2).

674 Report on the Practice of Zimbabwe, 1998, Chapter 6.7.

III. Practice of International Organisations and Conferences

United Nations
604. No practice was found.

Other International Organisations
605. In 1995, the Rapporteur of the Parliamentary Assembly of the Council of Europe on the conflict in Chechnya noted that the Russian federal command, after having originally adopted a policy of trying to brand the Chechen as the cruel enemy, was apparently trying to make amends by strengthening discipline. It was to be achieved "by directives and recommendations to officers to explain the rules of international law to their soldiers".[675]

International Conferences
606. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on "all States to remind military commanders that they are required to make their subordinates aware of obligations under international humanitarian law [and] to make every effort to ensure that no violations are committed".[676]

IV. Practice of International Judicial and Quasi-judicial Bodies

607. No practice was found.

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

608. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the commander himself must ensure that: a) his subordinates are aware of their obligations under the law of war".[677] Delegates also teach that:

> 275. . . . Every commander holds full responsibility for proper law of war training within his sphere of authority. Thus, law of war training is an essential part of command activity . . .
> 282. The superior is the normal instructor of his subordinates, also for law of war training. Thus, every commander must be acquainted with those parts of the law of war that are relevant for him and to those under his command . . .
> 292. Commanders shall issue instructions and organize appropriate training for specific circumstances, such as:

[675] Council of Europe, Parliamentary Assembly, Opinion on procedure on Russia's request for membership of the Council of Europe, Doc. 7384, 15 September 1995, § 67.
[676] 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(e).
[677] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 270.

a) commando and other small units with independent missions;
b) combat in unusual environment;
c) warfare between dissimilar forces (e.g. a modern high technology force opposing a more or less organized group fighting with primitive weapons).[678]

609. In a communication to the press in 2002, the ICRC called upon the parties to the conflict in Colombia to respect IHL and stated that "commanders must supervise their men so as to ensure that their conduct towards civilians complies at all times with the ... rules and principles [of IHL]".[679]

VI. Other Practice

610. No practice was found.

E. Dissemination of International Humanitarian Law among the Civilian Population

I. Treaties and Other Instruments

Treaties

611. Article 26 of the 1906 GC provides that "the signatory governments shall take the necessary steps ... to make [the provisions of this convention] known to the people at large".

612. Article 27 of the 1929 GC provides that "the High Contracting Parties shall take the necessary steps ... to bring [the provisions of the present Convention] to the notice of the civil population".

613. Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV provide that:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and, in particular, to include the study thereof [if possible] in their programmes of ... civilian instruction, so that the principles thereof may become known to the entire population.

614. Article 25 of the 1954 Hague Convention states that:

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

[678] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 275, 282 and 292.
[679] ICRC, Communication to the Press No. 02/16, Colombia: ICRC calls on all parties to conflict to respect international humanitarian law, 21 February 2002.

615. Article 83 AP I provides that:

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, ... to encourage the study thereof by the civilian population, so that those instruments may become known ... to the civilian population.
2. Any ... civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Article 83 AP I was adopted by consensus.[680]

616. Article 30 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

1. The Parties shall endeavour by appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect for cultural property by their entire population.
2. The Parties shall disseminate this Protocol, as widely as possible, both in time of peace and in time of armed conflict.
3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end, the Parties shall, as appropriate:
   ...
   (b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes.

Other Instruments

617. Article 3(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, dealing with tasks of the National Red Cross and Red Crescent Societies, provides that the National Societies "disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect".

618. Paragraph 13 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY states that:

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law ... this shall be done in particular:

...
- via articles in the press, and radio and television programmes prepared also in cooperation with the ICRC and broadcast simultaneously;
- by distributing ICRC publications.

619. Paragraph 4 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that:

[680] CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 30 May 1977, p. 307.

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law . . . [T]his shall be done in particular:

. . .

– by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
– by distributing ICRC publications.

620. In Paragraph II (10) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina the ICRC requested the parties to "undertake to ensure that the principles and rules of international humanitarian law and, in particular, [the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina] are known . . . to the civilian population".

621. Section 17 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that "States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programmes of . . . civil instruction".

II. National Practice

Military Manuals

622. Australia's Defence Training Manual provides that "the Government of Australia is required to disseminate the text of the conventions [Geneva Conventions, AP I and AP II, and 1907 Hague Convention (IV)] as widely as possible, so that the principles become known . . . to the civilian population".[681]

623. Belgium's Law of War Manual provides that:

States signatory to the [Geneva] Conventions undertook to take a series of measures to promote the respect thereof.

These measures can be summarised as follows:

1) the widest dissemination possible of the content of the Conventions among the civilian population.[682]

624. Canada's LOAC Manual states that "Canada . . . has the obligation to . . . encourage the study of the LOAC by the civilian population".[683]

625. Cameroon's Instructors' Manual states that "the teaching and dissemination of the Law of War is of capital importance for Cameroon, on the civilian . . . level".[684]

626. Colombia's Basic Military Manual states that, before conflicts occur, there is an obligation "to adopt plans and programmes of dissemination and capacity building through which IHL is made known to . . . the civil society (. . . public servants, students and the community in general)".[685] In a chapter dealing with

[681] Australia, *Defence Training Manual* (1994), § 4.
[682] Belgium, *Law of War Manual* (1983), p. 55.
[683] Canada, *LOAC Manual* (1999), p. 15-1, § 6.
[684] Cameroon, *Instructors' Manual* (1992), p. 2.
[685] Colombia, *Basic Military Manual* (1995), pp. 27 and 28.

AP II, the manual further states that "it is important to underline the obligation incumbent upon States to organise periodical and systematic instruction on the content of the Protocol, so that ... civil society in general can apply and insist on respect for its norms".[686]

627. Germany's Military Manual states that:

> The four Geneva Conventions and [AP I] oblige all contracting parties to disseminate the text of the conventions as widely as possible ... This shall particularly be accomplished ... by encouraging the civilian population to study these conventions ... Considering their responsibility in times of armed conflict, ... civilian authorities shall be fully acquainted with the text of the Conventions and the Protocol Additional to them.[687]

The manual further states that:

> Effective implementation is depending on dissemination of humanitarian law. Providing information about it is the necessary basis to create a common consciousness and to further the attitude of peoples towards greater acceptance of these principles as an achievement of the social and cultural development of mankind.[688]

628. Hungary's Military Manual stresses that "everybody must know the rules".[689]

629. New Zealand's Military Manual notes that "the parties [to the Geneva Conventions] are ... encouraged to disseminate the Conventions as widely as possible among their civilian populations".[690]

630. Nigeria's Military Manual incorporates the content of Article 47 GC I and adds that "dissemination simply means that in the law of armed conflict, the obligation is that States make the principles of the law known to ... the civilian population by ... encouraging the civilian population to study them".[691] The manual further states that:

> The dissemination of the conventions and the protocols therefore must be as orderly as possible in the respective countries and in particular to encourage the study thereof by the civilian population. The purpose therefore is that any ... civilian authorities, who in time of armed conflict, assume responsibilities in respect of the application of the [Geneva] conventions and the protocols, shall be fully acquainted with the text thereof.[692]

631. Sweden's IHL Manual notes that:

> I Geneva Convention (GC I, Art. 47) states that the contracting parties shall undertake, both in peace and in war, to ensure the widest possible dissemination of the convention texts and to introduce study thereof into programmes of ... civilian instruction. The III Geneva Convention (GC III, Art. 127) states that the principles

[686] Colombia, *Basic Military Manual* (1995), p. 46.
[687] Germany, *Military Manual* (1992), § 136.
[688] Germany, *Military Manual* (1992), § 1223.
[689] Hungary, *Military Manual* (1992), p. 31.
[690] New Zealand, *Military Manual* (1992), § 1602.1, footnote 5.
[691] Nigeria, *Military Manual* (1994), p. 29, § 1.
[692] Nigeria, *Military Manual* (1994), p. 30, § 3.

of the conventions shall be made known to . . . the entire population. Similarly, the IV Geneva Convention (GC IV, Art. 144) states that the principles for protection of civilians shall be made known to the entire population. The undertaking of the parties concerning information and instruction in international humanitarian law is stressed in Additional Protocol I to the 1949 Geneva Conventions (AP I, Art. 83), which, however, goes further than the earlier conventions. According to the Protocol, the military and civilian authorities responsible for their application during a conflict shall possess full knowledge of the texts both of the Protocol and of the Conventions. Thus a definite tightening of the demands has been introduced.[693]

The manual further states that "by its ratification in 1977 of the Additional Protocols to the Geneva 1949 Conventions, Sweden pledged herself to inform and instruct . . . the civilian population . . . on the rules of international humanitarian law".[694]

632. Spain's LOAC Manual provides that "the instruction and dissemination of [IHL] are established as obligatory, so that the State has the duty to introduce it in its programmes of . . . civil instruction".[695] The manual identifies the sectors of the public that should be targeted in priority: National Societies, universities, schools, medical circles, communication media, and the general public, particularly young people and teachers.[696]

633. In the Order on Law of Armed Conflict Curriculum, Tajikistan's Minister of Education decided "to include in the curriculum of the Republican Specialised Boarding School No. 1 for the Intensive Study of the Russian Language and for Military-Physical Training in Dushanbe the subject 'Law of Armed Conflict'".[697]

634. In the Order No. 148 on Law of Armed Conflict Courses, Tajikistan's Minister of Defence decided "to include in the curricula of the Military Chairs of civilian Institutions of Higher Education . . . the subject 'Law of Armed Conflict'".[698]

635. In the Order No. 554 on Law of Armed Conflict Courses, Tajikistan's Minister of Education decided "to include in the curricula of the Military Chairs of civilian Institutions of Higher Education the subject 'Law of Armed Conflict'".[699]

636. The UK Military Manual notes that:

Under the 1949 [Geneva] Conventions the parties are bound, both in time of peace and in war, to disseminate the text of the Conventions in their countries and to include the study of them in their programmes . . . if possible (*i.e.*, according to the constitution of the country concerned) of civilian instruction.[700]

693 Sweden, *IHL Manual* (1991), Section 4.1, pp. 91 and 92.
694 Sweden, *IHL Manual* (1991), Section 10.1, p. 168.
695 Spain, *LOAC Manual* (1996), Vol. I, § 10.1.a, see also §§ 1.1.d.(7) and 11.3.b.(2) (which add that the instruction must take place in time of peace as well as in time of war).
696 Spain, *LOAC Manual* (1996), Vol. I, § 10.2.b.(3).
697 Tajikistan, *Order on Law of Armed Conflict Curriculum* (1997), § 1.
698 Tajikistan, *Order No. 148 on Law of Armed Conflict Courses* (1997), § II.
699 Tajikistan, *Order No. 554 on Law of Armed Conflict Courses* (1997), § 2.
700 UK, *Military Manual* (1958), § 120.

637. The US Field Manual reproduces Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV.[701]

638. The US Air Force Pamphlet quotes a directive of the Department of Defense which provides that "the Armed Forces of the United States will insure that programs to prevent violations of the law of war to include training and dissemination as required by the Geneva Conventions . . . and by [the 1907] Hague Convention IV . . . are instituted and implemented".[702] The Pamphlet adds that "all states must include the text of the Conventions in programs of . . . if possible, civil instruction".[703]

National Legislation

639. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the appropriate authorities and governmental bodies of [the] Azerbaijan Republic insure [that] all the citizens always learn the provisions of this law on civil defence".[704] It further provides that "if [the] Azerbaijan Republic is one of the parties to the conflict, then necessary instruction is given to [the] civilian population in such a conflict area".[705]

640. Croatia's Emblem Law provides that:

> In accordance with the commitments made on [the] international level concerning the promotion of [the] Geneva Conventions, it is necessary to elaborate adequate programmes and ensure their implementation among:
>
> – [the] civilian population of the Republic of Croatia – Croatian Red Cross;
> . . .
> – high schools and university students – Ministry of Culture and Education.[706]

641. Peru's Law on Compulsory Human Rights Education, providing, *inter alia*, for the establishment of a national plan on the teaching of human rights and IHL in universities and higher education establishments, states that "the duty to teach human rights and international humanitarian law must aim at full implementation and strict compliance with the international treaties and conventions as well as the protection of fundamental rights in the national and international arenas".[707]

642. Russia's Ordinance regarding Ratification of the Additional Protocols recommends that the Executive Committee of the Union of the Red Cross and Red Crescent Societies of the USSR take measures for the publication and dissemination of the texts of the Additional Protocols among the civilian population.[708]

[701] US, *Field Manual* (1956), § 14.
[702] US, *Air Force Pamphlet* (1976), § 1-4(c).
[703] US, *Air Force Pamphlet* (1976), § 15-2(b).
[704] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 1.
[705] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 30.
[706] Croatia, *Emblem Law* (1993), Article 14.
[707] Peru, *Law on Compulsory Human Rights Education* (2002), Article 3.
[708] Russia, *Ordinance regarding Ratification of the Additional Protocols* (1989), § 3.

643. Russia's Order on the Publication of the Geneva Conventions and Protocols contains a provision for the teaching of these treaties during studies and education.[709]

644. Russia's Draft Law on the Red Cross Society and Emblem provides that:

> The Russian Red Cross Society shall interact with the bodies of state power and local self-government bodies in carrying out the following tasks: . . . dissemination of international humanitarian law, including the provisions of the Geneva Conventions, of the principles and ideals of the International Movement of the Red Cross and Red Crescent.[710]

The Draft Law also provides that:

> The dissemination of international humanitarian law among the population is carried out by the Russian Red Cross Society in cooperation with the bodies of State power and local self-government.
>
> The dissemination of international humanitarian law in the educational establishments is carried out by the Russian Red Cross Society in cooperation with the appropriate administrative bodies.[711]

645. Slovakia's Law on the Red Cross Society and Emblem provides that:

> The Slovak Red Cross fulfils in accordance with the Geneva Conventions and their Additional Protocols and the conclusions of the International Conferences of the Red Cross and Red Crescent during the peace and war period primarily the following tasks:
>
> . . .
> – it familiarises the population with the basic principles of the Red Cross, with the principles of international humanitarian law, disseminates the ideas of peace, mutual respect and understanding among people and nations.[712]

National Case-law

646. No practice was found.

Other National Practice

647. According to the Report on the Practice of Algeria, courses in IHL are organized at Algerian universities and at the École Nationale d'Administration at postgraduate level. The report also mentions the activities of the Algerian Red Crescent Society, stating, however, that they consist mainly of first-aid training.[713]

[709] Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 2.
[710] Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 2.
[711] Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 5.
[712] Slovakia, *Law on the Red Cross Society and Emblem* (1994), Section 2(h).
[713] Report on the Practice of Algeria, 1997, Chapter 6.6.

648. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Argentina pledged to "incorporate the study of international humanitarian law into the curricula of secondary schools and universities".[714]

649. The rules of procedure of the Argentine Committee on the Implementation of International Humanitarian Law (CADIH), established to undertake studies on the teaching and dissemination of the rules of IHL, make specific reference to the teaching and dissemination of the law among the civilian population.[715]

650. According to the Report on the Practice of Argentina, which refers to several annexed university curricula, IHL is part of some university programmes in Argentina. The report further notes that the CADIH also plans to introduce courses on IHL in secondary school curricula.[716]

651. In its report to UNESCO on measures to implement the 1954 Hague Convention, the Australian government noted that it provided funds to the Australian Red Cross to enable it to conduct IHL dissemination activities throughout Australia, which included a description of the contents of the 1954 Hague Convention.[717]

652. Enumerating the matters which Australia believed must receive priority attention in the outcomes of the 26th International Conference of the Red Cross and Red Crescent in 1995, the head of the Australian delegation noted that:

> All States must take effective action to disseminate the law [of armed conflict] . . . because of the growth of irregular conflict, to their general populations. States and relevant international organizations must work together to ensure that dissemination programs are given the highest priority in terms of funding and materials.[718]

653. In 2002, during a debate in the UN Security Council concerning the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Australia stated that "practical measures can be taken by Governments to promote understanding and observance of international humanitarian law within their own communities . . . also among civilian

[714] Argentina, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

[715] Argentina, Committee on the Implementation of International Humanitarian Law (CADIH), Internal Rules of Procedure, Article 10.

[716] Argentina, Curricula for the courses on Human Rights and Humanitarian Law, Law Faculty, University of Buenos Aires, 1986; Curriculum for the course on International Public Law as part of the Political Science degree, Pontifical Catholic University of Argentina; Curriculum for the course on International Public Law, Faculty of Law, Austral University; Statement by the Legal Adviser to the Argentine Ministry of Foreign Affairs, First Meeting of the Argentine and Chilean Committees on the Implementation of International Humanitarian Law, 1997; Report on the Practice of Argentina, 1997, Chapter 6.6.

[717] Australia, Report to UNESCO on Australian Measures to Implement the 1954 Hague Convention, 1994, § 2.

[718] Australia, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, reprinted in *Australian Year Book of International Law*, Vol. 17, 1996, p. 787.

populations, including by disseminating information about international humanitarian law".[719]

654. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belarus pledged "to continue the dissemination of information on the fundamental norms and principles of [IHL] among the population of the Republic of Belarus".[720]

655. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belgium pledged "to implement training programmes in international humanitarian law targeted at those who are most directly concerned by the application of and respect for this body of law, namely the judiciary . . .".[721]

656. The Report on the Practice of Belgium notes that, although the Belgian government does not itself conduct dissemination activities for the civilian population, it actively supports such activities undertaken by the Belgian Red Cross, by institutions of higher education and by NGOs.[722]

657. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Chile pledged to "incorporate study of [international humanitarian] law's fundamental principles into Ministry of Education programmes".[723]

658. At the 27th International Conference of the Red Cross and Red Crescent in 1999, China pledged that it would promote and strengthen "the wide dissemination and education of international humanitarian law among the people of China".[724]

659. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Colombia solemnly pledged to "promote and spread knowledge of international humanitarian law through training courses for all sectors of Colombian society and through general education programmes for trade schools, universities and schools".[725]

660. According to a report on the promotion and implementation of IHL in the DRC (Zaire), IHL is taught in the law and political science faculties of universities.[726]

661. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Cuba solemnly pledged to "continue promoting dissemination of the

[719] Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.
[720] Belarus, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[721] Belgium, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[722] Report on the Practice of Belgium, 1997, Chapter 6.6.
[723] Chile, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[724] China, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[725] Colombia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[726] Mavungu Mvumbi-di-Ngoma, Report on the Promotion and Implementation of International Humanitarian Law in the Republic of Zaire, September 1996, p. 22.

norms and principles governing international humanitarian law, with a view to heightening the population's awareness thereof".[727]

662. According to the Report on the Practice of Cuba, IHL is taught in the law faculties' departments of international law and is included in postgraduate courses in Cuba.[728]

663. According to the Report on the Practice of Egypt, IHL is taught to second-year and postgraduate university students.[729]

664. In 1996, in reply to a formal question from a member of parliament, a German Minister of State, referring to Articles 83(1) AP I and 19 AP II, stated that:

> The Federal Government supports the dissemination of International Humanitarian Law in all areas and at all levels of state. It hereby fulfils its duties resulting from international public law. The four Geneva Conventions and the two Additional Protocols oblige all contracting parties to disseminate the wording of the Conventions as widely as possible ... This shall be done in particular by ... stimulating the civilian population to study the Conventions. Military and civil offices shall, in times of an armed conflict [and] with regard to their responsibilit[ies], be entirely familiar with the wording of the Conventions and the Additional Protocols.[730]

The Minister of State further stated that, in addition to members of the armed forces, civil defence personnel, fire brigades and border guards receive instruction in IHL. According to the Minister, "aspects of international humanitarian law" are part of the general instruction in first aid given to the civilian population by aid organisations. He also pointed out the commitment of the German Red Cross Society with respect to the dissemination of IHL among the civilian population and stated that the material for the teaching of soldiers is, within certain limits, available free of charge for interested citizens.[731]

665. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Greece pledged to "enhance dissemination of international humanitarian law ... by reviewing existing educational and training curricula so as to integrate international humanitarian law into ... universities, schools, media and public administration".[732]

666. In 1999, the Greek authorities, namely the Hellenic Armed Forces and the Ministries of Foreign Affairs, Justice and Education, made commitments

[727] Cuba, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[728] Report on the Practice of Cuba, 1998, Chapter 6.6.
[729] Report on the Practice of Egypt, 1997, Chapter 6.6.
[730] Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, p. 2.
[731] Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, pp. 2–4.
[732] Greece, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

to enhance awareness and knowledge of IHL among various groups (the military, diplomats, judges, lawyers, detention personnel, students and youth in general).[733]

667. At the 27th International Conference of the Red Cross and Red Crescent in 1999, the Holy See pledged "to take suitable initiatives in favour of instruction in international humanitarian law for religious personnel in the armed forces (Catholic military chaplains)".[734]

668. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Iceland, jointly with the Icelandic Red Cross, pledged "to cooperate on disseminating international humanitarian law together by... organizing seminars and workshops for relevant government officials and other groups".[735]

669. According to the Report on the Practice of India, there is no dissemination activity for the civilian population in general. IHL is taught at graduate level in Indian universities.[736]

670. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Indonesia pledged to "intensify the dissemination and education in International Humanitarian Law and the works of humanitarian organizations to the civilian community".[737]

671. According to the Report on the Practice of Indonesia, IHL is part of the curriculum of some academic institutions in Indonesia.[738]

672. According to the Report on the Practice of Iraq, IHL is taught at university in Iraq.[739]

673. In 1997, in its Final Report on the Events in Somalia, the Italian Government Commission of Inquiry stated that it was necessary to establish a compulsory course on IHL and on human rights not only for the armed forces but also for civilians, and that instruction in these subjects should be introduced in military and non-military schools.[740]

674. According to the Report on the Practice of Kuwait, IHL is taught at Kuwait University.[741]

675. According to the Report on the Practice of Malaysia, Malaysian legislation does not provide specifically for the dissemination of IHL among the civilian population. According to the report, which refers to an interview conducted

[733] ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 32.
[734] Holy See, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[735] Iceland, Pledge made together with the Icelandic Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[736] Report on the Practice of India, 1997, Chapter 6.6.
[737] Indonesia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
[738] Report on the Practice of Indonesia, 1997, Chapter 6.6
[739] Report on the Practice of Iraq, 1998, Chapter 6.6.
[740] Italy, Government Commission of Inquiry, Final Report on the Events in Somalia, 8 August 1997, pp. 44–46.
[741] Report on the Practice of Kuwait, 1997, Chapter 6.6.

with the Ministry of Home Affairs, in practice efforts to disseminate IHL among the civilian population have been undertaken by the Malaysian Red Crescent Society and by the law faculty of the University of Malaya.[742]

676. In 1999, a seminar on implementation of IHL organised by Malawi's Ministry of Defence, the Law Commissioner, the ICRC and the National Red Cross Society encouraged Malawi to include IHL in training programmes for the police, prison and immigration services and in university curricula.[743]

677. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged to "undertake efforts aimed at disseminating and promoting the International Humanitarian Law in ... educational institutions particularly at the university level".[744]

678. In an explanatory memorandum submitted to the Dutch Parliament in the context of the ratification procedure of the CCW, both the Minister for Foreign Affairs and the Minister of Defence expressed themselves in favour of information on IHL being given not only to soldiers, but also to a broader group of people. However, it was stressed that to support governmental activities in this field, non-governmental activities were also needed.[745]

679. In 2002, at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, the President of the National Assembly of Niger committed the National Assembly and the deputies of Niger:

> 3) To observe that the government disseminates international humanitarian law through the education of the Forces of Defence and Security and the sensitisation of the population.
> 4) To fully engage in the process of sensitisation, information and education of the citizens.[746]

680. According to the Report on the Practice of Peru, which refers to various university programmes and curricula, IHL is taught at university level.[747]

681. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Slovenia pledged to give "support to the dissemination of the Geneva Conventions with the Additional Protocols and other instruments of International Humanitarian Law within ... educational, health and other institutions".[748]

742 Report on the Practice of Malaysia, 1997, Chapter 6.6.
743 ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 44.
744 Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.
745 Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the CCW, 1983–1984 Session, Doc. 18 278 (R 1248), Nos. 1–3, p. 9.
746 Niger, Pledge made at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, §§ 3–4.
747 Report on the Practice of Peru, 1998, Chapter 6.6.
748 Slovenia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

682. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand pledged "to raise awareness of and promote respect for International Humanitarian Law and Principles in Thai society".[749]

683. According to the Report on the Practice of Uruguay, which contains, as annexes, several syllabi of courses of the faculty of law of the University of Uruguay, IHL is part of the teaching in public international law and human rights law in the university's law faculty.[750]

684. By a ministerial decree, a national committee on humanitarian law was created within the Ministry of Foreign Affairs of Uruguay to study and formulate recommendations on the dissemination of the Geneva Conventions and Additional Protocols at all levels of public and private education, and on the implementation of IHL through legislation, regulations, and measures guaranteeing the effective application of the Conventions.[751]

685. At the 27th International Conference of the Red Cross and Red Crescent in 1999, the US pledged that "the United States will work to broaden and enhance efforts for dissemination of IHL, including in co-operation with the American Red Cross".[752]

686. The Report on the Practice of the SFRY (FRY) notes that dissemination activities should be carried out in a much more systematic manner and that the curricula of law faculties and faculties of political sciences, which include subjects on international law, do not pay sufficient attention to IHL.[753]

687. The Report on the Practice of Zimbabwe notes that "little has been done to educate civilians [in IHL]".[754]

III. Practice of International Organisations and Conferences

United Nations

688. In a resolution adopted in 1999 on protection of civilians in armed conflicts, the UN Security Council underlined the importance of the widest possible dissemination of IHL and of relevant training for civilian police, armed forces, members of the judicial and legal professions, civil society and personnel of international and regional organisations.[755]

689. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts

749 Thailand, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

750 Uruguay, Syllabi of the courses in Public International Law and Human Rights, Faculty of Law, University of the Republic, 1990, Report on the Practice of Uruguay, 1997, Chapter 6.6.

751 Uruguay, Ministry of Foreign Affairs, Decree No. 677/1992 creating the National Commission of Humanitarian Law, 24 November 1992, Article 1, *Diario Oficial*, 1 March 1993, p. 498-A.

752 US, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

753 Report on the Practice of the SFRY (FRY), 1997, Chapter 6.6.

754 Report on the Practice of Zimbabwe, 1998, Chapter 6.6.

755 UN Security Council, Res. 1265, 17 September 1999, preamble. (The resolution was adopted unanimously.)

"to provide . . . instruction concerning [the international humanitarian rules which are applicable] to the civilian population". It also requested that the UN Secretary-General "encourage the study and teaching of principles of respect for international humanitarian law applicable in armed conflict".[756]

690. In a resolution adopted in 1973 on respect for human rights in armed conflicts, the UN General Assembly urged that "information concerning the [rules of IHL] be given to civilians everywhere, with a view to securing their strict observance".[757]

Other International Organisations

691. In a recommendation adopted in 1982, the Parliamentary Assembly of the Council of Europe stressed that "past experience in armed conflict has established the need for the Geneva Conventions and the two protocols to be disseminated as widely as possible . . . among the civilian population". It recommended that the Committee of Ministers invite the governments of member States "to ensure that international humanitarian law becomes known by disseminating and teaching the Geneva Conventions . . . and their protocols among the . . . civilian population".[758]

692. In a resolution adopted in 1994, the OAU Council of Ministers requested that member States "educate their population on the fundamental rules and principles of the International Humanitarian Law".[759]

693. The first OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1994, concluded that "it is necessary to lay emphasis on the creation and improvement of the teaching materials [of IHL], particularly in the field of teaching even to the civilian education starting with primary schools".[760] The OAU Council of Ministers took note of the recommendations of the seminar.[761]

694. The second OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1995, recommended the "implementation of specific sensitization and information activities on the International Humanitarian Law . . . for the people in general".[762]

International Conferences

695. The 15th International Conference of the Red Cross in 1934 adopted a resolution in which it asked the ICRC and the League of Red Cross Societies to prepare a small booklet designed for youth – children between 10 and 14 years

[756] UN General Assembly, Res. 3032 (XXVII), 18 December 1972, §§ 2–3.
[757] UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 5.
[758] Council of Europe, Parliamentary Assembly, Rec. 945, 2 July 1982, §§ 10 and 11(b).
[759] OAU, Council of Ministers, 6–11 June 1994, Res. 1526 (LX), § 7.
[760] OAU/ICRC, First seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 7 April 1994, Conclusions and Recommendations, § 3.
[761] OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 1.
[762] OAU/ICRC, Second seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 11–12 April 1995, Recommendations, § 1(b).

of age – with respect to the Geneva Convention and the activity of the Red Cross.[763]

696. The 19th International Conference of the Red Cross in 1957 adopted a resolution on young people and the Geneva Conventions stating that it considered that Article 144 GC IV "makes it incumbent on the Governments which have ratified that Convention to make known the letter and spirit thereof to the whole population". It recommended that "in negotiations with the Governments, the National Societies endeavour to obtain space in the school curricula for the history and aims of [the] Red Cross and for the basic principles of the Geneva Conventions".[764]

697. The 19th International Conference of the Red Cross in 1957 adopted a resolution on practical means of spreading knowledge of the Geneva Conventions among young people in which it stated that "the Geneva Conventions constitute a sound basis for social education". The Conference recommended that "radio and television broadcasts dealing with the questions [of the history of the Red Cross and the Geneva Conventions] be regularly organized" and invited the ICRC and the League of Red Cross Societies to "examine, with National Societies, the possibilities of producing one or more films for Juniors covering the history, subject matter and aims of the Geneva Conventions". The Conference further recommended that the ICRC and the League of Red Cross Societies "issue informative publications suitable for children and young people, dealing with the history of the Red Cross and the fundamental principles of the Geneva Conventions".[765]

698. The 20th International Conference of the Red Cross in 1965 adopted a resolution on instruction of medical personnel in the Geneva Conventions in which it urged:

> the Governments and National Societies to intensify and co-ordinate their efforts to disseminate the 1949 Geneva Conventions among the medical personnel of their country, by introducing this subject in the compulsory syllabi of nursing and assistant nurses' schools, and including it in all courses for Red Cross voluntary auxiliaries and first aiders.[766]

699. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the implementation and dissemination of the Geneva Conventions in which it called upon governments and National Societies:

> to intensify their efforts with a view, on the one hand, to making known to the population as a whole the basic principles of the Red Cross and international humanitarian law by all effective means available to competent authorities at all

[763] 15th International Conference of the Red Cross, Tokyo, 20–29 October 1934, Res. IX.
[764] 19th International Conference of the Red Cross, New Delhi, 28 October–7 November 1957, Res. XXIX.
[765] 19th International Conference of the Red Cross, New Delhi, 28 October–7 November 1957, Res. XXX.
[766] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXXIII.

levels, and on the other hand, to imparting clear concepts regarding the Geneva Conventions to specialized spheres such as . . . civil administrations, institutes of higher learning, the medical and para-medical professions, etc.

It requested that the ICRC "support the efforts of governments and National Societies in their dissemination of and instruction in the Geneva Conventions".[767]

700. In a resolution adopted in 1977 on dissemination of knowledge of international humanitarian law applicable in armed conflicts, the CDDH invited:

> the signatory States to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed conflicts, and of the fundamental principles on which that law is based, is effectively disseminated, particularly by:
>
> . . .
>
> (c) recommending that the appropriate authorities intensify the teaching of international humanitarian law in universities (faculties of law, political science, medicine, etc.);
>
> (d) recommending to educational authorities the introduction of courses on the principles of international humanitarian law in secondary and similar schools.[768]

The resolution was adopted by 63 votes in favour, 2 against and 21 abstentions.[769]

701. The 23rd International Conference of the Red Cross in 1977 adopted a resolution stating that it considered that "the dissemination of knowledge of international humanitarian law applicable in armed conflicts is one of the vital conditions for its observance". The Conference invited "National Societies to intensify their efforts, in collaboration with their governments, for the dissemination of knowledge of international humanitarian law and of its principles as widely as possible among the population and especially among youth". It also recognised "the role of UNESCO in the dissemination of knowledge of international humanitarian law" and invited "the ICRC and the League [of Red Cross Societies] to intensify their collaboration with UNESCO with a view in particular to the award of training fellowships at specialized institutes".[770]

702. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of the civilian population in armed conflicts in which it recommended "a universal campaign to make known to all, not only to the armed forces, but to the civilians, the rights of the latter according to international law".[771]

[767] 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. XII.
[768] CDDH, *Official Records*, Vol. I, CDDH/446, 7 June 1977, Resolution 21, Dissemination of knowledge of international humanitarian law applicable in armed conflicts, Article 2.
[769] CDDH, *Official Records*, Vol. VII, CDDH/SR.55, 7 June 1977, § 48.
[770] 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. VII, preamble and §§ 2 and 4.
[771] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VIII, § 3.

703. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to make every effort to:

> disseminate international humanitarian law in a systematic way by teaching its rules to the general population, including incorporating them in education programmes and by increasing media awareness, so that people may assimilate that law and have the strength to react in accordance with these rules to violations thereof.[772]

704. In 1993, the 90th Inter-Parliamentary Conference adopted a resolution in which it called on all States "to increase public awareness of and to promote respect for international humanitarian law through education and information programmes".[773]

705. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that:

> States examine their educational and training curricula to ensure that international humanitarian law is integrated in an appropriate manner in their programmes for . . . relevant civil servants. States promote knowledge of international humanitarian law among decision-makers and the media and work for the inclusion of international humanitarian law in the general educational programmes of relevant organizations, professional bodies and educational institutions.[774]

706. In the Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, the participants stated that:

> 15. We undertake to promote knowledge of International Humanitarian Law and humanitarian norms as well as International Refugee Law among parliamentarians at national, regional and sub-regional levels.
> 16. We wish that seminars and workshops be organized for parliamentarians on these issues at the national, regional and sub-regional levels with the cooperation of competent organizations, particularly through the APU and other African parliamentary organizations.
> 17. We encourage the ICRC and National Societies of the Red Cross and Red Crescent to intensify their efforts to disseminate the rules of International Humanitarian Law in our States.[775]

IV. Practice of International Judicial and Quasi-judicial Bodies

707. No practice was found.

[772] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(1), *ILM*, Vol. 33, 1994, p. 299.

[773] 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(c).

[774] 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.4, § 16.

[775] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, §§ 15–17.

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

708. The ICRC Commentary on the First Geneva Convention notes with respect to Article 47 GC I that:

> The provision is, however, qualified by the words "if possible", not because the Diplomatic Conference of 1949 thought civilian instruction any less imperative than military instruction, but because education comes under the provincial authorities in certain countries with federal constitutions, and not under the central Government. Constitutional scruples, the propriety of which is open to question, led some delegations to safeguard the freedom of provincial decisions.[776]

709. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on information and dissemination of IHL in which it invited the entire Movement "to continue and expand its activities for the dissemination of knowledge of international humanitarian law and the Fundamental Principles in various circles, including young people, nationally, regionally and internationally".[777]

710. In 1993, in its report to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

> The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following:
>
> . . .
>
> (c) the obligation of States to ensure that the provisions of the Geneva Conventions and their Additional Protocols are known as widely as possible . . .
>
> Each State Party to the Geneva Conventions or to their Additional Protocols must ensure that the text of these treaties is disseminated as widely as possible throughout its territory in both peacetime and wartime. The States must, *inter alia*, incorporate study of the subject [if possible] into their programmes of . . . civilian instruction.[778]

VI. Other Practice

711. In 1995, the IIHL, commenting on the Declaration of Minimum Humanitarian Standards, stated that:

[776] Jean S. Pictet *et al.* (eds.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 349.

[777] International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro, 27 November 1987, Res. 4, §§ 1 and 2.

[778] ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the 48th Session of the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 51.

The importance of making known, disseminating and teaching these minimum humanitarian standards should be underlined. A clause on that subject could form a special article at the end of the declaration, which could read:

> "The minimum humanitarian standards, defined in this Declaration, should be made known and disseminated to all the authorities concerned, and to individuals who may be potential victims".[779]

[779] IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, § 23, reprinted in Report of the UN Secretary-General prepared pursuant to Commission resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 11.

CHAPTER 41

ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW

A. Ensuring Respect for International Humanitarian Law Erga Omnes

I. Treaties and Other Instruments

Treaties

1. Common Article 1 of the 1949 Geneva Conventions states that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

2. Article 1(1) AP I provides that "the High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances". Article 1 AP I was adopted by 87 votes in favour, 1 against and 11 abstentions.

3. Article 89 AP I provides that "in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter". Article 89 AP I was adopted by 50 votes in favour, 3 against and 40 abstentions.[1]

4. Upon ratification of AP I, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation. In this context it wishes to assert that military commanders planning or executing attacks make their decisions on the basis of their assessment of all kinds of information available to them at the time of the military operations.[2]

5. In communications in relation to the declarations made in the instruments of accession by Oman, Syria and UAE to AP I and, in the case of Oman, also AP II, Israel stated that:

> The Instrument deposited by the Sultanate of Oman includes a hostile declaration of a political character regarding Israel . . . The statement by the Sultanate of Oman cannot in any way affect whatever obligations are binding upon it under general international law or under particular conventions. In so far as the substance of the matter is concerned, the Government of Israel will adopt towards the Sultanate of Oman an attitude of complete reciprocity.
> . . .
> The Instrument deposited by the Government of the Arab Republic of Syria contains a hostile statement of a political character in respect of Israel . . . This statement by the Government of the Arab Republic of Syria cannot in any way affect whatever obligations are binding upon the Arab Republic of Syria under general international law or under particular conventions. The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of the Arab Republic of Syria an attitude of complete reciprocity.
> . . .

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41.
[2] Egypt, Declaration made upon ratification of AP I, 9 October 1992.

The Instrument deposited by the Government of the United Arab Emirates contains a statement of a political character in respect of Israel . . . This statement by the Government of the United Arab Emirates cannot in any way affect whatever obligations are binding upon the United Arab Emirates under general international law or under particular conventions. The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of the United Arab Emirates an attitude of complete reciprocity.[3]

6. Upon accession to AP I and AP II, Oman declared that "while deposing these instruments, the Government of the Sultanate of Oman declares that these accessions shall in no way amount to recognition of nor the establishment of any relations with Israel with respect to the application of the provisions of the said protocols".[4]

7. Upon accession to AP I, Syria made a reservation to the effect that "this accession in no way constitutes recognition of Israel nor the establishment of relations with Israel as regards the application of the provisions of the aforementioned Protocol".[5]

8. Upon accession to AP I, the UAE declared that "on accepting the said protocol, the Government of the United Arab Emirates takes the view that its acceptance of the said protocol does not, in any way, imply its recognition of Israel, nor does it oblige it to apply the provisions of the protocol in respect of the said country".[6]

9. Article 31 of the 1999 Second Protocol to the 1954 Hague Convention provides that "in situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations".

Other Instruments

10. Article 16 of the 2001 ILC Draft Articles on State Responsibility, entitled "Aid or assistance in the commission of an internationally wrongful act", states that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State.

[3] Israel, Communications made in relation to the declarations made in the instruments of accession by Oman, Syria and the UAE to AP I and, in the case of Oman, also AP II, reprinted in Dietrich Schindler and Jirí Toman, *The Law of Armed Conflicts*, Martinus Nijhoff Publishers/Henry Dunant Institute, Dordrecht/Geneva, 1988, pp. 711–712.
[4] Oman, Declaration made upon accession to AP I and AP II, 29 March 1984.
[5] Syria, Declaration made upon accession to AP I, 14 November 1983.
[6] UAE, Declaration made upon accession to AP I, 9 March 1983.

II. National Practice

Military Manuals
11. No practice was found.

National Legislation
12. No practice was found.

National Case-law
13. In the *Sinnappu case* before a Canadian Federal Court in 1997, the applicants, unsuccessful claimants for refugee status, argued that, *inter alia*, their deportation to Sri Lanka would violate Canada's obligations under the Geneva Conventions Act of 1985. The judge held that:

> I cannot agree that common Article 1 of the Geneva Conventions of 1949 imposes upon Canada an obligation not to return unsuccessful refugee claimants to Sri Lanka. In my opinion, Sri Lanka is engaged in an internal armed conflict to which common Article 3 of the Geneva Conventions, 1949 and customary law on armed conflicts apply. Since Canada has no involvement whatsoever in that dispute, common Article 1 of the Geneva Conventions, 1949 does not impose upon our country an obligation to ensure that the parties to that conflict respect common Article 3. Furthermore, even if Canada does have such an obligation under common Article 1, I cannot accept that it would affect the application of our laws pertaining to immigration. Alternatively, even if I am wrong in determining that the armed conflict in Sri Lanka is internal in nature, I have nevertheless concluded that nothing in common Article 1 of the Geneva Conventions, 1949 would prevent Canada from removing a person, who had exhausted all of his avenues of recourse under the Act and Regulations, to the territory of a state engaged in an international armed conflict.[7]

14. In 1985, in the case of a Salvadoran citizen who had fled El Salvador in 1980 and applied for asylum in the US, it was argued on behalf of the applicant that the US was precluded from deporting her to El Salvador, as that would mean exposing her to violations of common Article 3 of the 1949 Geneva Conventions and thus, by virtue of common Article 1 of the 1949 Geneva Conventions, involved the responsibility of the US to ensure respect for GC IV, notably its Article 3. An Immigration Court in the US held that the applicant, "a Salvadoran citizen who is not taking active part in the hostilities, is a protected person under the minimum provisions set forth in Article 3" common to the 1949 Geneva Conventions and that GC IV "provides a potential basis for relief from deportation within the jurisdiction of the immigration judge".[8] However, on appeal, the US Board of Immigration Appeals reversed these findings and concluded that it was unclear "what obligations, if any, Article 1 [common to the 1949 Geneva Conventions] was intended to impose with

[7] Canada, Federal Court Trial Division, *Sinnappu case*, Judgement, 14 February 1997.
[8] US, Executive Office for Immigration Review, Harlingen, Texas, *Case No. A26 949 415: In the Matter of Jesus del Carmen Medina, in Deportation Proceedings*, Decision, 25 July 1985, referred to in Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", *YIHL*, Vol. 2, 1999, pp. 4–5.

respect to violations of the Conventions by other States" and that, in any event, the said provision was not self-executing.[9]

15. In the *Baptist Churches case* in 1989, a US District Court considered an application for an injunction to prevent the deportation of Central American nationals seeking temporary refuge based on, *inter alia*, Articles 1, 3 and 45 GC IV. The plaintiffs argued that "by deporting Salvadorans and Guatemalans to countries where Article 3 violations are occurring, the United States . . . failed to 'respect and ensure respect' for the Convention within the meaning of Article 1".[10] Reiterating criteria that had to be met by a treaty in order to be self-executing and applying them to Article 1 GC IV, the Court stated that:

> Article 1 of the Geneva Conventions is not a self-executing treaty provision. The language used does not impose any specific obligations on the signatory nations, nor does it provide any intelligible guidelines for judicial enforcement . . . The treaty provision is "phrased in broad generalities" . . . and contains no "rules by which private rights may be determined".[11]

Other National Practice

16. In 1995, in reply to a question from members of parliament concerning Russian action in Chechnya, the German government stated that:

> The Federal Government has repeatedly reminded Russia of the latter's duty to abide by its obligations under Protocol II additional to the 1949 Geneva Conventions, which provides for the protection of victims of non-international armed conflicts and thus applies to the conflict in Chechnya.[12]

17. In 1980, during a debate in the Special Political Committee of the UN General Assembly on Israeli practices in the occupied territories, Oman stated that the obligations imposed by Article 1 GC IV on all State parties involved "collective action to ensure adherence to the Convention, non-recognition of measures taken in contravention of its provisions and refraining from offering any aid to the occupying Power which might encourage it in its obstinacy".[13]

18. The Report on the Practice of Jordan states that Jordan has:

> always protested against the Israeli breaches of Human Rights and of International Humanitarian Law in the occupied territories and it always asked Israel to refrain from further breaches. Jordan used also to request the ICRC to urge Israel to observe

[9] US, Board of Immigration Appeals, *Case No. A26 949 415 – Harlingen, In re Jesus del Carmen Medina, in Deportation Proceedings: Certification*, Decision of 7 October 1988, referred to in Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", *YIHL*, Vol. 2, 1999, p. 5.

[10] US, District Court for the Northern District of California, *Baptist Churches case*, Judgement, 24 March 1989, § 9.

[11] US, District Court for the Northern District of California, *Baptist Churches case*, Judgement, 24 March 1989, § 12.

[12] Germany, Lower House of Parliament, Reply of the Federal Government to a question from members of the Federal Parliament, *BT-Drucksache* 13/718, 9 March 1995, p. 3.

[13] Oman, Statement before the Special Political Committee of the UN General Assembly, UN Doc. A/SPC/35/SR.27, 11 November 1980, § 4.

the rules of I.H.L. and to appeal to the UN and through it to the whole community of States.[14]

19. In 1979, in reaction to the appeal made by the ICRC to ensure respect for international humanitarian law with regard to the conflict in Rhodesia/Zimbabwe, the UK stated that "we give our wholehearted support" to the ICRC Appeal.[15]

20. In 1979, in reaction to the appeal made by the ICRC to ensure respect for international humanitarian law with regard to the conflict in Rhodesia/Zimbabwe, the US stated that "we . . . wish to endorse the appeal issued by the International Committee of the Red Cross".[16]

III. Practice of International Organisations and Conferences

United Nations

21. In a resolution adopted in 1990 following Israel's decision to deport four Palestinians from the occupied territories, the UN Security Council called upon "the high contracting parties to the Fourth Geneva Convention of 1949 to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with Article 1 thereof" and requested:

> the Secretary-General, in co-operation with the International Committee of the Red Cross, to develop further the idea expressed in his report of convening a meeting of the high contracting parties to the Fourth Geneva Convention and to discuss possible measures that might be taken by them under the Convention and for this purpose to invite these parties to submit their views on how the idea could contribute to the goals of the Convention, as well as on other relevant matters, and to report thereon to the Council.[17]

22. In a resolution adopted in 1977, the UN General Assembly, considering that GC IV was applicable to the territories occupied by Israel, urged all parties thereto "to exert all efforts in order to ensure respect for and compliance with the provisions thereof in all the Arab territories occupied by Israel".[18]

23. In a resolution adopted in 1982 on the situation in the Middle East, the UN General Assembly called upon "the parties [to the 1907 Hague Convention IV and GC IV] to respect and ensure respect of their obligations under these instruments in all circumstances".[19]

[14] Report on the Practice of Jordan, 1997, Chapter 6.2.
[15] UK, Secretary of State (FCO), Speech given by Mr. David Owen at the Bow Group meeting, House of Commons, 26 March 1979.
[16] US, Department of State, Statement by the Spokesperson for the Department of State, Mr. Hodding Carter, 21 March 1979.
[17] UN Security Council, Res. 681, 20 December 1990, §§ 5 and 6.
[18] UN General Assembly, Res. 32/91 A, 13 December 1977, § 4; see also Res. 33/113 A, 18 December 1978, § 4, Res. 34/90 A, 12 December 1979, § 4, Res. 34/90 C, 12 December 1979, § 5, Res. 35/122 A, 11 December 1980, § 4, Res. 35/122 B, 11 December 1980, § 5, Res. 36/147 A, 16 December 1981, § 5, Res. 36/147 B, 16 December 1981, § 5, Res. 37/88 A, 9 December 1982, § 4, Res. 37/88 B, 9 December 1982, § 5, Res. 38/79 A, 15 December 1983, §4, Res. 38/79 B, 15 December 1983, § 5, Res. 39/95 A, 14 December 1984, § 4, Res. 39/95 B, 14 December 1984, § 5, Res. 40/161 B, 16 December 1985, § 4 and Res. 40/161 C, 16 December 1985, § 5.
[19] UN General Assembly, Res. 37/123 A, 16 December 1982, § 6.

24. In a resolution adopted in 1983 on the situation in the Middle East, the UN General Assembly called upon "parties [to the 1907 HR and GC IV] to respect and ensure respect of their obligations under these instruments in all circumstances".[20]

25. In a resolution adopted in 1988 on the uprising (*intifadah*) of the Palestinian people, the UN General Assembly called upon "all the High Contracting Parties to [GC IV] to take appropriate measures to ensure respect by Israel, the occupying Power, for the Convention in all circumstances, in conformity with their obligation under article 1 thereof".[21]

26. In a resolution adopted in 1990 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights called upon the States parties to GC IV "to apply article 1 of the Convention and to ensure respect by Israel for the Convention".[22] This appeal was reiterated in 1991 and 1992.[23]

27. In a resolution adopted in 1993 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights called upon "the States parties to [GC IV] to implement article 1 of the Convention, to ensure respect by Israel for the Convention and to secure protection for the Palestinian people under occupation, until the end of this occupation".[24]

28. In 1984, in reaction to the appeals made by the ICRC to ensure respect for international humanitarian law in the Iran-Iraq war, the UN Secretary-General stated that he remained "deeply concerned that serious infringements of the terms of the Geneva Conventions may bring into discredit those rules of law and universal principles" and underscored "the vital importance of ensuring the observance of the principles embodied in the Geneva Conventions".[25]

29. In 1988, in a report on the situation in the Palestinian and other Arab territories, the UN Secretary-General recommended that:

> The Security Council should consider making a solemn appeal to all the High Contracting Parties to the Fourth Geneva Convention that have diplomatic relations with Israel, drawing their attention to their obligation under article 1 of the Convention to "... ensure respect for the present Convention in all circumstances" and urging them to use all the means at their disposal to persuade the Government of Israel to change its position as regards the applicability of the Convention.[26]

[20] UN General Assembly, Res. 38/180 A, 19 December 1983, § 6.
[21] UN General Assembly, Res. 43/21, 3 November 1988, § 5.
[22] UN Sub-Commission on Human Rights, Res. 1990/12, 30 August 1990, § 4.
[23] UN Sub-Commission on Human Rights, Res. 1991/6, 23 August 1991, § 4; Res. 1992/10, 26 August 1992, § 4.
[24] UN Sub-Commission on Human Rights, Res. 1993/15, 20 August 1993, § 4.
[25] UN Secretary-General, Note verbale dated 26 June 1984 addressed to the member States and observer States that are States Parties to the Geneva Conventions of 1949, UN Doc. S/16648, 26 June 1984, p. 2.
[26] UN Secretary-General, Report on the situation in the territories occupied by Israel submitted in accordance with UN Security Council Resolution 605 (1987), UN Doc. S/19443, 21 January 1988, § 27.

Other International Organisations

30. In a resolution adopted in 1984 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe noted that "all the High Contracting Parties to the [1949] Geneva Conventions share an equal burden of responsibility to ensure respect for the principle of humanitarian protection, which is the cornerstone of the said conventions".[27]

31. In a resolution adopted in 1987 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe recalled that "the members of the Council of Europe, as parties to the [1949] Geneva Conventions, have a particular responsibility and must exert their influence to ensure respect for the rules of international humanitarian law at all times and in all circumstances".[28] It invited the governments of member States "to help to ensure respect in all circumstances for the 1949 Geneva Conventions and the international humanitarian law applicable to armed conflicts".[29]

32. In a resolution adopted in 1989 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe invited the governments of member States "to respect and to help to ensure respect in all circumstances for the 1949 Geneva Conventions and their Additional Protocols of 1977, and the international humanitarian law applicable to armed conflicts".[30]

33. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited the governments of member States "to launch an appeal to the conflicting parties to respect the four Geneva conventions of 1949".[31]

34. In a declaration adopted in 1993 on the rape of women and children in the territory of the former Yugoslavia, the Committee of Ministers of the Council of Europe, "having regard to the specific responsibility of the Council of Europe to safeguard human rights and fundamental freedoms", appealed "to member States and the international community at large to ensure that these atrocities cease and that their instigators and perpetrators are prosecuted by an appropriate national or international penal tribunal".[32]

35. In a resolution adopted in 1999, the NATO Parliamentary Assembly reminded all States of their obligation, under the Geneva Conventions, not only to respect but to ensure respect for IHL in all circumstances.[33]

36. In a resolution on health and war adopted in 1995, the OAU Conference of African Ministers of Health, after urging member States to accede to the Geneva Conventions and the Additional Protocols, stressed "the obligation for them to

[27] Council of Europe, Parliamentary Assembly, Res. 823, 28 June 1984, § 8.
[28] Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 21.
[29] Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 23(iii).
[30] Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 20(i).
[31] Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 13(iii).
[32] Council of Europe, Committee of Ministers, Declaration on the rape of women and children in the territory of former Yugoslavia, 18 February 1993, § 4.
[33] NATO, Parliamentary Assembly, Civilian Affairs Committee Resolution, Amsterdam, 15 November 1999, § 7.

respect and have the International Humanitarian Law respected, particularly by the strengthening of the implementation mechanisms".[34]

37. In a resolution on respect for IHL adopted in 1996, the OAS General Assembly urged all members to "observe and fully enforce . . . the customary principles and norms contained in the 1977 Additional Protocols".[35]

International Conferences

38. The World Conference on Human Rights in 1968 adopted a resolution in which it noted that "States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict". It further requested:

> the Secretary-General, after consultation with the [ICRC], to draw the attention of all States members of the United Nations system to the existing rules of international law on the subject and urge them, pending the adoption of new rules of international law relating to armed conflicts, to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with "the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience".[36]

39. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the application of GC IV "to the occupied territories in the Middle East" in which it expressed its consciousness "of the fact that the Parties to the Geneva Conventions have undertaken, not only to respect, but also to ensure respect for the Conventions in all circumstances".[37]

40. The 24th International Conference of the Red Cross in 1981 adopted a resolution in which it recalled that "pursuant to the Geneva Conventions, the States have the obligation not only to respect but to ensure respect for these Conventions" and made "a solemn appeal that the rules of international humanitarian law and the universally recognized humanitarian principles be safeguarded at all times and in all circumstances".[38]

41. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it appealed "to Parties to the Geneva Conventions to fully carry out their obligations under the Fourth Geneva Convention" and reminded "all parties to the Geneva Conventions of their common obligation to respect and ensure respect for those Conventions in all circumstances".[39]

[34] OAU, Conference of African Ministers of Health, 24–29 April 1995, Res. 14 (V), § 2.
[35] OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, § 4.
[36] World Conference on Human Rights, Res. XXIII on Human Rights in Armed Conflicts, Teheran, 12 May 1968, preamble and § 2.
[37] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. III, preamble.
[38] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. VI.
[39] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, §§ 4–5.

42. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States declared that they would "in all circumstances respect and ensure respect for international humanitarian law including the protection of the civilian population".[40]

43. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants undertook "to act in co-operation with the UN and in conformity with the UN Charter to ensure full compliance with international humanitarian law in the event of genocide and other serious violations of this law", affirmed their responsibility, "in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war" and urged all States to make every effort to "ensure the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations".[41]

44. In 1994, at the Budapest Summit of Heads of State or Government, CSCE participating States reaffirmed "their commitment to respect and ensure respect for general international humanitarian law and in particular for their obligations under the relevant international instruments, including the 1949 Geneva Conventions and their additional protocols, to which they are a party".[42]

45. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration stating that:

> 4. The participating High Contracting Parties call upon all parties, directly involved in the conflict [between Israel and Palestinians] or not, to respect and to ensure respect for the Geneva Conventions in all circumstances . . .
> 5. The participating High Contracting Parties stress that the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances.
> . . .
> 17. The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties to follow up on the implementation of the present Declaration.[43]

[40] CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 48.

[41] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, §§ I(6), II and II(11), *ILM*, Vol. 33, 1994, pp. 299 and 301.

[42] CSCE, Budapest Summit of Heads of State or Government, 5–6 December 1994, Budapest Document 1994: Towards a Genuine Partnership in a New Area, Decisions, Chapter VIII: The Human Dimension, § 33.

[43] Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, §§ 4–5 and 17.

IV. Practice of International Judicial and Quasi-judicial Bodies

46. In the *Nicaragua case (Merits)* in 1986, the ICJ addressed the issue of US responsibilities under IHL. It considered that:

> There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.[44]

The ICJ also stated that "the US is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949". The Court then went on to consider some of the activities allegedly carried out by the US, in particular, the publication and dissemination of a manual on "psychological operations", which provided advice on how to "neutralize" certain "carefully selected and planned targets" such as judges, police officers and State security officials. The Court held that:

> When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found . . . that at the relevant time those responsible for the issue of the manual were aware of, at the least, the allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law . . . The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.[45]

47. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber held that:

> Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.[46]

48. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber, in rejecting the defence's arguments based on the *tu quoque* principle (whereby

[44] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 220.
[45] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, §§ 255 and 256.
[46] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 151.

the fact that the adversary has also committed similar crimes offers a valid defence to the accused), held that:

As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather – as was stated by the International Court of Justice in the Barcelona Traction case (which specifically referred to obligations concerning fundamental human rights) – they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations.[47]

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

49. The ICRC Commentary on the Third Geneva Convention states with respect to Article 1 GC III that:

In the event of a Power failing to fulfil its obligations, each of the Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.[48]

50. The ICRC Commentary on the Additional Protocols states with respect to Article 1 AP I that by including the express reference to the duty to ensure respect for IHL, as well as articles on specific methods of implementing this duty, the CDDH "clearly demonstrated that humanitarian law creates for each State obligations towards the international community as a whole (*erga omnes*); in view of the importance of the rights concerned, each State can be considered to have a legal interest in the protection of such rights".[49]

51. The ICRC Commentary on the Additional Protocols states with respect to Article 89 AP I that:

The article prescribes for all Contracting Parties, and not only those who are Members of the United Nations, that they should act in those situations in co-operation with the Organization and in conformity with its Charter . . .

The wording of this article follows *mutatis mutandis* Article 56 of the United Nations Charter which is aimed at co-operation for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all with a view to ensuring peaceful and friendly relations among nations . . .

Acting for the protection of man, also in time of armed conflict, accords with the aims of the United Nations no less than does the maintenance of international peace and security.[50]

[47] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 519.
[48] Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, p. 18.
[49] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 45.
[50] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3594–3596.

52. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC stated that:

> 2. . . . Fundamental humanitarian rules accepted by all nations – such as the obligation to distinguish between combatants and civilians, and to refrain from violence against the latter – have been largely ignored . . .
> 3. Since the end of 1976, the ICRC has on several occasions launched formal appeals to the authorities in Salisbury and to the leaders of the nationalist movements in order that they respect and apply the basic humanitarian rules in their conduct of warfare. The Front-Line States as well as the United Kingdom have been informed of the launching of these appeals and invited to support them . . .
> 8. The ICRC points out that ultimate responsibility for respecting and applying the provisions of humanitarian law lies, not with the ICRC, but with the parties to the conflict and with all States which have ratified or adhered to the Geneva Conventions and have thereby committed themselves to respect and to *ensure respect* for these Conventions in all circumstances. It therefore also appeals to:
>
> – all the States parties to the Geneva Conventions, and in particular the United Kingdom,
> – the Front-Line States (Angola, Botswana, Mozambique, Tanzania, Zambia),
> – the members of the United Nations Security Council,
> – the Chairman of the Organization of African Unity,
> – the Secretary-General of the United Nations,
> – to fully support its appeal to the warring parties in Rhodesia/Zimbabwe in order that an end be put to all the suffering there and that all the victims of the conflict receive the humanitarian protection and assistance to which they are entitled and which they so urgently need.[51]

53. In an appeal issued in 1983 concerning the Iran–Iraq War, the ICRC asked:

> the States parties to the [1949] Geneva Conventions to make every effort – in discharge of the obligation they assumed under article 1 of the Conventions not only to respect but to ensure respect for the Conventions – to see that international humanitarian law is applied and these violations affecting tens of thousands of persons cease . . . Every means provided for in the Geneva Conventions to ensure their respect must be used to effect, especially the Protecting Powers which should be appointed to represent the belligerents' interests in their enemy's territory.[52]

54. In an appeal issued in 1984 concerning the Iran–Iraq War, the ICRC stated that it wished "the States to take up in their dealings with the two belligerents the humanitarian issues it has brought to their attention, and to that effect it submitted a new memorandum to the States party to the [1949] Geneva Conventions on 13 February 1984". It further stated that "it is convinced that the States, conscious of what is at stake, will have the desire and determination

[51] ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 8, *IRRC*, No. 209, 1979, pp. 87–90.
[52] ICRC, Conflict between Iraq and Iran: ICRC Appeal, 7 May 1983, *IRRC*, No. 235, 1983, p. 222.

to act in accordance with the commitment they made of their own volition to respect and ensure respect for the Geneva Conventions".[53]

55. In a speech to all permanent Representatives of States in Geneva in late 1984 concerning the Iran–Iraq War, the ICRC stated that:

> The ICRC, in its resolve to use all means to ensure the respect for international humanitarian law in the conflict between Iraq and Iran, has already approached the international community in order to denounce violations of the [1949] Geneva Conventions, and this in two memoranda dated 7 May 1983 and 10 February 1984 . . . The states signatory to the Geneva Conventions, who have undertaken to ensure that countries at war respect these Conventions, hold in their hands the fate of . . . threatened people, whom the ICRC alone is unable to save.[54]

56. In a letter to two UK Members of Parliament in 1989, the ICRC Director of Principles, Law and Relations within the Movement wrote that:

> The ICRC considers it vital that the States party to the Geneva Conventions take all possible steps to ensure respect for [IHL] . . . It is moreover a legal obligation for them to do so because, in becoming party to the Geneva Conventions, those States have undertaken not only to respect the said Conventions themselves, but also to ensure respect for them by other States in all circumstances. This is the tenor of Article 1 common to the four Conventions . . . [It is] a matter of direct responsibility for the States. The ICRC therefore cannot but encourage them to make every effort to ensure that international humanitarian law is duly respected.[55]

57. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the International Conference for the Protection of War Victims in which it underlined the determination of States "to take firm action with respect to those States which are responsible for serious violations of international humanitarian law".[56]

58. At the Conference of High Contracting Parties to the Fourth Geneva Convention in 2001, the ICRC stated that:

> 10. Article 1 common to the four Geneva Conventions stipulates that the "High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances". This conference is to be viewed within that context. The ICRC has always welcomed all individual and joint efforts made by States party to the Geneva Conventions to fulfil this obligation and ensure respect for international humanitarian law. These efforts are all the more vital as violations of humanitarian law are far too common around the globe.

[53] ICRC, Conflict between Iran and Iraq: Second ICRC Appeal, 10 February 1984, *IRRC*, No. 239, 1984, p. 113.

[54] ICRC, Press Release No. 1498, The ICRC appeals to governments: its work halted in Iran, 23 November 1984.

[55] ICRC, Letter dated 18 October 1989 from the ICRC Director of Principles, Law and Relations within the Movement to two UK Members of Parliament, reprinted in Labour Middle East Council and Conservative Middle East Council (eds.), *Towards a Strategy for the Enforcement of Human Rights in the Israeli Occupied West Bank and Gaza*, A Working Symposium, London, 25 July 1989, pp. vii–viii.

[56] International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham, 29–30 October 1993, Res. 2, preamble.

11. The means used to meet these legal and political responsibilities are naturally a matter to be decided upon by States. Whatever the means chosen, however, the ICRC wishes to emphasize that any action States may decide to take at international level must be aimed at achieving practical results and at ensuring application of and compliance with international humanitarian law, in the interests of the protected population.[57]

VI. Other Practice

59. In a resolution adopted during its Berlin Session in 1999, the Institute of International Law stated that:

V. Every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances, and any other State is legally entitled to demand respect for this body of law. No State or non-State entity can escape its obligations by denying the existence of an armed conflict.

...

VII. Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations, in case of systematic and massive violations of humanitarian law or fundamental human rights, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any party to the armed conflict which has violated its obligations, provided such measures are permitted under international law.[58]

B. Definition of Reprisals

Note: *For practice concerning the principle of reciprocity in the application of international humanitarian law, see Chapter 40, section B. For practice concerning collective punishment, see Chapter 32, section O.*

Purpose of reprisals

I. Treaties and Other Instruments

Treaties

60. Neither the Geneva Conventions nor the Additional Protocols provide a definition of "reprisal". They are also silent on the requirements for legitimate reprisals in cases where they are not explicitly prohibited.

61. Common Article 1 of the 1949 Geneva Conventions provides that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

[57] ICRC, Statement at the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, §§ 10–11.

[58] Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, §§ V and VII.

62. Article 60(5) of the 1969 Vienna Convention on the Law of Treaties states that the principle of reciprocity does not apply "to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".
63. Article 1(1) AP I provides that "the High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances". Article 1 AP I was adopted by 87 votes in favour, one against and 11 abstentions.[59]
64. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that this would be true "to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles".[60]

Other Instruments
65. Article 28 of the 1863 Lieber Code provides that:

> Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.
>
> Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

66. Article 49 of the 2001 ILC Draft Articles on State Responsibility, entitled "Object and limits of countermeasures", provides that:

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two [Articles 28–41].
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

II. National Practice

Military Manuals
67. Australia's Commanders' Guide defines a reprisal as "an act, otherwise unlawful under the international law regulating armed conflict, utilised for the purpose of coercing an adversary to stop violating the recognised rules of

[59] CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41.
[60] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

armed conflict".[61] It further states that "reprisals are otherwise illegal actions that are taken by one nation for the sole purpose of persuading another nation to comply with LOAC. Nevertheless, because there is a risk that the conflict may escalate as a result, reprisals are rarely employed."[62]

68. Australia's Defence Force Manual, in its table of definitions, defines the term "reprisal" as "an act, otherwise unlawful under the international law regulating armed conflict, utilised for the purpose of coercing an adversary to stop violating the recognised rules of armed conflict".[63] It also states that "a reprisal is an otherwise illegal act done in response to a prior illegal act by the enemy. A reprisal aims to counter unlawful acts of warfare and to force the enemy to comply with the LOAC."[64] The manual further states that "reprisals are otherwise illegal actions that are taken by one nation for the sole purpose of persuading another nation to comply with the LOAC. Nevertheless, because there is a risk that the conflict may escalate as a result, reprisals are rarely employed."[65]

69. Belgium's Law of War Manual states that "belligerent reprisals are actions which in themselves are contrary to the law of armed conflict but which are taken in response to violations committed by the adversary and to oblige him to comply with the law of armed conflict". It adds that, when recourse is made to reprisals, "the following conditions must be fulfilled: 1) the adversary must have committed a violation duly established by the law of armed conflict".[66]

70. Benin's Military Manual states that "as far as reprisals are concerned, under customary law, they are permitted to counter an unlawful act of warfare".[67] It also states that "acts of vengeance are prohibited".[68]

71. Canada's LOAC Manual defines a reprisal as "an act, otherwise unlawful under the LOAC . . . utilized for the purpose of coercing an adversary to stop violating the recognized rules of armed conflict".[69] It also states that:

> In the event of serious or persistent breaches of the LOAC it may be necessary for the adverse party to resort to a reprisal in an attempt to terminate the illegality. A reprisal is an illegal act resorted to after the adverse party has performed illegal acts and has refused to stop after being called upon to do so.[70]

The manual further states that a reprisal "is not a retaliatory act or a simple act of vengeance".[71] It goes on to say that:

> To qualify as a reprisal, an act must satisfy the following conditions:

[61] Australia, *Commanders' Guide* (1994), Glossary, p. xxiii.
[62] Australia, *Commanders' Guide* (1994), § 1211.
[63] Australia, *Defence Force Manual* (1994), § 804.
[64] Australia, *Defence Force Manual* (1994), § 920.
[65] Australia, *Defence Force Manual* (1994), § 1310.
[66] Belgium, *Law of War Manual* (1983), p. 35.
[67] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[68] Benin, *Military Manual* (1995), Fascicule I, p. 17.
[69] Canada, *LOAC Manual* (1999), Glossary, p. GL-17.
[70] Canada, *LOAC Manual* (1999), p. 15-2, § 12.
[71] Canada, *LOAC Manual* (1999), p. 15-2, § 14.

a. It must respond to serious violations and manifestly unlawful acts, committed by an adversary government, its military commanders, or combatants for whom the adversary is responsible;
b. It must be accomplished for the purpose of compelling the adversary to observe the LOAC. Reprisals can not be undertaken for revenge or punishment. They are directed against an adversary in order to induce compliance with LOAC. Thus, reprisals serve as a law enforcement mechanism. Above all, reprisals are justifiable only to force an adversary to stop its illegal activity. If, for example, a party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those responsible, then the action taken by another party to "redress" the situation cannot be justified as a lawful reprisal;
c. There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be taken;
...
g. It must be publicized. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of LOAC, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law.[72]

72. Congo's Disciplinary Regulations states that "it is prohibited [to military personnel in combat] to commit reprisals".[73]
73. Croatia's LOAC Compendium defines a reprisal as a "direct law enforcement procedure" and as a "breach of the L.O.W. [laws of war] for the purpose of terminating enemy violations". It also states that a condition for a reprisal is that it is directed "against [a] serious, manifest and deliberate breach of [the] L.O.W.".[74]
74. Ecuador's Naval Manual states that:

A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict.[75]

It further states that:

To be valid, a reprisal action must conform to the following criteria:
...
2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized.
...

[72] Canada, *LOAC Manual* (1999), p. 15-2, § 17.
[73] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[74] Croatia, *LOAC Compendium* (1991), p. 19.
[75] Ecuador, *Naval Manual* (1989), § 6.2.3.

4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.[76]

75. France's LOAC Manual states that:

Reprisals aim to obtain the cessation of a violation committed by the enemy . . . The United Nations Charter permitting the use of force only in case of aggression, reprisals are permitted only in response to a previous attack. They must always aim at a military objective and be preceded by a warning. One must not confuse reprisals, retaliation and vengeance. Vengeance is always prohibited.[77]

76. Germany's Soldiers' Manual states that "reprisals are measures of retaliation, as such adverse to international public law, which a State may, as an exception, use against another State in order to induce the latter to stop the violation of international public law".[78]

77. Germany's Military Manual states that "reprisals are retaliatory measures normally contrary to international law taken by one party to the conflict in order to stop the adversary from violating international law".[79] It further states that "the use of reprisals can cause an adversary acting contrary to international law to stop his violations of the law. Reprisals are permissible only in exceptional cases and only for the purpose of enforcing compliance with international law."[80]

78. Germany's IHL Manual provides that "reprisals are compulsory measures which one State may exceptionally use against another State in order to cause the latter to stop violations of international public law".[81]

79. Hungary's Military Manual defines a reprisal as a "direct law enforcement procedure" and as a "breach of the L.O.W. [laws of war] for the purpose of terminating enemy violations". It also provides that a condition for a reprisal is that it is directed "against [a] serious, manifest and deliberate breach of [the] L.O.W.".[82]

80. Indonesia's Air Force Manual provides that:

In principle, reprisals in warfare are prohibited, i.e. an act which categorize[s] against the laws of war and aim[s] to [answer to] the breach of the laws of war treaties committed by the adverse party. The reprisal could be allowed if, although it has been warned, the adverse party still continue[s] to violate the laws of war.[83]

81. Italy's IHL Manual states that:

The purpose of a reprisal is to induce the enemy to respect its obligations under international law and can be carried out either by means of acts similar to those illegally committed or by means of acts of a different nature. Therefore, a reprisal does not have the nature of a punishment, but is only a measure of direct coercion in

[76] Ecuador, *Naval Manual* (1989), § 6.2.3.1.
[77] France, *LOAC Manual* (2001), pp. 108 and 109.
[78] Germany, *Soldiers' Manual* (1991), p. 2.
[79] Germany, *Military Manual* (1992), § 476.
[80] Germany, *Military Manual* (1992), § 1206.
[81] Germany, *IHL Manual* (1996), § 318.
[82] Hungary, *Military Manual* (1992), p. 35.
[83] Indonesia, *Air Force Manual* (1990), § 15(c).

inducing the enemy to respect its obligations towards [Italy] . . . Given the nature and scope of a reprisal, it can, as a general rule, only be directed against the belligerent that violated the laws of war with regard to [Italy].[84]

The manual further states that the Italian government has declared in international fora that, in response to grave and systematic violations of the obligations relative to the protection of the civilian population and civilian objects, Italy will react by every measure permitted under international law to prevent the recurrence of such violations.[85]

82. Kenya's LOAC Manual states that:

Under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if:

- they are intended to secure legitimate warfare;
  . . .
- . . . they are carried out only against combatants and military objectives.

Reprisals are an unsatisfactory way of enforcing the law. They tend to be used as an excuse for illegal methods of warfare and carry a danger of escalation through repeated reprisals and counter reprisals.[86]

83. Mali's Army Regulations states that it is prohibited for military personnel in combat "to commit reprisals".[87]

84. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[88]

85. The Military Manual of the Netherlands states that "a reprisal is a measure which by itself constitutes a violation of the rules of humanitarian law of war but which is justified by the fact that it aims to force a state to put an end to previously committed violations of humanitarian law of war and to comply with the law".[89] The manual, referring to customary law, further states that reprisals are in principle allowed, provided that a number of conditions are fulfilled:

- Reprisals are only lawful when they aim at a violation previously committed by the adverse party the existence of which must be properly determined.
  . . .
- Reprisals against reprisals are prohibited.[90]

The manual concludes that "the freedom of states which have ratified Additional Protocol I to take recourse to reprisals is very limited".[91]

[84] Italy, *IHL Manual* (1991), Vol. I, § 23.
[85] Italy, *IHL Manual* (1991), Vol. I, § 26.
[86] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[87] Mali, *Army Regulations* (1979), Article 36.
[88] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[89] Netherlands, *Military Manual* (1993), p. IV-5, see also p. IX-2.
[90] Netherlands, *Military Manual* (1993), p. IV-5.
[91] Netherlands, *Military Manual* (1993), p. IV-6.

86. New Zealand's Military Manual states that "a reprisal is an illegal act resorted to after the adverse Party has himself indulged in illegal acts and refused to desist from them after being called upon to do so. The reprisal is not a retaliatory act or simple act of vengeance."[92] The manual further states that:

In order to be considered a reprisal, an act must have certain characteristics:

a) It must respond to grave and manifestly unlawful acts committed by an adverse government, its military commanders, or combatants for whom the adversary is responsible.

b) It must be for the purpose of compelling the adverse Party to observe the law of armed conflict. Reprisals cannot be undertaken for the law of armed revenge, spite or punishment. Rather, they are directed against an adverse Party in order to induce him to refrain from further violations of the law of armed conflict. Thus, reprisals serve as an ultimate legal sanction or law enforcement mechanism. Above all, they are justifiable only to force an adverse Party to stop its illegal activity. If, for example, one Party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those immediately responsible, the other Party cannot justify a lawful reprisal as the appropriate action to "right" the situation.

c) There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend on the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adverse Party that reprisals will be undertaken.

. . .

g) It must be publicized. Since reprisals are undertaken to induce an adverse Party's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adverse Party is aware of its obligation to abide by the law.[93]

87. Nigeria's Military Manual, in a section dealing with GC I and those upon whom reprisals are prohibited, states that "[in the cases where reprisals are prohibited], a belligerent party cannot claim a right to set aside the rules of the convention in order to induce the enemy to return to an attitude of respect for the law of armed conflict".[94]

88. The Soldier's Rules of the Philippines states that a soldier must "abstain from all acts of vengeance".[95]

89. South Africa's LOAC Manual states that "a reprisal is an otherwise illegal act in response to a *prior* illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war. Reprisals are only permitted according to strict criteria."[96] (emphasis in original)

[92] New Zealand, *Military Manual* (1992), § 1606(1).
[93] New Zealand, *Military Manual* (1992), § 1606(4).
[94] Nigeria, *Military Manual* (1994), p. 14, § 5.
[95] Philippines, *Soldier's Rules* (1989), §§ 8 and 9.
[96] South Africa, *LOAC Manual* (1996), § 34(e).

90. Spain's LOAC Manual defines a reprisal as "a violation of the law of war, committed in response to the violation of the said law committed by the enemy".[97] Among the conditions which must be fulfilled for the lawful taking of reprisals, the manual states that "the action of the enemy must constitute a grave, manifest and deliberate violation of the law of war". It further emphasises that reprisals are only permitted if authorisation is given by the international conventions.[98] In another chapter, the manual states that "the fear of reprisals can influence belligerent parties and induce them to respect the International Conventions. Reprisals are authorized only in case of a violation of the law of war."[99]

91. Sweden's IHL Manual states that:

> Reprisals very seldom achieve their intended aim – the return of a wrongdoer to compliance with international law. In most cases, use of reprisals has, instead, led to a serious increase of suffering and losses among civilians. For these reasons, Sweden has, during the [CDDH] and elsewhere, worked for a strict limitation to the right to reprisal. Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[100]

92. Switzerland's Basic Military Manual states that "reprisals are measures contrary to international law taken by one of the belligerents to punish unlawful acts committed by the enemy Power and to bring them to a halt".[101]

93. Togo's Military Manual states that "as far as reprisals are concerned, under customary law, they are permitted to counter an unlawful act of warfare".[102] It also states that "acts of vengeance are prohibited".[103]

94. The UK Military Manual states that "reprisals between belligerents are acts of retaliation for illegitimate acts of warfare. One of their objects is to cause the enemy to comply in future with the recognised laws of war. Reprisals are by custom admissible as a means of securing legitimate warfare."[104] It further states that "the illegitimate acts in respect of which reprisals are admissible may be committed by a government, by its military commanders, or by some person or persons whom it is impossible, for the time being, to apprehend, try and punish".[105] The manual also notes that:

> Reprisals are an extreme measure of coercion, because in most cases they inflict suffering upon innocent individuals. Nevertheless, in the circumstances of war, they often provide the only remedy as a punishment, as a deterrent and as a means of inducing the enemy to desist from his unlawful conduct.[106]

[97] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c(5)(a).
[98] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(a).
[99] Spain, *LOAC Manual* (1996), Vol. I, § 11.10.c.
[100] Sweden, *IHL Manual* (1990), Section 3.5, p. 89.
[101] Switzerland, *Basic Military Manual* (1987), Article 197(1).
[102] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[103] Togo, *Military Manual* (1996), Fascicule I, p. 18.
[104] UK, *Military Manual* (1958), § 642.
[105] UK, *Military Manual* (1958), § 643.
[106] UK, *Military Manual* (1958), § 644.

In addition, in a footnote on a provision regarding the procedure before recourse to reprisals is made, the manual states that "a certain caution should be exercised before deciding to institute reprisals, as in some cases counter-reprisals may follow, thus defeating the purpose of the original reprisals".[107]

95. The UK LOAC Manual states that "under customary law reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: a. they are intended to secure legitimate warfare."[108] It also states that "reprisals are an unsatisfactory way of enforcing the law. They tend to be used as an excuse for illegal methods of warfare with a danger of escalation through repeated reprisals and counter-reprisals."[109] However, the manual also states that "the United Kingdom reserves the right to take proportionate reprisals against an enemy's civilian population or civilian objects where the enemy has attacked our own civilians or civilian objects in violation of [AP I]".[110]

96. The US Field Manual states that:

> Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.[111]

The manual further states that "reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices".[112] It goes on to say that "the rule requiring careful inquiry into the real occurrence will always be followed unless the safety of the troops requires immediate drastic action and the persons who actually committed the offence cannot be ascertained".[113] Furthermore, the manual notes that "the taking of prisoners by way of reprisal for acts previously committed (so-called "reprisal prisoners") is likewise forbidden (See GC [IV], art. 33)."[114]

97. The US Air Force Pamphlet states that:

> In order to be considered as a reprisal, an act must have the following characteristics when employed:
>
> (1) It must respond to grave and manifestly unlawful acts, committed by an adversary government, its military commanders, or combatants for whom the adversary is responsible.
> (2) It must be for the purpose of compelling the adversary to observe the law of armed conflict. Reprisals cannot be undertaken for revenge, spite or punishment. Rather, they are directed against an adversary in order to induce him to refrain from further violations of the law of armed conflict. Thus, reprisals serve as an ultimate legal sanction or law enforcement mechanism. Above all, they are justifiable only to force an adversary to stop its extra-legal activity.

[107] UK, *Military Manual* (1958), § 646, footnote 2.
[108] UK, *LOAC Manual* (1981), Section 4, p. 17, § 14.
[109] UK, *LOAC Manual* (1981), Section 4, p. 17, § 15.
[110] UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.
[111] US, *Field Manual* (1956), § 497(a).
[112] US, *Field Manual* (1956), § 497(d).
[113] US, *Field Manual* (1956), § 497(f).
[114] US, *Field Manual* (1956), § 497(g).

If, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those immediately responsible, then any action taken by another party to "right" the situation cannot be justified as a lawful reprisal.

(3) There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be undertaken.[115]

The Pamphlet also states that:

If an act is a lawful reprisal, then as a legal measure it cannot lawfully be the excuse for a counter-reprisal. Under international law, as under domestic law, there can be no reprisal against a lawful reprisal. In fact, reprisals have frequently led to counter-reprisals, and the escalation of the conflicts through reprisals and counter-reprisals is one of the reasons for decline in the use of reprisals.[116]

It further states that:

[The reprisal] must be publicized. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law.[117]

98. The US Air Force Commander's Handbook states that:

A reprisal is an otherwise illegal act committed to persuade the enemy to cease some illegal activity on their part . . .

(1) While it is both lawful and proper to plan reprisal actions, as a practical matter, reprisals are often subject to abuse and merely result in escalation of the conflict.

. . .

(3) In most twentieth century conflicts, the United States has, as a matter of national policy, chosen not to carry out reprisals against the enemy, both because of the potential for escalation and because it is generally in our national interest to follow the law even if the enemy does not.

(4) The term "reprisal" is sometimes used to refer to any act or retaliation between the parties to a conflict. In law, however, the term should be limited to otherwise illegal acts done in reply to prior illegal acts of the enemy, as described in this paragraph.[118]

99. The US Naval Handbook states that:

A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response

[115] US, *Air Force Pamphlet* (1976), § 10-7(c)(1), (2) and (3).
[116] US, *Air Force Pamphlet* (1976), § 10-7(a).
[117] US, *Air Force Pamphlet* (1976), § 10-7(c)(7).
[118] US, *Air Force Commander's Handbook* (1980), § 8-4(b).

to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict.[119]

It further states that:

To be valid, a reprisal action must conform to the following criteria:

...

2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized. ...
4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.[120]

The Handbook also provides that "although reprisal is lawful when the foregoing requirements are met, there is always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy. The United States has historically been reluctant to resort to reprisal for just this reason."[121]

100. The Annotated Supplement to the US Naval Handbook states that:

A careful inquiry by the injured belligerent into the alleged violating conduct should precede the authorization of any reprisal measure. This is subject to the important qualification that, in certain circumstances, an offended belligerent is justified in taking immediate reprisals against illegal acts of warfare, particularly in those situations where the safety of his armed forces would clearly be endangered by a continuance of the enemy's illegal acts.[122]

It also states that:

Acts taken in reprisal may also be brought to the attention of neutrals if necessary to achieve maximum effectiveness. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law and to ensure that the reprisal action is not, itself, viewed as an unlawful act.[123]

The Annotated Supplement further states that "if an act is a lawful reprisal, it cannot lawfully be a basis for a counter-reprisal. Under international law, there can be no reprisal against a lawful reprisal."[124] In another note, it states that "although it is not prohibited to issue ... an order [that no quarter will be given or that no prisoners will be taken] as a reprisal, this form of reprisal offers little military advantage".[125]

101. The YPA Military Manual of the SFRY (FRY) states that:

[119] US, *Naval Handbook* (1995), § 6.2.3.
[120] US, *Naval Handbook* (1995), § 6.2.3.1.
[121] US, *Naval Handbook* (1995), § 6.2.3.3.
[122] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 38.
[123] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 40.
[124] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 43.
[125] US, *Annotated Supplement to the Naval Handbook* (1997), § 11.7, footnote 45.

Reprisal, under the provisions of this military manual, means an act which is contrary to the laws of war, but whose unlawfulness is abolished because it is undertaken in response to acts of the enemy who does not respect the laws of war, in order to force him to stop such violations, and to respect the laws of war in future.[126]

In another provision entitled "Aim and duration of reprisals", the manual states that "the aim of reprisals is to prevent the enemy from repeating violations of the laws of war and to force him to respect the laws of war".[127] It further provides that "the armed forces of the SFRY shall undertake reprisals against the enemy exceptionally and temporarily . . . Reprisals shall not be undertaken for every violation of the laws of war by the enemy but only in response to preceding, serious and repeated violations."[128] Moreover, it states that "the taking of hostages is prohibited in reprisal as well".[129]

National Legislation

102. Under the DRC Code of Military Justice as amended, killing as a means of reprisal is prohibited.[130]

103. Italy's Law of War Decree as amended states that "reprisals have the aim of inducing the enemy to observe the obligations deriving from international law and can be carried out either by means of acts similar to those committed [by the enemy] or by means of acts of a different nature".[131]

104. Italy's Wartime Military Penal Code provides for the punishment of a commander who orders the taking of acts of reprisal – other than those permitted under the law or international conventions – or who does not order them to be stopped.[132]

105. Luxembourg's Law on the Repression of War Crimes states that putting a person to death by means of reprisal is considered to be murder.[133]

106. Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes", states that "no interest and no political, military or national necessity whatsoever can justify [war crimes under the 1949 Geneva Conventions and both AP I and AP II], not even as a means of reprisal".[134]

107. Under Spain's Penal Code "anyone who . . . carries out or orders . . . reprisals or violent acts or threats in order to terrify [the civilian population]" is punishable.[135]

[126] SFRY (FRY), *YPA Military Manual* (1988), § 27.
[127] SFRY (FRY), *YPA Military Manual* (1988), § 28.
[128] SFRY (FRY), *YPA Military Manual* (1988), § 29.
[129] SFRY (FRY), *YPA Military Manual* (1988), § 31.
[130] DRC, *Code of Military Justice as amended* (1972), Article 523.
[131] Italy, *Law of War Decree as amended* (1938), Article 8.
[132] Italy, *Wartime Military Penal Code* (1941), Article 176.
[133] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(3)
[134] Niger, *Penal Code as amended* (1961), Article 208.6.
[135] Spain, *Penal Code* (1995), Article 611.

National Case-law

108. In the *Priebke case* in 1996, the Military Tribunal of Rome stated that reprisals "are to carry out an act in order to bring a violation to an end or to deter the commission of other violations [of international law]". It went on to state that "a reprisal is based on the need to recognise the injured State a means of self-help allowing it to attack any interest of the offending State". The Tribunal further stated that:

> It is useful to underline that a reprisal must have as its objective prevention or repression, but not revenge. It must aim for the cessation or non-repetition of an illegitimate injurious act, and must be carried out in a direct manner for this purpose and must not be more serious as the [initial] violation. Otherwise it becomes an act which is itself unjust and illegitimate, giving rise to an endless spiral of disproportionate reactions.[136]

109. In the *Hass and Priebke case* in 1997, the Military Tribunal of Rome made a similar statement to the one made in its judgement in the *Priebke case* in 1996 and added that "reprisals basically are a sanction, that is a reaction to an unlawful act. The unlawfulness of the act to which it is replying gives lawfulness to the sanctional activities." It further recalled the definition of reprisals contained in Italy's Law of War Decree as amended.[137] In its relevant parts, this judgement was confirmed by Italy's Military Appeals Court and the Supreme Court of Cassation.[138]

110. In its judgement in the *Rauter case* in 1948, the Special Court (War Criminals) at The Hague observed that "it is in fact generally accepted that a belligerent has the right to take reprisals as a requital for unlawful acts of war committed by the opponent". Referring to the judgement of the US Military Tribunal at Nuremberg in the *List (Hostages Trial) case* as well as to the conditions required for reprisals in general by the UK and US military regulations, the Court stated, however, that reprisals may never be taken for revenge but only as a means of inducing the enemy to desist from unlawful practices of warfare.[139] Nevertheless, on appeal, the Special Court of Cassation of the Netherlands stated that:

> In the proper sense one can speak of reprisals only when a State resorts, by means of its organs, to measures at variance with International Law, on account of the fact that its opponent – in this case the State with which it is at war – had begun, by means of one or more of its organs, to commit acts contrary to International Law, quite irrespective of the question as to what organ this may have been,

[136] Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996, Section 7.

[137] Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997, Section 4.

[138] Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke* case, Judgement in Trial of Third Instance, 16 November 1998.

[139] Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.

Government or legislator, Commander of the Fleet, Commander of the Land Forces, or of the Air Force, diplomat or colonial governor. The measures which the appellant describes . . . as "reprisals" bear an entirely different character, they are indeed retaliatory measures taken in time of war by the occupant of enemy territory as a retaliation not of unlawful acts of the State with which it is at war, but of hostile acts of the population of the territory in question or of individual members thereof.[140]

111. In the *Bruns case* before the Norwegian Eidsivating Court of Appeal (sitting as the Tribunal of first instance) in 1946, the Counsel for Defence claimed that the Norwegian military organisation and its activities were at variance with international law and that the Germans in fighting the organisation were, therefore, justified in using methods contrary to international law. The German methods of carrying out interrogations had to be regarded as constituting reprisals. However, the Court held that the Norwegian underground military movement did not constitute a breach of international law and therefore the Germans were not justified in using torture against its members as a means of reprisal.[141] In the same case, the Norwegian Supreme Court stated that it could not be established that the acts of torture had been carried out as reprisals. Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. During the whole of the occupation there was no indication from the German side to the effect that their acts of torture were to be regarded as reprisals against the Norwegian military organisation. They appeared to be German police measures designed to extort during interrogations information which could be used to punish people or could eventually have led to real reprisals to stop activities about which information was gained. The method applied to the interrogatories ("*verschärfte Vernehmung*") was nothing but a German routine police method and could, therefore, not be regarded as a reprisal.[142]

112. In the *Flesch case* in 1946 in which a German national was charged with having ordered the killing of Norwegian citizens who had allegedly been members of the Norwegian underground movement, the Frostating Court of Appeal stated that whatever the legal position, an act of reprisal can in no circumstances be pleaded in exculpation unless it was, at the time, announced publicly as such, or it appeared from the act itself that it was intended as a reprisal and showed clearly against what unlawful acts it was directed. None of the incidents in question fulfilled any of these minimum demands. As the defendant maintained that the acts were acts of reprisal directed against a number of subversive acts, the Frostating Court of Appeal did not regard the alleged acts of sabotage carried out by soldiers in uniform as constituting a breach of international law and therefore concluded that the acts committed by the

[140] Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.
[141] Norway, Eidsivating Court of Appeal, *Bruns case*, Judgement, 20 March 1946.
[142] Norway, Supreme Court, *Bruns case*, Judgement, 3 July 1946.

accused could not be regarded as reprisals but must be considered as acts solely intended to terrorise the population in order to stem the underground movement.[143] In the same case, the Norwegian Supreme Court agreed with the view held by the Frostating Court of Appeal to the effect that the execution of the Norwegian citizens without previous trial could not be regarded as constituting justifiable reprisals and made reference to what had been held by the Supreme Court in the *Bruns case*.[144]

113. In the *List (Hostages Trial) case* in the late 1947/48, the US Military Tribunal at Nuremberg held that "a reprisal is a response to an enemy's violation of the laws of war which would otherwise be a violation on one's own side".[145] As to the difference between the taking of hostages and measures of reprisal, the Tribunal stated that:

> Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.

However, it stated that "the term 'reprisal prisoners' will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offences committed by unknown persons within the occupied area". It also stated that:

> Where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, International Law provides a protective mantle against the abuse of the right.[146]

Other National Practice

114. During the Algerian war of independence, the FLN denounced violations of IHL by French forces, stating that "it will be impossible for the FLN to respect the laws of war, if France persists in ignoring them".[147]

115. During discussions on reprisals in Committee I of the CDDH, Argentina welcomed the efforts of the French delegation with regard to the introduction of a provision on the prohibition of reprisals in AP I.[148] It further noted that the French proposal "should perhaps be completed so as to ensure that excessive reprisals did not lead to counter-reprisals".[149]

[143] Norway, Frostating Court of Appeal, *Flesch case*, Judgement, 2 December 1946.
[144] Norway, Supreme Court, *Flesch case*, Decision, 12 February 1948.
[145] US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, 8 July 1947–19 February 1948.
[146] US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, 8 July 1947–19 February 1948.
[147] *El Moudjahid*, Vol. 1, p. 372.
[148] Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 61, § 32.
[149] Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 61, § 35.

116. The Report on the Practice of Australia states that "Australia's *opinio juris* is, with certain exceptions, supportive of a prohibition against belligerent reprisals".[150]

117. During discussions on reprisals in Committee I of the CDDH, Austria stated that the French proposal on a prohibition of reprisals "gave a good definition of what a reprisal was", stating, however, that Austria "had great difficulty with the idea of introducing into humanitarian law a legal sanction of the law of war always regarded as incompatible with the very principle of humanity".[151]

118. During discussions on reprisals in Committee I of the CDDH, Belarus, opposing the French proposal on a prohibition of reprisals and referring to a number of international instruments, stated that "there was a clearly expressed general trend towards the prohibition of reprisals". It went on to say that "any toleration of the possibility of taking reprisals ... would be in radical conflict with the spirit and meaning of the Geneva Conventions ... Furthermore, it would run counter to a number of resolutions of the United Nations General Assembly."[152]

119. In 1981, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Foreign Affairs noted that AP I "has so effectively limited the areas of permissible reprisals as to virtually constitute a total ban on them".[153] As a counter-argument against a reservation on reprisals, it noted, *inter alia*, that "reprisals are punitive rather than protective in character and therefore do not belong within the framework of a humanitarian agreement" and that "they cannot be controlled and contribute to counter-reprisals and a general escalation of violence".[154] It further stated that:

> A reservation on reprisals would also affect the operation of the general obligation contained in Article 1 of [AP I], viz, "The High Contracting Parties undertake to respect and ensure respect for this Protocol in all circumstances". The phrase "in all circumstances" can be taken to include circumstances in which the adverse party is violating the Protocol.[155]

The memorandum also stated that:

> The "material breach" provision of the Vienna Convention on the Law of the Treaties (Article 60) cannot be invoked to permit a party to the Protocol to suspend

[150] Report on the Practice of Australia, 1998, Chapter 2.9.

[151] Austria, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 78, § 52.

[152] Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, pp. 80 and 81, §§ 61 and 62.

[153] Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada's attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 6.

[154] Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada's attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 8.

[155] Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada's attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 12.

the operation of the prohibition of reprisals in the face of e.g. enemy bombardment of the civilian population. The fifth paragraph of the Article 60 of the Convention . . . was expressly introduced in the Treaty to reinforce the already existing prohibitions against reprisals contained in the Geneva Conventions. It could therefore be argued that to enter a reservation on reprisals with respect to [AP I] defeats the object of the Conventions and Protocol and also the object of the relevant provision of the Vienna Convention. In other words, the reserving State would be attempting to do by reservation what it could not do by suspension of the agreement on the grounds of material breach.[156]

With regard to the compatibility of a possible reservation regarding reprisals in respect of AP I and Principle II of the Declaration on Principles Guiding Relations between Participating States of the Final Act of the CSCE Helsinki Summit of 1975, the memorandum noted that "the Final Act does not of course have the force of law except to the extent that it incorporates already binding obligations. Nevertheless, it comprises commitments undertaken at the highest political level on the part of the thirty-five states participating in the CSCE." It therefore stated that "a reservation regarding reprisals under [AP I] is thus likely to provoke allegations of non-compliance with the CSCE Final Act".[157]

120. In 1986, in an annex to a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that:

The expression "reprisal" is not defined in any international agreement. An acceptable definition would be as follows:

A reprisal is an otherwise illegal act of retaliation committed by one belligerent against another belligerent after that belligerent has violated the laws of war which is intended to cause that belligerent to comply in future with the laws of war. The act of reprisal must be proportional to the illegal act or acts committed by the other belligerent.[158]

It further noted that:

Under the [1949] Geneva Conventions, reprisals are permissible when directed against enemy military or civilian property or personnel behind the enemy's lines. Under [AP I], the only legitimate reprisal targets are enemy armed forces or military objectives. Since these are already legitimate targets, the only means for carrying out reprisals would be the use of unlawful methods of combat, such as denial of quarter, or the use of unlawful weapons, such as biological weapons or lethal gases . . . The use of such methods or weapons would be more likely to increase the scale or

[156] Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada's attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 13.

[157] Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada's attitude to possible reservations, Doc. FLO-830, 16 June 1981, §§ 14–15.

[158] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 1.

intensity of the conflict than a response to a violation which is proportional and similar in kind.[159]

The Ministry of Defence also stated that "it is difficult to point out individual cases where the possibility of reprisal deterred the commission of breaches of the law of armed conflict".[160]

121. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals and expressed regret that the term had not been adequately defined".[161]

122. During discussions on reprisals in Committee I of the CDDH, the representative of Czechoslovakia said that "his delegation was in favour of the absolute prohibition of all measures of reprisal".[162]

123. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

Add a new Article 74 bis [to AP I]:

1. Reprisals shall be prohibited under the present Protocol.
2. Nevertheless, in the event of a belligerent State infringing the regulations laid down by the present Protocol and the State victim of that breach considering the violation to be so serious and deliberate as to render it imperative to call upon its perpetrator to respect the law, the prohibition referred to in paragraph 1 of the present Article may be waived on condition . . .[163]

124. At the CDDH, France made another proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

Add a new Article 74 bis [to AP I]:

1. In the event that the Party to a conflict commits serious, manifest and deliberate breaches of its obligations under this Protocol, and a Party victimized by these breaches considers it imperative to take action to compel the Party violating its obligations to cease doing so, the victimized Party shall be entitled, subject to the provisions of this Article, to resort to certain measures which are designed to repress the breaches and induce compliance with the Protocol, but which would otherwise be prohibited by the Protocol.[164]

125. During discussions in the First Committee of the CDDH with respect to its delegation's draft provisions on reprisals in AP I, France noted that "many delegations had, in fact, felt that the effect of the proposal was to justify

[159] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 8.
[160] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 14.
[161] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[162] Czechoslovakia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 94, § 52.
[163] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.
[164] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

reprisals" but that "that was not the true aim of the proposal and in drafting it the French delegation had had in mind only the cause of humanitarian law".[165] It further noted that:

> The purpose of its proposal was not to allow the victim [of a breach of the law] to react with violence, but to give it the possibility under the Conventions of deterring the party committing the breach from continuing its action, of obliging it to respect the law. Such a threat ... should of course arise from "serious, manifest and deliberate" breaches not requiring recourse to a commission of inquiry. They would clearly not just be the individual breaches mentioned in [draft] article 74. Such a possibility of deterrence sanctioned by a convention would have to be limited by strict conditions.[166]

France also noted that "generally speaking, the French proposal was designed to cover cases in which, as the Oxford Manual stated, there was an urgent need to recall the party committing the breach to a respect for the rules to which it had subscribed".[167]

126. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, the FRG stated that "it supported proposals for a restriction on the right to resort to reprisals".[168]

127. During discussions on reprisals in Committee I of the CDDH, the GDR stated that his delegation felt that the French proposal on a prohibition of reprisals "would not help to implement [AP I] but would rather tend to weaken it; and he therefore strongly opposed it".[169]

128. The Report on the Practice of Germany states that the Rules of Engagement for the German Composite Force in Somalia provided that when it became necessary to open fire, "retaliation is forbidden".[170]

129. During discussions on reprisals in Committee I of the CDDH, Hungary, opposing the French proposal on a prohibition of reprisals, stated that "if the parties to the conflict were evenly balanced, reprisals would lead to counter-reprisals and thus to escalation, rather than to respect for law. When the forces were not evenly balanced, reprisals would merely increase the advantage of the stronger power."[171]

[165] France, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 58, § 15.
[166] France, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 58, § 24.
[167] France, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 58, § 27.
[168] FRG, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/28/SR.1452,3 December 1973, § 43.
[169] GDR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 72, § 27.
[170] Report on the Practice of Germany, 1997, Chapter 2.9, referring to Rules of Engagement for the German Composite Force in Somalia.
[171] Hungary, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 79, § 56.

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

> Reprisals or retaliation under international law are also governed by certain specific principles. First, reprisals to be valid and admissible could only be taken in response to a prior delict or wrongful act by a State . . . In other words, a nuclear weapon could not be used by way of reprisal against another State if that State did not commit any wrongful act or delict involving use of force.[172]

After pointing out the principle of proportionality and the obligation to respect "certain fundamental principles of humanitarian law", India stated that:

> In view of the above, use of nuclear weapons even by way of reprisal or retaliation, appears to be unlawful. In any case, if the wrongful use of force in the first instance did not involve the use of nuclear weapons, it is beyond doubt that even in response by way of retaliation States do not have the right to use nuclear weapons because of their special quality as weapons of mass destruction.[173]

131. According to the Report on the Practice of Iran, the *opinio juris* of Iran is supportive of the right to take reprisals. It states that in practice during the Iran–Iraq War, Iran resorted to reprisals. However, it also notes that in most cases, Iran stopped carrying out reprisals after Iraq had ceased attacking civilian objects.[174]

132. According to the Report on the Practice of Iraq, a reprisal is "a reaction from one party to the adverse party which undertook an act that led to damages thereto with the aim of revenge and deterrence".[175]

133. During discussions on reprisals in Committee I of the CDDH, the representative of Italy stated that "from the standpoint of the required conditions laid down, he could accept the [French] proposal [on a prohibition of reprisals] in principle".[176]

134. At the CDDH, in an explanation of vote, Mexico stated that:

> The delegation of Mexico could not have accepted that a Protocol intended to strengthen the law concerning warlike activities should authorize reprisals, even if it were claimed that the intention was to force the enemy to respect humanitarian law . . . Experience shows that reprisals do not lead the enemy to respect humanitarian law, but result in an increase in violations and hostilities.
>
> Legalization of reprisals, as proposed by France, would have enabled belligerents who were in breach of humanitarian law to claim every time that their breach was a legitimate reprisal sanctioned by international law. The delegation of Mexico believes that the mandatory nature of humanitarian law does not depend from the observance of its rules by the adverse Party, but stems from the inherently wrongful nature of the act prohibited by international humanitarian law. The Declaration on

[172] India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.
[173] India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 2–3.
[174] Report on the Practice of Iran, 1997, Chapter 2.9.
[175] Report on the Practice of Iraq, 1998, Chapter 2.9.
[176] Italy, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 77, § 48.

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, unanimously adopted by the United Nations General Assembly in its resolution 2625 (XXV) of 24 October 1970, prohibits reprisals involving the use of force. The delegation of Mexico maintains that this Declaration is a valid interpretation of the United Nations Charter, so that the prohibition in question is legally binding.[177]

135. During discussions on reprisals in Committee I of the CDDH, the Netherlands stated that "reprisals were a very questionable means of securing respect for humanitarian law". It further stated that "reprisals should remain a measure of last resort by which to induce an enemy to respect the law, provided that certain strict conditions and safeguards were observed".[178]

136. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that "a reprisal is a means of sanction, consisting in an act that itself is prohibited by international law, to which a State resorts in order to compel another State to cease a violation which that other State is committing". It further stated that:

> In practice, it will often be very difficult to fulfil all the requirements that make a reprisal a justified action. Moreover, reprisals can lead to counter-reprisals and create a risk of a fast escalation of violations of humanitarian law. Finally, reprisals are objectionable because, even if all conditions are met, they create victims among persons who have no fault in the immediate causes of the reprisals.[179]

It also noted that under AP I, only the section on means and methods of warfare did not contain any prohibition on reprisals. Adopting an *a contrario* reasoning resulting from this, it took the view that reprisals could only be taken in the event of the use of prohibited weapons or of acts of perfidy.[180]

137. During discussions on reprisals in Committee I of the CDDH, Norway stated that "it was doubtful whether a victim State or party would be helped by resorting to actions directed against the innocent, even if it had done so in the past. Reprisals might well have the opposite effect, and lead to counter-reprisals."[181]

138. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[182]

[177] Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 449–450.
[178] Netherlands, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 86, § 14.
[179] Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 40.
[180] Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 41.
[181] Norway, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 76, § 45.
[182] Report on the Practice of the Philippines, 1997, Chapter 2.9.

139. During discussions on reprisals in Committee I of the CDDH, the representative of Poland noted that:

> To admit reprisals, even on a limited or exceptional scale, would be a backward step. All reprisals against persons and objects were prohibited by the Hague and Geneva Conventions, and . . . prohibition should be confirmed and extended by the Protocol. Moreover, reprisals would be contrary to the spirit of both the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly Resolution 2625 (XXV)) . . . His delegation did not share the view of those who held that reprisals might help to ensure respect for international law. They could only lead to counter-reprisals, even if the strictest conditions were laid down . . . The Second World War had shown that it was completely possible to refrain from taking reprisals.[183]

140. During discussions on reprisals in Committee I of the CDDH, Switzerland stated that it supported the French amendment on a prohibition of reprisals "in principle".[184]

141. In 1988, in a note on the prohibition on the use of chemical weapons, the Swiss Federal Department of Foreign Affairs stated that "the 1925 Protocol declares a custom". It added that "the 1925 Protocol and custom prohibit the first use of chemical weapons and accept the lawfulness of second use only in the case of reprisals in kind".[185]

142. During discussions on reprisals in Committee I of the CDDH, the representative of the USSR, opposing the French proposal on a prohibition of reprisals, stated that his delegation was "really concerned with reprisals, and analysis revealed that they contravened the meaning and spirit of the Geneva Conventions of 1949 and draft [AP I]". He also stated that the implementation of the French proposal "could in practice lead to far-reaching consequences and could even undermine the basis of international humanitarian law" and that "his delegation took the view that reprisals were inhumane and unjust. They inevitably involved persons who had not participated in the original violation alleged to have taken place, and they mainly affected the civilian population."[186]

143. During discussions on reprisals in Committee I of the CDDH, the UK stated that it was "not true that at the present time [in 1976] the old system of lawful counter-measures was excluded; it still existed under customary law,

[183] Poland, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 63, §§ 42 and 43.

[184] Switzerland, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 65, § 50.

[185] Switzerland, Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs, 15 December 1988, reprinted in *Annuaire Suisse de Droit International*, Vol. 46, 1989, pp. 244–247 (in French) and in Marco Sassóli and Antoine A. Bouvier, *How Does Law Protect in War!*, ICRC, Geneva, 1999, pp. 608–610 (in English).

[186] USSR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, pp. 74 and 75, §§ 39 and 40.

and any exclusion must be expressed, as in the Geneva Conventions". It also stated that it would "support the principle embodied in [the French proposal on a prohibition of reprisals]".[187]

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

> A belligerent reprisal is an action, taken by a party to an armed conflict, which would normally constitute a violation of the laws of armed conflict but which is lawful because it is taken in response to a prior violation of that law by an adversary . . . To be lawful, a belligerent reprisal must meet two conditions . . . It must meet the criteria for the regulation of reprisals, namely that it is taken in response to a prior wrong . . . is undertaken for the purpose of putting an end to the enemy's unlawful conduct and for preventing further illegalities.[188]

145. In 1980, in a footnote to a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State noted that "reprisals are permitted under the laws of war only for the limited purpose of compelling the other belligerent to observe the laws of war".[189]

146. In 1987, a Legal Adviser of the US Department of State, explaining "the position of the United States on current law of war agreements", stated with regard to Article 51 AP I that "[this provision] prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations".[190]

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

> For the purpose of the law of armed conflict, reprisals are lawful acts of retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent in response to violations of the law of war by another belligerent. Such reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically, the reprisals must be taken with the intent to cause the enemy to cease violations of the law of armed conflict . . . As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the

[187] UK, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 74, § 38.

[188] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 58.

[189] US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.

[190] US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 22 January 1987, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 469.

basis of the actual circumstances in each case, and could not be made in advance or in the abstract.[191]

148. During discussions on reprisals in Committee I of the CDDH, the representative of Venezuela stated that the French proposal on a prohibition of reprisals "was excellent". However, he suggested that the final text "should also include a formal prohibition of counter-reprisals so as to avoid situations in which the parties to a conflict become involved in a vicious circle and also because counter-reprisals were a negation of the law".[192]

149. In 1991, notwithstanding the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, according to which these States agreed that hostilities should be conducted in accordance with, *inter alia*, Articles 48–58 AP I, the YPA issued a general warning to the attention of the Croatian authorities to the effect that "a number of impudent crimes has been committed against the members of the Y.P.A. . . . Family members of the Y.P.A. are being maltreated, persecuted and destroyed in many different ways. This cannot be tolerated any longer." The YPA therefore warned that:

1. For every attacked and seized object of the [YPA] – an object of vital importance for the Republic of Croatia will be destroyed immediately.
2. For every attacked and occupied garrison – an object of vital importance to the town in which the garrison is located will be destroyed. This is, at the same time, a warning to civilian persons to abandon such settlement in time.[193]

According to the Report on the Practice of the SFRY (FRY), "this warning calls for detailed analysis, but arguably it can be classified as a threat of the use of belligerent reprisals".[194]

III. Practice of International Organisations and Conferences

United Nations

150. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 49 entitled "Object and limits of countermeasures", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[195]

[191] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 30.
[192] Venezuela, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 72, §§ 30 and 32.
[193] SFRY, Headquarters of the Supreme Command of the Armed Forces of the S.F.R.Y, Warning to the attention of the President of Croatia, the Government of Croatia and the General Staff of the Croatian Army, 1 October 1991.
[194] Report on the Practice of the SFRY (FRY), 1997, Chapter 2.9.
[195] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

151. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

> 63. A reprisal must be distinguished from a simple act of retaliation or vengeance. An unlawful act committed under the guise of retaliation or vengeance remains unlawful, and the claim of retaliation or vengeance is no defence.
> 64. A reprisal is an otherwise illegal act resorted to after the adverse party has himself indulged in illegal acts and refused to desist therefrom after being called upon to do so. The purpose of a reprisal is to compel the adverse party to terminate its illegal activity.[196]

Other International Organisations

152. No practice was found.

International Conferences

153. The Declaration on Principles Guiding Relations between Participating States of the Final Act of the CSCE Helsinki Summit of 1975 provides, *inter alia*, that the participating States "will also refrain in their mutual relations from any act of reprisal by force".[197]

IV. Practice of International Judical and Quasi-judicial Bodies

154. In its advisory opinion in the *Namibia case* in 1971, the ICJ considered it to be a general principle of law that "a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character".[198]

155. In the *Naulilaa case* in 1928 regarding acts taken by Germany against Portugal in reprisal for the killing of three German officials by Portuguese soldiers, the Special Arbitral Tribunal stated that:

> The latest doctrine, and more particularly German doctrine, defines reprisals in these terms:
>
> Reprisals are an act of taking the law into its own hands . . . by the injured State, an act carried out – after an unfulfilled demand – in response to an act contrary to the law of nations by the offending State. Their effect is to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations. They are limited by the experiences of mankind and the rules of good faith, applicable in relations between States. They would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive.[199]

[196] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 63–64.
[197] CSCE, Final Act of the 1975 Summit, Declaration on Principles Guiding Relations between Participating States, Helsinki, 1 August 1975, Principle II.
[198] ICJ, *Namibia case*, Advisory Opinion, 21 June 1971, § 96.
[199] Special Arbitral Tribunal, *Naulilaa case*, Decision, 31 July 1928, pp. 1025–1026.

156. In the *Cysne case* in 1930 dealing with the destruction of a Portuguese vessel by Germany in reprisal for violations of international law by the UK, the Special Arbitral Tribunal stated that:

> As the respondent maintains, an act contrary to international law may be justified, by way of reprisals, if motivated by a like act . . . However, the German argument, which is sound up to this point, overlooks an essential question which can be put in the following terms: Could the measure which the German Government was entitled to take, by way of reprisals against Great Britain and its allies, be applied to neutral vessels and specifically to Portuguese vessels?
>
> The answer must be in the negative, even according to the opinion of German scholars. This answer is the logical consequence of the rule that reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were provoked by some other act likewise contrary to that law. Only reprisals taken against the provoking State are permissible. Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavor to avoid or to limit as far as possible. By contrast, the measures taken by the German State in 1915 against neutral merchant vessels were aimed directly and deliberately against the nationals of States innocent of the violations of the London Declaration attributed to Great Britain and its allies. Consequently, not being in conformity with the Declaration, they constituted acts contrary to the law of nations, unless one of the neutral States had committed against Germany an act contrary to the law of nations that could make it liable to reprisals. There is no evidence of any such act having been committed by Portugal, and the German claim relies exclusively on the acts committed by Great Britain and its allies. Hence, in the absence of any Portuguese provocation warranting reprisals, the German State must be held not to have been entitled to violate article 23 of the Declaration in respect of Portuguese nationals. Accordingly, it was contrary to the law of nations to treat the cargo of the *Cysne* as absolute contraband.[200]

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

157. No practice was found.

VI. Other Practice

158. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that:

> (1) Subject to Subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures
>
> (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and
>
> (b) are not out of proportion to the violation and the injury suffered.

[200] Special Arbitral Tribunal, *Cysne case*, Decision, 30 June 1930, pp. 1956–1057.

(2) The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to Subsection (1).[201]

159. Greenwood states that:

It has never been doubted that reprisals may only be taken in response to a violation of international law by the party against which they are directed (or its ally). In the case of belligerent reprisals, however, a question arises about the nature of the prior violation which provides the justification for the reprisal. Belligerent reprisals consist of acts which, if they could not be justified as reprisals, would constitute violations of the law which regulates the conduct of war or armed conflict . . . The better view is . . . that belligerent reprisals may lawfully be taken only in response to a prior violation of the law of armed conflict and not in retaliation for an unlawful resort to force.
. . .
The prior violation to which the reprisals are a response must be imputable to the State against which the reprisals are directed, or perhaps to an ally of that State . . . Allies of a State which is responsible for a violation of the laws of armed conflict may also be subjected to reprisals where they are themselves implicated in the violation and probably even where they have no direct involvement if the violation takes the form of a policy of conducting hostilities in a particular way. Thus, the United Kingdom extended the maritime reprisals adopted against Germany to Italy and Japan when they entered the Second World War. The United Kingdom maintained that, in allying themselves with Germany, Italy and Japan had made themselves "party to the methods of waging war adopted by Germany" and would "share in any advantages derived therefrom".[202]

Measure of last resort

I. Treaties and Other Instruments

Treaties

160. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that this would be true "only after [a] formal warning to the adverse party requiring cessation of the violations has been disregarded".[203]

Other Instruments

161. Article 52 of the 2001 ILC Draft Articles on State Responsibility, entitled "Conditions relating to resort to countermeasures", states that:

[201] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 905.
[202] Christopher Greenwood, "The Twilight of the Law of Belligerent Reprisals", *Netherlands Yearbook of International Law*, Vol. 20, 1989, pp. 40–43. On the extension by the UK of maritime reprisals adopted against Germany to Italy, see also Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 120 and 156.
[203] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

1. Before taking countermeasures, an injured State shall:
   (a) Call on the responsible State . . . to fulfil its obligations under Part Two [Articles 28–41];
   (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

II. National Practice

Military Manuals

162. Australia's Defence Force Manual states that "some nations may not comply with LOAC in the conduct of armed conflict. Where this occurs, and all methods of persuasion and diplomatic pressure have failed, reprisals may be justified but only against military objectives."[204] It adds that "in any case, reprisals must . . . only be resorted to after lesser forms of redress have been tried".[205]

163. Belgium's Law of War Manual states that, when recourse is made to reprisals, the following conditions must be fulfilled: "2) attempts must first be made to stop [the violation of the LOAC by the adversary] or to prevent its repetition by peaceful means".[206]

164. Benin's Military Manual states that reprisals "may only be used if: . . . a prior warning is given".[207]

165. Canada's LOAC Manual provides that:

To qualify as a reprisal, an act must satisfy the following conditions:

. . .

c. There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be undertaken;
d. The victim of a violation must first exhaust other reasonable means of securing compliance in order to justify taking a reprisal.[208]

166. Croatia's LOAC Compendium states that a condition for a reprisal is that it is a "last resort" and that "prior warning" be given.[209]

167. Ecuador's Naval Manual provides that:

To be valid, a reprisal action must conform to the following criteria:

. . .

3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.

[204] Australia, *Defence Force Manual* (1994), § 1309; see also *Commanders' Guide* (1994), § 1210.
[205] Australia, *Defence Force Manual* (1994), § 1310; see also *Commanders' Guide* (1994), § 1211.
[206] Belgium, *Law of War Manual* (1983), p. 35.
[207] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[208] Canada, *LOAC Manual* (1999), p. 15-3, § 17.
[209] Croatia, *LOAC Compendium* (1991), p. 19.

...

5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.[210]

168. France's LOAC Manual states that reprisals must always be preceded by a warning.[211]

169. Germany's Military Manual provides that "reprisals ... shall be the last resort, if all other means to stop the illegal behaviour have failed and the warning has not been heeded".[212]

170. Hungary's Military Manual states that a condition for a reprisal is that it is a "last resort" and that "prior warning" be given.[213]

171. Indonesia's Air Force Manual provides that:

> In principle, reprisals in warfare are prohibited, i.e. an act which categorize[s] against the laws of war and aim[s] to [answer to] the breach of the laws of war treaties committed by the adverse party. The reprisal could be allowed if, although it has been warned, the adverse party still continue[s] to violate the laws of war.[214]

172. Kenya's LOAC Manual states that reprisals "can only be taken if ... prior warning is given".[215]

173. The Military Manual of the Netherlands, referring to customary law, states that reprisals are in principle allowed, provided that a number of conditions are fulfilled. Among these conditions it lists that "it must first have been tried to stop the violation of humanitarian law of war by other means (for example by the intervention of a protecting power)".[216]

174. New Zealand's Military Manual states that:

> There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend on the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adverse Party that reprisals will be undertaken.
>
> The victim of a violation must first exhaust other reasonable means of securing compliance in order to justify taking reprisal.[217]

175. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria".[218]

176. Spain's LOAC Manual, in the chapter dealing with the exercise of command and its restrictions with regard to reprisals, states that "reprisals must be the ultimate resort to re-establish respect for the law of war and may not

[210] Ecuador, *Naval Manual* (1989), § 6.2.3.1.
[211] France, *LOAC Manual* (2001), p. 109.
[212] Germany, *Military Manual* (1992), § 478.
[213] Hungary, *Military Manual* (1992), p. 35.
[214] Indonesia, *Air Force Manual* (1990), § 15(c).
[215] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[216] Netherlands, *Military Manual* (1993), p. IV-5.
[217] New Zealand, *Military Manual* (1992), § 1606(4)(c) and (d).
[218] South Africa, *LOAC Manual* (1996), § 34(e).

lose sight of this aim".[219] In the chapter dealing with methods of combat, the manual lists among the conditions which must be fulfilled for the lawful taking of reprisals that: "they must be a last resort to re-establish respect for the laws of war"; that the State which takes reprisals "has unsuccessfully tried to make the enemy respect the law of war or that such attempts would be of no use"; and that the enemy has been formally warned of the measure that would be taken if it failed to comply with or repeated its violations of the law of war.[220]

177. Togo's Military Manual states that reprisals "may only be used if: . . . a prior warning is given".[221]

178. The UK Military Manual states that:

> An infraction of the laws of war having been definitely established, every effort should first be made to detect and punish the actual offenders. Only if this is impossible may recourse be had to reprisals, if the injured belligerent is of the opinion that the facts warrant them. As a rule, the injured party must not at once resort to reprisals, but must first lodge a complaint with the enemy (or with a neutral Power, for transmission to the enemy) with a view to preventing any repetition of the offence and to securing the punishment of the guilty. This course should always be pursued unless the safety of the troops requires immediate drastic action and the persons who actually committed the offences cannot be secured.[222]

179. The UK LOAC Manual states that reprisals can only be taken if "prior warning is given".[223]

180. The US Field Manual states that:

> Priority to Other Remedies. Other measures of securing compliance with the law of war should normally be exhausted before resort is had to reprisals. This course should be pursued unless the safety of the troops requires immediate drastic action and the persons who actually committed the offences cannot be secured. Even when appeal to the enemy for redress has failed, it may be a matter of policy to consider, before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of war on the part of their adversary.[224]

The manual stresses that "reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices".[225]

181. The US Air Force Pamphlet, in explaining reprisals, states that "the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future".[226] It further states that:

> In order to be considered a reprisal, an act must have the following characteristics when employed:

[219] Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(6).
[220] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(a).
[221] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[222] UK, *Military Manual* (1958), § 646.
[223] UK, *LOAC Manual*, Section 4, p. 17, § 14(b).
[224] US, *Field Manual* (1956), § 497(b).
[225] US, *Field Manual* (1956), § 497(d).
[226] US, *Air Force Pamphlet* (1976), § 10-7(a).

...

(3) There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be undertaken.

(4) Other reasonable means to secure compliance must be attempted. The victim of a violation in order to justify taking a reprisal must first exhaust other reasonable means of securing compliance. This may involve appeals or notice ... Finally, even if an appeal or other methods fail, reprisals should not be undertaken automatically since there are various other factors governing their employment.[227]

182. The US Air Force Commander's Handbook states that "the taking of reprisals should be preceded by a request for redress of the wrong".[228]

183. The US Naval Handbook provides that:

To be valid, a reprisal action must conform to the following criteria:

...

3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.

...

5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.[229]

184. The YPA Military Manual of the SFRY (FRY) states that "before they undertake reprisals, the armed forces of the SFRY shall try to force the enemy to respect the laws of war by means of other methods for preventing violations of such laws".[230]

National Legislation

185. No practice was found.

National Case-law

186. In its judgement in the *Hass and Priebke case* in 1997, the Military Tribunal of Rome stated that, according to the unanimous views of writers, reprisals were legitimate only when they appeared as the only possible reaction because all possible means of identification and capture of the author of the unlawful act had been exhausted.[231] In its relevant parts, this judgement was confirmed by the Military Appeals Court and the Supreme Court of Cassation.[232]

[227] US, *Air Force Pamphlet* (1976), § 10-7(c).
[228] US, *Air Force Commander's Handbook* (1980), § 8-4(b)(2).
[229] US, *Naval Handbook* (1995), § 6.2.3.1.
[230] SFRY (FRY), *YPA Military Manual* (1988), § 29.
[231] Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in the Trial of First Instance, 22 July 1997, Section 4.
[232] Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.

187. In its judgement in the *Rauter case* in 1948, the Special Court (War Criminals) at The Hague referred to the judgement of the US Military Tribunal at Nuremberg in the *List (Hostages Trial) case*, as well as to the conditions required for reprisals in general by the UK and US military regulations, and stated that, accordingly, reprisals were admitted only as a measure of last resort.[233]
188. In its judgement in the *List (Hostages Trial) case* in the late 1940s, the US Military Tribunal at Nuremberg, discussing the taking of hostages in occupied territories, noted that "the occupant is required to use every available method to secure order and tranquillity before resort may be had to the taking and execution of hostages". However, the Tribunal had previously stated that:

> Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.[234]

Other National Practice
189. The Report on the Practice of Australia states that "Australia's *opinio juris* is, with certain exceptions, supportive of a prohibition against belligerent reprisals". It adds, however, that "Australian *opinio juris* does not consider that exceptions to the prohibition against reprisals, where these represent measures of last resort, will place it in breach of its customary obligations".[235]
190. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

> 2. ... The prohibition [of the taking of reprisals] may be waived on condition:
> (a) that the Party victim of the breach clearly has no means of putting an end to the breach other than by considering recourse to reprisals,
> ...
> (c) that the Party responsible for the violation shall be given due warning that such measures will be taken if the violation is continued or renewed.[236]

191. At the CDDH, France made another proposal for a draft Article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

> 2. The measures [which are designed to repress the breaches of and induce compliance with the Protocol] may be taken only when the following conditions are met:
> (a) The measures may be taken only when other efforts to induce the adverse Party to comply with the law have failed or are not feasible, and the victimized Party clearly has no other means of ending the breach;
> ...

[233] Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.
[234] US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.
[235] Report on the Practice of Australia, 1997, Chapter 2.9.
[236] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.

(c) The Party committing the breach must be given specific, formal, and prior warning that such measures will be taken if the breach is continued or renewed.[237]

192. During discussions on reprisals at the CDDH, the representative of the Netherlands that "reprisals were a very questionable means of securing respect for humanitarian law". He also said that his delegation felt that "reprisals should remain a measure of last resort".[238]

193. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that for a reprisal to be lawful "the taking of the reprisal as such must be announced [and] other attempts to force the other party to comply with international law must have failed".[239]

194. In a written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

> The Netherlands Government ... believes that even if it were to be assumed that the (first) use of nuclear weapons by a State were unlawful *per se* under present international law – *quod non* –, this would not necessarily exclude the permissibility of the use of nuclear weapons by way of belligerent reprisal against an unlawful use of (nuclear) weapons, provided of course the retaliating State observed the conditions set by international law for the taking of lawful reprisals, i.e. satisfies, *inter alia*, the requirement that the retaliation ... serves as an *ultimum remedium*.[240] [emphasis in original]

195. In a written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that "to be lawful, a belligerent reprisal must meet two conditions ... It must meet the criteria for the regulation of reprisals, namely that it is ... a means of last resort."[241]

196. In 1980, in a footnote to a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State stated that "reprisals are permitted under the laws of war ... only after other means of achieving this objective [i.e. "the limited purpose of compelling the other belligerent to observe the laws of war"] have been exhausted (including diplomatic protest)".[242]

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[237] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

[238] Netherlands, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 86, § 14.

[239] Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, pp. 40.

[240] Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 29.

[241] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 58.

[242] US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.

197. In a written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

> Reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically . . . other means of securing compliance [of the enemy with the law of armed conflict] should be exhausted . . . As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the basis of the actual circumstances in each case, and could not be made in advance or in the abstract.[243]

III. Practice of International Organisations and Conferences

United Nations

198. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 52 entitled "Conditions relating to resort to countermeasures", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[244]

199. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that "a reprisal is an otherwise illegal act resorted to after the adverse party has himself indulged in illegal acts and refused to desist therefrom after being called upon to do so".[245]

Other International Organisations

200. No practice was found.

International Conferences

201. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

202. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

> It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst

[243] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 30.
[244] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[245] UN Commission of Experts established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 63–64.

other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes).[246]

203. In the *Naulilaa case* in 1928 regarding acts taken by Germany against Portugal in reprisal for the killing of three German officials by Portuguese soldiers, the Special Arbitral Tribunal stated that "reprisals . . . are an act carried out – after an unfulfilled demand" and that "reprisals are only lawful when preceded by an unsatisfied demand. The use of force is only satisfied by its character of necessity."[247]

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

204. No practice was found.

VI. Other Practice

205. Kalshoven states that:

The requirement of subsidiarity has generally been taken to mean that recourse to belligerent reprisals is an exceptional measure which must be regarded as an ultimate remedy, after other available means of a less exceptional character have failed. Applying this criterion to inter-State belligerent reprisals (as opposed to State-to-population or quasi-reprisals), it would imply that protests, warnings appeals to third parties and other suitable means must have remained without effect, or so obviously been doomed to failure that there was no need to attempt them first. Nor is this an unreasonable requirement even in time of war: the practice of belligerents shows a frequent recourse to such comparatively innocent means as protests, appeals to international public opinion, complaints lodged with appropriate international bodies, threats to punish individual war criminals, and so on. Indeed, it would seem that in no instance have belligerent reprisals been taken without previous attempts to obtain satisfaction in other ways, or in any event without its having been considered that these would have been possible. However, on theoretical considerations the possibility cannot be excluded of situations where the fruitlessness of any other remedy but reprisals is apparent from the outset. In such exceptional situations, too, recourse to reprisals can be regarded as an ultimate remedy and, hence, as meeting the requirement of subsidiarity.[248]

206. Greenwood notes that "reprisals are a subsidiary means of redress and thus should be used only as a last resort. This principle is often expressed in terms of a requirement that a State must actually employ all other methods of securing redress before recourse is had to reprisals." With regard to the exceptional cases referred to by Kalshoven, he states that:

While the availability of other sanctions for violations of the law of armed conflict should not be underestimated, it is likely that there will be occasions when the

[246] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.
[247] Special Arbitral Tribunal, *Naulilaa case*, Decision, 31 July 1928, pp. 1026–1027.
[248] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 340.

possibility to which Kalshoven refers will be more than theoretical . . . However, the use of reprisals in an armed conflict is such a serious step and may have such disastrous consequences that the requirement that all reasonable steps be taken to achieve redress by other means before reprisals are ordered is probably one which should be strictly insisted upon, unless delay will endanger the safety of troops or civilians.[249]

Proportionality of reprisals

I. Treaties and Other Instruments

Treaties

207. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that "any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto".[250]

Other Instruments

208. Article 86 of the 1880 Oxford Manual provides that "in grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy".

209. Article 51 of the 2001 ILC Draft Articles on State Responsibility, entitled "Proportionality", provides that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question".

II. National Practice

Military Manuals

210. Australia's Defence Force Manual and Commanders' Guide state that "in any case, reprisals must be timely, responsive to the enemy's conduct [and] proportional".[251]

211. Belgium's Law of War Manual states that, when recourse is made to reprisals, the following conditions must be fulfilled: "3) the damage suffered by the adversary must be proportionate to the damage that he has caused".[252]

[249] Christopher Greenwood, "The Twilight of the Law of Belligerent Reprisals", *Netherlands Yearbook of International Law*, Vol. 20, 1989, p. 47.
[250] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).
[251] Australia, *Defence Force Manual* (1994), § 1310; *Commanders' Guide* (1994), § 1211.
[252] Belgium, *Law of War Manual* (1983), p. 35.

212. Benin's Military Manual states that reprisals "may only be used if: . . . they are proportional to the violation of the law of war committed by the enemy".[253]
213. Canada's LOAC Manual states that:

> [The reprisal] must be proportionate to the original wrongdoing, and must be terminated as soon as the original wrongdoer ceases the illegal actions. Proportionality is not strict, for, if the reprisal is to be effective, it may often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure.[254]

The manual further provides that:

> To qualify as a reprisal, an act must satisfy the following conditions:
> . . .
> f. A reprisal must be proportional to the original violation. Although a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adversary's violation either in violence or effect.[255]

214. Croatia's LOAC Compendium states that a condition for reprisals is that they be "proportionate".[256]
215. Ecuador's Naval Manual provides that "to be valid, a reprisal action must conform to the following criteria: . . . 6. Each reprisal must be proportional to the original violation".[257]
216. Germany's Military Manual provides that "reprisals shall not be excessive in relation to the offence committed by the adversary".[258]
217. Hungary's Military Manual states that a condition for reprisals is that they be "proportionate".[259]
218. Italy's IHL Manual provides that "the reprisal must be sufficiently proportionate to the gravity of the offence suffered and may not consist, except in cases of absolute necessity, in belligerent acts directed against the civilian population".[260]
219. Kenya's LOAC Manual states that "under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: . . . they are proportionate to the breach of the law of war committed by the enemy."[261]
220. The Military Manual of the Netherlands, referring to customary law, states that reprisals are in principle allowed, provided that a number of conditions are fulfilled. Among these conditions, it states that "the damage

[253] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[254] Canada, *LOAC Manual* (1999), p. 15-2, § 14.
[255] Canada, *LOAC Manual* (1999), p. 15-3, § 17.
[256] Croatia, *LOAC Compendium* (1991), p. 19.
[257] Ecuador, *Naval Manual* (1989), § 6.2.3.1.
[258] Germany, *Military Manual* (1992), § 478.
[259] Hungary, *Military Manual* (1992), p. 35.
[260] Italy, *IHL Manual* (1991), Vol. I, § 23.
[261] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

to be caused to the adversary and the damage unlawfully suffered must be proportional".[262]

221. New Zealand's Military Manual states that:

> [The reprisal] must be proportionate to the original wrongdoing... The proportionality is not strict: if the reprisal is to be effective, it will often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure.[263]

The manual further states that:

> In order to be considered a reprisal, an act must have certain characteristics:... A reprisal must be proportional to the original violation. Although a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adverse Party's violation either in violence or in effect. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall further transgressions.[264]

222. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria".[265]

223. Spain's LOAC Manual states that "the action must be in proportion to the violation committed by the enemy".[266]

224. Togo's Military Manual states that reprisals "may only be used if:... they are proportional to the violation of the law of war committed by the enemy".[267]

225. The UK Military Manual states that "what kinds of acts should be resorted to as reprisals is a matter for consideration by the injured party. Acts done by way of reprisals must not, however, be excessive. They must bear a reasonable relation to the degree of violation committed by the enemy."[268] In a footnote relating to this provision, the manual refers to the Nuremberg trials and states that:

> Acts of reprisal that are grossly excessive against non-protected persons... constitute a war crime. During the Second World War German forces applied a "hundred to one" order in occupied territories, whereby one hundred civilians would be seized at random and shot as a reprisal for the killing of one German. On occasions civilians already held as prisoners were shot in the same proportion.[269]

226. The UK LOAC Manual states that reprisals can only be taken if "they are in proportion to the violation complained of".[270]

[262] Netherlands, *Military Manual* (1993), p. IV-5.
[263] New Zealand, *Military Manual* (1992), § 1606(1).
[264] New Zealand, *Military Manual* (1992), § 1606(4)(f).
[265] South Africa, *LOAC Manual* (1996), § 34(e).
[266] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(a).
[267] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[268] UK, *Military Manual* (1958), § 648.
[269] UK, *Military Manual* (1958), § 648, footnote 1.
[270] UK, *LOAC Manual* (1981), Section 4, p. 17, § 14(c).

227. The US Field Manual states that "what kinds of acts should be resorted to as reprisals is a matter for consideration by the injured party. Acts done by way of reprisals must not, however, be excessive. They must bear reasonable relation to the degree of violation committed by the enemy."[271]

228. The US Air Force Pamphlet states that:

A reprisal must be proportional to the original violation. Although a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adversary's violation either in violence or effect. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall further transgressions.[272]

229. The US Naval Handbook provides that "to be valid, a reprisal action must conform to the following criteria: . . . 6. Each reprisal must be proportional to the original violation."[273]

230. The Annotated Supplement to the US Naval Handbook states that:

This rule [that a reprisal must be proportional to the original violation] is not of strict equivalence because the reprisal will usually be somewhat greater that the initial violation that gave rise to it. However, care must be taken that the extent of the reprisal is measured by some degree of proportionality and not solely by effectiveness. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall a further transgression . . . The acts resorted to by way of reprisal need not conform in kind to those complained of by the injured belligerent. The reprisal action taken may be quite different from the original act which justified it, but should not be excessive or exceed the degree of harm required to deter the enemy from continuance of his initial unlawful conduct.[274]

231. The YPA Military Manual of the SFRY (FRY) states that "reprisals may be undertaken by application of the same or similar measures. The consequences of such measures must be proportionate to the consequences that the enemy caused by violating the laws of war."[275] The manual further states that:

When reprisals are undertaken, care must be taken that they be in proportion to the seriousness of the violations committed by the enemy, that is, that the seriousness of the reprisals undertaken corresponds to the seriousness of the violations of the laws of war committed by the enemy.[276]

National Legislation

232. No practice was found.

[271] US, *Field Manual* (1956), § 497(e).
[272] US, *Air Force Pamphlet* (1976), § 10-7(c)(6).
[273] US, *Naval Handbook* (1995), § 6.2.3.1.
[274] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 43.
[275] SFRY (FRY), *YPA Military Manual* (1988), § 27.
[276] SFRY (FRY), *YPA Military Manual* (1988), § 29.

National Case-law

233. In its judgement in the *Kappler case* in 1948, Italy's Military Tribunal of Rome found that the massacre of 335 prisoners in the Ardeatine Caves, ordered as a reprisal for a bomb attack by the Italian resistance which killed 33 German military policemen, was disproportionate, because of the ratio of 10:1 and because of the ranks of the executed Italian prisoners.[277]

234. In its judgement in the *Priebke case* in 1996 in connection with the Ardeatine Caves massacre during the Second World War, Italy's Military Tribunal of Rome stated that "the principle of proportionality has never been questioned by international law scholars, as it finds its origin in the unquestionable axioms of rationality". The Tribunal found that the executions were grossly disproportionate.[278]

235. In its judgement in the *Hass and Priebke case* in 1997 concerning the Ardeatine Caves massacre during the Second World War, Italy's Military Tribunal of Rome, with respect to the conditions required for a reprisal, stated that "also such a reaction must be proportionate to the damage suffered". It found unacceptable the disproportion between the deaths of 33 German soldiers and the execution of 335 persons.[279] In its relevant parts, the decision was confirmed by the Military Appeals Court and the Supreme Court of Cassation.[280]

236. In its judgement in the *Rauter case* in 1948, the Special Court (War Criminals) at The Hague referred to the judgement of the US Military Tribunal at Nuremberg in the *List (Hostages Trial) case*, as well as to the conditions required for reprisals in general by the UK and US military regulations and stated that, accordingly, the taking of reprisals required a due proportion between the acts undertaken in reprisals and the original offence. It found, *inter alia*, that by killing several hostages at a time for the death of one member of the German authorities, the accused had committed excessive reprisals in violation of the rule requiring due proportion.[281] In its judgement on appeal in 1949, the Special Court of Cassation of the Netherlands also stated, *inter alia*, that genuine reprisals may be taken, "provided they are taken within certain limits and provided attention is paid to a certain proportion".[282]

237. In its judgement in the *List (Hostages Trial) case* in the late 1940s, the US Military Tribunal at Nuremberg stated that "it is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct.

[277] Italy, Military Tribunal of Rome, *Kappler case*, Judgement, 20 July 1948.
[278] Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996, Section 7.
[279] Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997, Section 4.
[280] Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.
[281] Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.
[282] Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.

Where an excess is knowingly indulged, it in turn is criminal and may be punished."[283]

Other National Practice

238. In 1967, a Belgian Senator stated with respect to bombardments of North Vietnam by the US that "it is recognised today that [reprisals] must be proportionate to the injury suffered. In case one has not suffered any damage, as it was the case, it is incomprehensible to pretend to start a period of bombardments on North Vietnam, as reprisals for attacks on the high sea."[284]

239. In 1986, in an annex to a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that "the act of reprisal must be proportional to the illegal act or acts committed by the other belligerent".[285]

240. According to the Report on the Practice of China, in 1972, during the conflict in the Middle East, China condemned Israeli reprisals allegedly "not in conformity with the principle of proportionality".[286]

241. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

> 2. ... The prohibition [of the taking of reprisals] may be waived on condition:
> ...
> (d) that the means of application and the extent of such measures, if it proves imperative to take them, shall in no case exceed the extent of the breach which they are designed to end.[287]

242. At the CDDH, France made another proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. If it proves imperative to take these measures, their extent and their means of application shall in no case exceed the extent of the breach which they are designed to end. The measures may not involve any actions prohibited by the Geneva Conventions of 1949."[288]

243. At the CDDH, the FRG, with regard to the French proposal for a draft article on reprisals, held that the principle of proportionality laid down therein was based on "precedents established in 1928 and 1930, which were now universally recognised".[289]

[283] US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.
[284] Belgium, Parliamentary Debates, 30 November 1967, *Annales Parlementaires*, Senate, p. 95, reprinted in *RBDI*, Vol. 6, 1970, pp. 656–657.
[285] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 1.
[286] Report on the Practice of China, 1997, Chapter 2.9, referring to a Statement on the Middle East made by the Vice Foreign Minister, 5 December 1972.
[287] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.
[288] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[289] FRG, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 84, § 6.

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

> Reprisals or retaliation under international law are also governed by certain specific principles . . . Reprisals must remain within reasonable bounds of proportionality to the effect created by the original wrongful act . . . In other words . . . when a State commits . . . a wrongful act or delict, the use of force by way of reprisal would have to be proportionate and as such if the wrongful act did not involve the use of a nuclear weapon, the reprisal could also not involve the use of a nuclear weapon . . . In view of the above, use of nuclear weapons, even by way of reprisal or retaliation, appears to be unlawful. In any case, if the wrongful use of force in the first instance did not involve the use of nuclear weapons, it is beyond doubt that even in response by way of retaliation States do not have the right to use nuclear weapons because of their special quality as weapons of mass destruction.[290]

245. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that "in the opinion of my country the use of nuclear weapons in reprisal – or any other pretext – against a non-nuclear attack is contrary to the principle of proportionality".[291]

246. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that for the reprisal to be lawful, "the violation of the law caused by the reprisal must be proportionate with the violation(s) committed by the adverse party".[292]

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

> The Netherlands Government . . . believes that even if it were to be assumed that the (first) use of nuclear weapons by a State were unlawful *per se* under present international law – *quod non* –, this would not necessarily exclude the permissibility of the use of nuclear weapons by way of belligerent reprisal against an unlawful use of (nuclear) weapons, provided of course the retaliating State observed the conditions set by international law for the taking of lawful reprisals, i.e. satisfies, *inter alia*, the requirement that the retaliation is proportionate and serves as an *ultimum remedium*.[293] [emphasis in original]

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

> To be lawful, a belligerent reprisal must meet two conditions . . . It must meet the criteria for the regulation of reprisals, namely that it is . . . proportionate . . . It has been argued that the use of nuclear weapons could never satisfy the requirements of proportionality . . . This argument, however, suffers from the same flaws as the

[290] India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.
[291] Mexico, Oral pleadings before the ICJ, *Nuclear Weapons case*, CR 95/25, 3 November 1995, p. 51.
[292] Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, pp. 40.
[293] Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 29.

argument that the use of nuclear weapons could never satisfy the requirements of self-defence. Whether the use of nuclear weapons would meet the requirements of proportionality cannot be answered in the abstract: it would depend upon the nature and circumstances of the wrong which prompted the taking of reprisal action.[294]

249. In 1980, in a footnote to a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State noted that "reprisals are permitted under the laws of war . . . only in proportion to the original violations".[295]

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

> Reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically . . . the reprisals must be proportionate to the violations [of the law of armed conflict by the enemy] . . . As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the basis of the actual circumstances in each case, and could not be made in advance or in the abstract.[296]

III. Practice of International Organisations and Conferences

United Nations

251. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 51 entitled "Proportionality", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[297]

252. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that a reprisal "must be proportionate to the original wrongdoing". It added that "the proportionality is not strict, for if the reprisal is to be effective, it will often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure."[298]

[294] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–60.
[295] US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.
[296] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 30.
[297] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[298] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 64.

Other International Organisations
253. No practice was found.

International Conferences
254. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

255. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ observed that "in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality".[299]
256. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued).[300]

257. In its judgement in the *Naulilaa case* in 1928 regarding acts taken by Germany against Portugal in reprisal for the killing of three German officials by Portuguese soldiers, the Special Arbitral Tribunal stated that:

The definition of reprisals does not require that the reprisal be proportionate to the offence. On this issue, the writers, unanimous until recently, start being divided in their opinions. In a certain proportionality between offence and reprisal the majority sees a necessary condition for the legitimacy of [reprisals]. Other writers, among the most modern ones, do not require this condition any more. As regards international law . . . it certainly tends to limit the notion of legitimate reprisals and prohibit excess.

The Tribunal went on to say that:

Even if one should assume that the law of nations does not require that the reprisal is approximatively measured with relation to the offence, one must certainly consider as being excessive and . . . illicit reprisals out of any proportion to the act which has caused them and that, even if it had been admitted that the conduct of the Portuguese authorities had been internationally wrongful, the German reprisals would still have been wrongful, for, *inter alia*, they were disproportionate to the alleged wrong.[301]

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

258. No practice was found.

[299] ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 46.
[300] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.
[301] Special Arbitral Tribunal, *Naulilaa case*, Decision, 31 July 1928, pp. 1026 and 1028.

VI. Other Practice

259. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures . . . (b) are not out of proportion to the violation and the injury suffered".[302]

260. Kalshoven states that:

> [The requirement of proportionality] . . . can be clarified to a certain degree. In particular, it can confidently be stated that the proportionality envisaged here is proportionality to the preceding illegality, not to such future illegal acts as the reprisal may (or may not) prevent. Expectations with respect to such future events will obviously play a part in the decision-making process; thus, a prognosis that the enemy, unless checked, will commit increasingly grave breaches of the laws of war, will tend to make the reaction to the breaches already committed still more severe. Whilst, however, this psychological mechanism may be of interest from the point of view of theories of escalation, it cannot influence a legal judgement of the retaliatory action, which can take account only of its proportionality to the act against which it constitutes retaliation.
>
> Furthermore, it can be stated with equal confidence that proportionality in this context means the absence of obvious disproportionality, as opposed to strict proportionality. In other words, belligerents are left with a certain freedom of appreciation; a freedom which in law is restricted by the requirement of reasonableness, but which in practice can easily lead to arbitrariness and excessive reactions . . . But . . . in the absence of a more precise rule . . . there is no alternative but to accept the flexibility and relative vagueness of the requirement of proportionality.[303]

Order at the highest authority of government

I. Treaties and Other Instruments

Treaties

261. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that such measures would be taken "only after a decision taken at the highest level of government".[304]

Other Instruments

262. Article 86 of the 1880 Oxford Manual states that reprisals "can only be resorted to with the authorization of the commander in chief".

[302] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, § 905.

[303] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 341–342; see also Christopher Greenwood, "The Twilight of the Law of Belligerent Reprisals", *Netherlands Yearbook of International Law*, Vol. 20, 1989, pp. 43–45, with more references.

[304] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

II. National Practice

Military Manuals

263. Australia's Commanders' Guide states that "reprisal action by ADF members requires prior approval at the highest level".[305]

264. Australia's Defence Force Manual provides that "reprisal action by the ADF members requires prior approval at government level".[306]

265. Belgium's Law of War Manual states that "although no precise rules exist on the subject, reprisals may only be ordered by the government or commanders-in-chief, because of the importance of the political and/or military consequences they may entail".[307]

266. Benin's Military Manual states that reprisals "may only be used if: . . . they are ordered at a high level".[308]

267. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[309]

268. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".[310]

269. Canada's LOAC Manual provides that "the use of reprisals has great political and strategic implications. The decision to take reprisal action must therefore be authorized at the highest political level. Operational commanders on their own initiative are not authorized to carry out reprisals."[311] The manual further states that:

> To qualify as a reprisal, an act must satisfy the following conditions:
>
> . . .
>
> h. It must be authorized by national authorities at the highest political level as it entails full state responsibility. Therefore, military commanders are not on their own authorized to carry out reprisals.[312]

270. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".[313]

271. Croatia's LOAC Compendium states that a condition for reprisals is that the "decision [is] taken at [the] highest governmental level".[314]

[305] Australia, *Commanders' Guide* (1994), § 1211.
[306] Australia, *Defence Force Manual* (1994), § 1310.
[307] Belgium, *Law of War Manual* (1983), p. 35.
[308] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[309] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[310] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[311] Canada, *LOAC Manual* (1999), p. 15-2, § 13.
[312] Canada, *LOAC Manual* (1999), p. 15-3, § 17.
[313] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[314] Croatia, *LOAC Compendium* (1991), p. 19.

272. Ecuador's Naval Manual provides that "to be valid, a reprisal action must conform to the following criteria: . . . 1. Reprisal must be ordered by the highest authority of the belligerent government."[315]

273. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".[316]

274. Germany's Soldiers' Manual states that "because of their political and military consequences reprisals on the part of the German Military Forces may only be ordered by the Federal Government".[317]

275. Germany's Military Manual provides that "because of their political and military significance, reprisals shall be ordered by the supreme political level, which would be in the Federal Republic of Germany the Federal Government. No soldier is entitled to order reprisals on his own accord."[318] The manual further states that reprisals "require a decision to be taken by the supreme political level".[319]

276. Hungary's Military Manual states that a condition for reprisals is that the "decision [is] taken at [the] highest governmental level".[320]

277. Italy's IHL Manual provides that "a reprisal is ordered by the Head of Government or by the authorities to which the power to order them has been lawfully delegated".[321]

278. Kenya's LOAC Manual states that "under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: . . . they are ordered at a high level."[322]

279. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[323]

280. The Military Manual of the Netherlands, referring to customary law, states that reprisals are in principle allowed, provided that a number of conditions are fulfilled, including that "because of its important political and military consequences, the power to decide on a reprisal belongs to the government".[324]

281. New Zealand's Military Manual states that "in order to be considered a reprisal, an act must have certain characteristics: . . . It must be authorized

[315] Ecuador, *Naval Manual* (1989), § 6.2.3.1.
[316] France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).
[317] Germany, *Soldiers' Manual* (1991), p. 2; see also *IHL Manual* (1996), § 319.
[318] Germany, *Military Manual* (1992), § 477.
[319] Germany, *Military Manual* (1992), § 1206.
[320] Hungary, *Military Manual* (1992), p. 35.
[321] Italy, *IHL Manual* (1991), Vol. I, § 27.
[322] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[323] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[324] Netherlands, *Military Manual* (1993), p. IV-5.

by national authorities at the highest political level and involve full State responsibility."[325]

282. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria. Decisions must be made at the highest level. Soldiers cannot take reprisals at their own initiative."[326]

283. Spain's LOAC Manual, in the chapter dealing with the exercise of command and its restrictions with regard to reprisals, states that:

> The taking of measures which constitute violations of the law of war, as a response to violations previously committed by the enemy with the aim of making such violations cease, is decided at the highest governmental level, because of the politico-military consequences to which they give rise.[327]

The manual further states that reprisals "require a decision taken at the highest political level".[328]

284. Sweden's IHL Manual states that:

> Ultimately, responsibility for observance of the system of rules of international humanitarian law, among them the conventions, lies with the government. If in special circumstances the question arises of the use of prohibited means or methods as a measure of reprisal, or even the making of significant exceptions from international humanitarian law for reasons of military necessity, the responsibility for this would fall upon the government.[329]

285. Switzerland's Basic Military Manual, in its introductory remarks, states that:

> In case an adversary should not respect these international rules ["rules of international public law in times of armed conflict"], only the *Conseil fédéral* [Federal Council] would be competent to decide which measures would be opportune, especially possible reprisals, or to give the necessary instructions to the command of the army.[330]

In a provision dealing with reprisals, the manual further states that "only the *Conseil fédéral* [Federal Council] is competent to order possible reprisals".[331]

286. Togo's Military Manual states that reprisals "may only be used if: . . . they are ordered at a high level".[332]

287. The UK Military Manual states that "although there is no clear rule of international law on the matter, reprisals should be resorted to only by order of a commander and never on the responsibility of an individual soldier".[333]

[325] New Zealand, *Military Manual* (1992), § 1606(4)(h).
[326] South Africa, *LOAC Manual* (1996), § 34(e).
[327] Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(6).
[328] Spain, *LOAC Manual* (1996), Vol. I, § 11.10.c.
[329] Sweden, *IHL Manual* (1991), Section 4.1, p. 91.
[330] Switzerland, *Basic Military Manual* (1987), Introductory remarks, p. III.
[331] Switzerland, *Basic Military Manual* (1987), Article 197(1).
[332] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[333] UK, *Military Manual* (1958), § 645.

288. The UK LOAC Manual states that reprisals can only be taken if "they are ordered at a high level".[334] For cases in which the UK should have recourse to reprisals against the enemy's civilian population or civilian objects, the manual states that "the decision to do so will be taken at Government level".[335]

289. The US Field Manual stipulates that:

> [Reprisals] should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offence. The highest accessible military authority should be consulted unless immediate action is demanded, in which event a subordinate commander may order appropriate reprisals upon his own initiative. Ill-considered action may subsequently be found to have been wholly unjustified and will subject the responsible officer himself to punishment for a violation of the law of war. On the other hand, commanders must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against repetition of unlawful acts.[336]

290. The US Air Force Pamphlet states that:

> In order to be considered a reprisal, an act must have the following characteristics when employed:
>
> . . .
>
> (8) It must be authorized by national authorities at the highest political level and entails full state responsibility.[337]

291. The US Air Force Commander's Handbook states that "a decision to violate the law in reprisal for enemy violations must be taken at the highest levels of the US government".[338] It further states that "only the national command authorities may authorize the execution of reprisals or other reciprocal violations of the law of armed conflict by US armed forces".[339]

292. The US Instructor's Guide states that "the individual soldier must never decide to make a reprisal. The decision to make a reprisal must be made at the highest command level."[340]

293. The US Naval Handbook provides that "to be valid, a reprisal action must conform to the following criteria: 1. Reprisal must be ordered by an authorized representative of the belligerent government."[341] It further provides that "the President alone may authorize the taking of reprisal action by U.S. Forces".[342]

294. The Annotated Supplement to the US Naval Handbook, in a part dealing with the necessity for the US that the President alone may authorize the taking

[334] UK, *LOAC Manual* (1981), Section 4, p. 17, § 14(e).
[335] UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.
[336] US, *Field Manual* (1956), § 497(d).
[337] US, *Air Force Pamphlet* (1976), § 10-7(c)(8).
[338] US, *Air Force Commander's Handbook* (1980), § 1-3(a)(2).
[339] US, *Air Force Commander's Handbook* (1980), § 8-4(b)(2).
[340] US, *Instructor's Guide* (1985), p. 27.
[341] US, *Naval Handbook* (1995), § 6.2.3.1. [342] US, *Naval Handbook* (1995), § 6.2.3.3.

of reprisal action by US forces, states that there is "always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy". It adds that:

Other factors which governments will usually consider before taking of reprisals include the following:

1. Reprisals may have an adverse influence on the attitudes of governments not participating in an armed conflict.
2. Reprisals may only strengthen enemy morale and underground resistance.
3. Reprisals may only lead to counter-reprisals by an enemy, in which case the enemy's ability to retaliate is an important factor.
4. Reprisals may render enemy resources less able to contribute to the rehabilitation of an area after the cessation of hostilities.
5. The threat of reprisals may be more effective than their actual use.
6. Reprisals, to be effective, should be carried out speedily and should be kept under control. They may be ineffective if random, excessive, or prolonged.
7. In any event, the decision to employ reprisals will generally be reached as a matter of strategic policy. The immediate advantage sought must be weighed against the possible long-range military and political consequences.

. . .
In addition to the legal requirements which regulate resort to reprisals, there are various practical factors which governments will consider before taking reprisals. For example, when appeal to the enemy for redress has failed, it may be a matter of policy to consider before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of armed conflict.[343]

295. The YPA Military Manual of the SFRY (FRY) states that "the armed forces of the SFRY shall undertake reprisals against the enemy . . . only by order of a commander who is competent to determine reprisals".[344] In another provision, the manual specifies that reprisals must be ordered by a competent commander (corps commander and equal or higher rank responsible for the sector in which the violation of the adversary took place), except when a commander of a lesser rank cannot establish contact with higher command. Reprisals against an entire enemy force can only be ordered by the Supreme Command.[345]

National Legislation

296. Argentina's Constitution provides for the competence of the President to order reprisals, with the authorisation and approbation of the National Congress.[346]

297. Italy's Law of War Decree as amended provides that:

Reprisals . . . are ordered by means of a "decree" of il Duce or by a delegated authority from him.

[343] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.3, footnote 52.
[344] SFRY (FRY), *YPA Military Manual* (1988), § 29.
[345] SFRY (FRY), *YPA Military Manual* (1988), § 30.
[346] Argentina, *Constitution* (1994), Articles 75(26) and 99(15).

Reprisals . . . inasmuch as they consist of military operations, can also be ordered by the supreme commander, or, when an immediate or exemplary action is necessary, by any other commander.[347]

National Case-law

298. No practice was found.

Other National Practice

299. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

2. . . . The prohibition [of the taking of reprisals] may be waived on condition:
   . . .
   (b) that the decision to have recourse to such measures shall be taken by the Government of the Party alleging the violation.[348]

300. At the CDDH, France made another proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

The measures [which are designed to repress the breaches and induce compliance with the Protocol] may be taken only when the following conditions are met:
. . .
(b) The decision to have recourse to such measures must be taken at the highest level of the government of the victimized Party.[349]

III. Practice of International Organisations and Conferences

301. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

302. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders).[350]

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

303. No practice was found.

[347] Italy, *Law of War Decree as amended* (1938), Article 10.
[348] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.
[349] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[350] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

VI. Other Practice

304. No practice was found.

Termination of reprisals as soon as the adversary complies again with the law

I. Treaties and Other Instruments

Treaties
305. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that "such measures [will not] be continued after the violations have ceased".[351]

Other Instruments
306. Article 85 of the 1880 Oxford Manual provides that "reprisals are formally prohibited in case the injury complained of has been repaired".
307. Article 53 of the 2001 ILC Draft Articles on State Responsibility, entitled "Termination of countermeasures", provides that "countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two [Articles 28–41] in relation to the internationally wrongful act".

II. National Practice

Military Manuals
308. Benin's Military Manual states that reprisals "may only be used if: . . . they cease as soon as the violation [of the law of war] which has triggered them ceases".[352]
309. Canada's LOAC Manual provides that a reprisal "must be terminated as soon as the original wrongdoer ceases the illegal actions".[353] In another provision, the manual states that:

> Above all, reprisals are justifiable only to force an adversary to stop its illegal activity. If, for example, a party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those responsible, then any action taken by another party to "redress" the situation cannot be justified as a lawful reprisal.[354]

310. Croatia's LOAC Compendium states that a condition for reprisals is that they "cease when [the] purpose [is] achieved".[355]

[351] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).
[352] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[353] Canada, *LOAC Manual* (1999), p. 15-2, § 14.
[354] Canada, *LOAC Manual* (1999), p. 15-2, § 17(b).
[355] Croatia, *LOAC Compendium* (1991), p. 19.

311. Ecuador's Naval Manual provides that "to be valid, a reprisal action must conform to the following criteria: . . . 7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict."[356]

312. Hungary's Military Manual states that a condition for reprisals is that they "cease when [the] purpose [is] achieved".[357]

313. Italy's IHL Manual states that "when the belligerent enemy who committed the unlawful act . . . has given proper satisfaction, each justification to continue or take [measures of reprisal] stops".[358]

314. Kenya's LOAC Manual states that "under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: . . . they cease when the violation complained of ceases."[359]

315. New Zealand's Military Manual states that "a reprisal . . . must be terminated as soon as the original wrongdoer ceases his illegal actions".[360]

316. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria".[361]

317. Spain's LOAC Manual specifies, among the conditions which must be fulfilled for the lawful taking of reprisals, that the action must cease once its objective has been met.[362]

318. Togo's Military Manual states that reprisals "may only be used if: . . . they cease as soon as the violation [of the law of war] which has triggered them ceases".[363]

319. The UK Military Manual states that "if the enemy ceases to commit the acts complained of, reprisals must not be resorted to; if reprisals have already begun, they must at once cease".[364]

320. The UK LOAC Manual states that reprisals can only be taken if "they cease when the violation complained of ceases".[365]

321. The US Naval Handbook states that "to be valid, a reprisal action must conform to the following criteria: . . . 7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict."[366]

322. The Annotated Supplement to the US Naval Handbook, with reference to the rule that a reprisal must cease as soon as the enemy is induced to desist from its unlawful activities, states that "when, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, then any action

[356] Ecuador, *Naval Manual* (1989), § 6.2.3.1.
[357] Hungary, *Military Manual* (1992), p. 35.
[358] Italy, *IHL Manual* (1991), Vol. I, § 24.
[359] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[360] New Zealand, *Military Manual* (1992), § 1606(1).
[361] South Africa, *LOAC Manual* (1996), § 34(e).
[362] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(a).
[363] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[364] UK, *Military Manual* (1958), § 649.
[365] UK, *LOAC Manual* (1981), Section 4, p. 17, § 14(d).
[366] US, *Naval Handbook* (1995), § 6.2.3.1.

taken by another party to 'right' the situation cannot be justified as a lawful reprisal".[367]

323. The YPA Military Manual of the SFRY (FRY), in a provision entitled "Aim and duration of reprisals", states that "when the enemy stops violating the rules of the international laws of war, the party to the conflict undertaking reprisals is obliged to terminate reprisals".[368] The manual further provides that "the armed forces of the SFRY shall undertake reprisals against the enemy exceptionally and temporarily".[369]

National Legislation

324. No practice was found.

National Case-law

325. No practice was found.

Other National Practice

326. According to the Report on the Practice of Iran, Iran reacted to violations by Iraq of the 1984 agreement relative to the cessation of attacks on cities by resorting to reprisals against Iraqi cities. The report notes, however, that Iran declared that it was ready to end these attacks and respect the agreement as soon as Iraq complied with it.[370]

327. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The measures must cease, in all events, when they have achieved their objective, namely, cessation of the breach which prompted the measures."[371]

328. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that for the reprisal to be lawful, "as soon as the adverse party behaves in compliance with the law the reprisal must end".[372]

III. Practice of International Organisations and Conferences

United Nations

329. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles

[367] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 44.
[368] SFRY (FRY), *YPA Military Manual* (1988), § 28.
[369] SFRY (FRY), *YPA Military Manual* (1988), § 29.
[370] Report on the Practice of Iran, 1997, Chapter 1.3.
[371] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[372] Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 40.

on State Responsibility, and thus Article 53 entitled "Termination of countermeasures", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[373]

330. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that "a reprisal ... must be terminated as soon as the original wrongdoer ceases his illegal actions".[374]

Other International Organisations

331. No practice was found.

International Conferences

332. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

333. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

> It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by ... the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued).[375]

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

334. No practice was found.

VI. Other Practice

335. No practice was found.

Limitation of reprisals by principles of humanity

I. Treaties and Other Instruments

Treaties

336. No practice was found.

[373] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[374] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 64.
[375] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

Other Instruments

337. Article 86 of the Oxford Manual provides that reprisals "must conform in all cases to the laws of humanity and morality".

338. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility states that:

> Countermeasures shall not affect:
>
> . . .
>
> (b) Obligations for the protection of fundamental human rights;
>
> . . .
>
> (d) Other obligations under peremptory norms of general international law.

II. National Practice

Military Manuals

339. Belgium's Law of War Manual, regarding the circumstances in which reprisals may be taken against individuals, cites a writer's opinion and states that "putting to death innocent persons to impose order by terror is a violation of both written law and the basic principles of humanity".[376]

340. Italy's IHL Manual, in the part dealing with reprisals, states that:

> The Italian laws of war, which are modelled upon the principles of civilisation and humanity as much as it is permitted by military necessity, provides for the humane treatment of enemy combatants, wounded or prisoners, as well as of the civilian population, even in cases in which there is no special obligation under international law to do so.[377]

341. Sweden's IHL Manual states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.
>
> The possibility just recounted – for a party to Additional Protocol I suffering a breach of international law to employ reprisals – is to be considered as a hypothetical case. The Committee strongly discourages such application in view of its manifestly inhuman effect.[378]

342. The YPA Military Manual of the SFRY (FRY) states that "Yugoslav military officers competent to determine reprisals cannot order the application of dishonourable methods of reprisals".[379]

National Legislation

343. No practice was found.

[376] Belgium, *Law of War Manual* (1983), p. 36, referring to Lord Wright, *BYIL*, Vol. 25, 1954, p. 296–310.
[377] Italy, *IHL Manual* (1991), Vol. I, § 28.
[378] Sweden, *IHL Manual* (1990), Section 3.5, p. 89.
[379] SFRY (FRY), *YPA Military Manual* (1988), § 29.

National Case-law

344. In the *Priebke case* in 1995, Argentina's Public Prosecutor of First Instance, dealing with Italy's request to extradite the accused, stated, *inter alia*, that writers had condemned the killing in reprisal of 330 civilians and POWs carried out by German soldiers in the Ardeatine Caves in Italy during the Second World War and qualified this act as "a reprisal which violated the fundamental principles of humanity".[380]

345. In the *Kappler case* in 1948, dealing with the Ardeatine Caves massacre during the Second World War, the Military Tribunal of Rome stated that:

> Reprisals are subject to a general limitation which consists in the duty not to violate those rights intended to safeguard fundamental needs. This principle . . . now finds clear expression in the preamble of the Hague Convention . . . where the activities of States are set a limit by "the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience".[381]

346. In its judgement in the *Priebke case* in 1996, the Military Tribunal of Rome, with regard to the principle of proportionality to which reprisals were subject, stated that:

> This is confirmed by the general limit on States' freedom to act, fixed by international custom and recalled in the preamble to the Hague Convention of 1907 which prohibits injuring fundamental rights established by "ius gentium", by the customs of civilised States, by the laws of humanity and by the exigencies of public conscience.[382]

347. In its judgement in the *Hass and Priebke case* in 1997, the Military Tribunal of Rome stated that actions taken by way of reprisals could never violate the fundamental and primary requirements of humanity and public conscience.[383]

Other National Practice

348. At the CDDH, during the discussions on Draft AP II, Finland stated that "there was universal agreement that reprisals of an inhumane nature were inadmissible".[384]

349. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India cited G. Fitzmaurice and stated that:

[380] Argentina, Hearing of the Public Prosecutor of the First Instance, *Priebke case*, 1995, Section V.2.
[381] Italy, Military Tribunal of Rome, *Kappler case*, Judgement, 20 July 1948.
[382] Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996, Section 7.
[383] Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997, Section 4.
[384] Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 324, § 8.

Reprisals or retaliation under international law are also governed by certain specific principles . . . Reprisals could not involve acts which are *malum in se* such as certain violations of human rights, certain breaches of the laws of war and rules in the nature of *ius cogens*, that is to say obligations of an absolute character compliance with which is not dependent on corresponding compliance by others but is requisite in all circumstances unless under stress of literal *vis major* . . . In other words . . . even where a wrongful act involved the use of a nuclear weapon the reprisal action cannot involve [the] use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances. In view of the above, [the] use of nuclear weapons even by way of reprisal or retaliation, appears to be unlawful.[385]

350. The Report on the Practice of Iraq, in the chapter dealing with reprisals and with reference to a speech of the Iraqi President in 1983, notes that "as for the activities which constitute a violation to the human rights or the humanitarian law, this can never be reciprocated".[386]

351. The Report on the Practice of Italy, having discussed the decisions in the *Schintlholzer*, *Priebke*, and *Hass and Priebke* cases, concludes that it is the *opinio juris* of Italy that States acting by way of reprisal could never violate the general limit fixed to their actions by customary law and by the preamble to the 1907 Hague Convention (IV).[387]

352. In its written statement submitted to the ICJ in the Nuclear Weapons case in 1995, Malaysia stated that reprisals "must conform in all cases to the laws of humanity and morality". It referred to Article 86 of the Oxford Manual.[388]

III. Practice of International Organisations and Conferences

United Nations

353. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(b) and (d) stating that countermeasures shall not affect obligations for the protection of fundamental human rights or other obligations under peremptory norms of general international law, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[389]

[385] India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.
[386] Report on the Practice of Iraq, 1998, Chapter 2.9.
[387] Report on the Practice of Italy, 1997, Chapter 2.9.
[388] Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 18.
[389] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

Other International Organisations
354. No practice was found.

International Conferences
355. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

356. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that "it should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . 'elementary considerations of humanity'".[390]

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

357. No practice was found.

VI. Other Practice

358. No practice was found.

C. Reprisals against Protected Persons

Captured combatants and prisoners of war

I. Treaties and Other Instruments

Treaties
359. Article 2, third paragraph, of the 1929 Geneva POW Convention provides that "measures of reprisal against [POWs] are forbidden".
360. Article 13, third paragraph, GC III provides that "measures of reprisal against prisoners of war are prohibited".

Other Instruments
361. Section 7.2 of the 1999 UN Secretary-General's Bulletin which deals under Section 7.1 with the protection of "persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of . . . detention", states that "the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: . . . reprisals".

[390] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

362. Section 8 of the 1999 UN Secretary-General's Bulletin, dealing with "Treatment of detained persons", states that "without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*".
363. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals
364. Argentina's Law of War Manual (1969), in a provision dealing with the treatment of POWs, refers to Article 13 GC III and provides that "measures of reprisal with respect to them remain prohibited".[391]
365. Argentina's Law of War Manual (1989), in an annex containing a list of "Fundamental rules of International Humanitarian Law applicable in armed conflict", provides that "captured combatants . . . will be protected against all acts of violence and reprisals".[392]
366. Australia's Commanders' Guide states that "protected from the moment of their surrender or capture, PW and PW camps must not be made the objects of . . . reprisals".[393] The Guide further refers to Article 13 GC III and states that "protected persons . . . should not be the subject of reprisals".[394]
367. Australia's Defence Force Manual, in a provision dealing with POWs, provides that "protected from the moment of their surrender or capture, prisoners of war must not be made the object of attack or reprisals".[395] In a chapter entitled "Prisoners of war and detained persons", the manual further states that "the fundamental rules for the treatment of [a] PW are: . . . reprisals against them are prohibited".[396] It also states that "reprisals may be justified but only against military objectives".[397] In another provision, the manual states that "protected persons . . . should not be the subject of reprisals".[398]
368. Belgium's Law of War Manual, citing several examples of jurisprudence, states that "the persons protected by the Geneva Conventions (. . . prisoners of war . . .) . . . may not be made the object of reprisals. Therefore, [reprisals] may

[391] Argentina, *Law of War Manual* (1969), § 2.013(1).
[392] Argentina, *Law of War Manual* (1989), Annex 10, § 4.
[393] Australia, *Commanders' Guide* (1994), § 414.
[394] Australia, *Commanders' Guide* (1994), § 1212.
[395] Australia, *Defence Force Manual* (1994), § 519.
[396] Australia, *Defence Force Manual* (1994), § 1002(c).
[397] Australia, *Defence Force Manual* (1994), § 1309.
[398] Australia, *Defence Force Manual* (1994), § 1311.

be directed only against combatants, non-protected property and a restricted group of non-protected civilians."[399]

369. Benin's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".[400] It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".[401]

370. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".[402]

371. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: ... to engage in reprisals or collective punishments".[403]

372. Canada's LOAC Manual, in the section dealing with the treatment of POWs, provides that "reprisals against PWs are prohibited".[404] In the section dealing with enforcement measures, the manual further states that "reprisals are permitted against combatants and against objects constituting military objectives".[405] In the same section, it also states that "reprisals against the following categories of persons and objects are prohibited: ... c. prisoners of war (PWs)".[406]

373. Canada's Code of Conduct provides that "no reprisals will be taken against PWs or detainees".[407]

374. Colombia's Circular on Fundamental Rules of IHL provides that "captured combatants ... shall be protected against ... reprisals".[408]

375. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[409]

376. Croatia's Instructions on Basic Rules of IHL states that captured combatants and civilians must be protected against all acts of violence and reprisals.[410]

377. Croatia's LOAC Compendium states that reprisals are prohibited against POWs. It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[411]

399 Belgium, *Law of War Manual* (1983), p. 36.
400 Benin, *Military Manual* (1995), Fascicule III, p. 12.
401 Benin, *Military Manual* (1995), Fascicule III, p. 13.
402 Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
403 Cameroon, *Disciplinary Regulations* (1975), Article 32.
404 Canada, *LOAC Manual* (1999), p. 10-3, § 25, see also p. 15-2, § 15(c).
405 Canada, *LOAC Manual* (1999), p. 15-2, § 16.
406 Canada, *LOAC Manual* (1999), p. 15-3, § 15.
407 Canada, *Code of Conduct* (2001), Rule 6, § 12.
408 Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.
409 Congo, *Disciplinary Regulations* (1986), Article 32(2).
410 Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.
411 Croatia, *LOAC Compendium* (1991), p. 19.

378. The Military Manual of the Dominican Republic, under the heading "Treat all captives and detainees humanely", states that "you must never carry out reprisals or acts of vengeance against any person, enemy or civilian, you have taken prisoner or detained during the fighting".[412]

379. Ecuador's Naval Manual provides that "reprisals are forbidden to be taken against: 1. Prisoners of war . . .".[413] It also provides that "prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them".[414]

380. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".[415]

381. France's LOAC Summary Note provides that "captured combatants . . . must be protected against violence and reprisals".[416]

382. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".[417] The manual refers to Article 13 GC III and states that "reprisals are prohibited against . . . prisoners of war".[418]

383. Germany's Soldiers' Manual states that "reprisals against prisoners of war are forbidden".[419]

384. Germany's Military Manual, referring to Article 13 GC III, provides that "it is expressly prohibited by agreement to make reprisals against: . . . prisoners of war (Art. 13 para 3 GC III)".[420] In the part dealing with the protection of POWs, and under a provision entitled "Fundamental rules for the treatment of prisoners of war", the manual refers to Article 13 GC III and provides that "reprisals against prisoners of war are prohibited".[421]

385. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . prisoners of war".[422]

386. Hungary's Military Manual states that reprisals are prohibited against POWs. It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[423]

[412] Dominican Republic, *Military Manual* (1980), p. 7.
[413] Ecuador, *Naval Manual* (1989), § 6.2.3.2.
[414] Ecuador, *Naval Manual* (1989), § 11.8.1.
[415] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[416] France, *LOAC Summary Note* (1992), § 2.1.
[417] France, *LOAC Manual* (2001), p. 85.
[418] France, *LOAC Manual* (2001), p. 108.
[419] Germany, *Soldiers' Manual* (1991), p. 7.
[420] Germany, *Military Manual* (1992), § 479.
[421] Germany, *Military Manual* (1992), § 704.
[422] Germany, *IHL Manual* (1996), § 320.
[423] Hungary, *Military Manual* (1992), p. 35.

387. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[424]

388. Italy's IHL Manual, providing for the prohibition of reprisals against POWs, states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals, such as, for instance, the rules regarding prisoners of war".[425]

389. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[426] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against prisoners of war".[427]

390. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[428] In the attached list of "Fundamental rules of international humanitarian law applicable in armed conflicts", the manual states that "captured combatants . . . will be protected against any act of violence and reprisals".[429]

391. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[430]

392. The Military Manual of the Netherlands, in the chapter dealing with the protection of POWs, states that "reprisals against prisoners of war are forbidden".[431]

393. The Military Handbook of the Netherlands states that "protected persons under the laws of war are: . . . prisoners of war . . . Reprisals against them must not be taken."[432]

394. New Zealand's Military Manual, in the chapter dealing with POWs and referring to Article 13 GC III, states that "reprisals against prisoners of war are prohibited".[433] In the footnote relative to this provision, the manual states that:

> Since prisoners of war are in the Power of the Detaining Power, they are among the easiest victims for reprisal action and are, of themselves, unable to affect the conduct of their national government. The [1907] HR made no reference to this matter and during World War I prisoners were often made the object of reprisals.

[424] Indonesia, *Air Force Manual* (1990), § 15(c).
[425] Italy, *IHL Manual* (1991), Vol. I, § 25.
[426] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[427] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[428] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[429] Madagascar, *Military Manual* (1994), p. 91, Rule 4.
[430] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[431] Netherlands, *Military Manual* (1993), p. VII-3.
[432] Netherlands, *Military Handbook* (1995), p. 7-38.
[433] New Zealand, *Military Manual* (1992), § 918(1).

The ban on such action first appeared in the 1929 Geneva Convention on Prisoners of War, Art. 2. In accordance with the provisions of AP I, reprisals are forbidden against all persons who are hors de combat, as well as against protected objects, the destruction of which would primarily affect such persons. During World War II the Germans fettered British prisoners of war claiming it as a reprisal for a raid on Sark in 1942, when five German captives had their hands tied so that they could be linked to their captors while being escorted to the boats of the raiding party. During the Dieppe raid, the Germans captured a Canadian order authorising the tying of prisoners' hands, the Germans protested about the order, which was subsequently described as unauthorized and countermanded.[434]

In the chapter dealing with reprisals and referring to Articles 13 GC I and 44 AP I, the manual further states that "reprisals against the following categories of persons and objects are prohibited . . . prisoners of war".[435]

395. Nicaragua's Military Manual, in the part dealing with international armed conflict, states that "prisoners of war . . . must be protected against . . . measures of reprisal".[436]

396. Nigeria's Military Manual, in a part dealing with GC III, states that "reprisals directed against prisoner[s] of war are prohibited".[437]

397. Nigeria's Manual on the Laws of War provides that "it is prohibited to take measures of reprisal against prisoners of war as a retaliation for violation of the Laws of War by the enemy".[438]

398. South Africa's LOAC Manual states that "soldiers who have surrendered or who are in the control of the enemy cannot be made the object of reprisal and must be protected".[439] It further provides that "reprisals against the persons and property of prisoners of war . . . are prohibited".[440]

399. Spain's LOAC Manual, referring to Article 13 GC III, lists POWs among the persons against whom the taking of reprisals is prohibited.[441]

400. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[442]

401. Switzerland's Basic Military Manual, in the chapter dealing with the "Fundamental protection of prisoners of war", contains a provision entitled

[434] New Zealand, *Military Manual* (1992), § 918(1), footnote 51.
[435] New Zealand, *Military Manual* (1992), § 1606(2)(c).
[436] Nicaragua, *Military Manual* (1996), Article 14(18).
[437] Nigeria, *Military Manual* (1994), p. 16, § 9.
[438] Nigeria, *Manual on the Laws of War* (undated), § 37.
[439] South Africa, *LOAC Manual* (1996), § 30.
[440] South Africa, *LOAC Manual* (1996), § 34(e).
[441] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[442] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

"Prohibition of reprisals" which refers to Article 13, third paragraph, GC III and states that "measures of reprisal are prohibited with regard to prisoners of war".[443] In the provision dealing with reprisals, referring, *inter alia*, to Article 13 GC III, the manual further states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to . . . prisoners of war".[444]

402. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[445] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[446]

403. The UK Military Manual, which in a footnote to the relevant provision refers to Article 2 of the 1929 Geneva POW Convention and Article 13 of GC III, states that:

> Measures of reprisal against prisoners of war are prohibited. This prohibition is of an absolute character, so that reprisals against prisoners of war are prohibited even if intended to be adopted as a measure of retaliation against the violation of provisions of [GC III] by the other party. Reprisals against such violations of the Convention are permissible, but they must not be directed against prisoners of war or any other persons protected by the 1949 Conventions.[447]

In the part dealing with reprisals, the manual refers to Article 13 GC III and states that "reprisals against prisoners of war . . . are . . . prohibited".[448] In a footnote relating to this provision, the manual further notes that "reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".[449] In a footnote relating to another provision, the manual moreover states that "reprisals against . . . prisoners of war . . . constitute war crimes".[450]

404. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against prisoners of war".[451]

405. The US Field Manual, referring to Article 13 GC III, stipulates that "reprisals against the persons or property of prisoners of war, including the wounded and sick, . . . are forbidden . . . However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals."[452]

406. The US Air Force Pamphlet, referring to Article 13 GC III, provides that "reprisals against prisoners of war are prohibited . . . No protected person may

[443] Switzerland, *Basic Military Manual* (1987), Article 98.
[444] Switzerland, *Basic Military Manual* (1987), Article 197(2).
[445] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[446] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[447] UK, *Military Manual* (1958), § 133(b) and footnotes 4 and 5.
[448] UK, *Military Manual* (1958), § 644.
[449] UK, *Military Manual* (1958), § 644, footnote 2.
[450] UK, *Military Manual* (1958), § 647, footnote 1.
[451] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
[452] US, *Field Manual* (1956), § 497(c).

be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."[453] The Pamphlet further states that:

> Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.[454]

In the chapter dealing with GC III, the Pamphlet reiterates that "measures of reprisal against prisoners of war are prohibited".[455]

407. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against . . . prisoners of war. (The reprisals against British prisoners of war that the US threatened during the Revolution would thus be illegal today, though at the time, reprisals against PWs were lawful.)"[456]

408. The US Soldier's Manual, under the heading "Treat all captives and detainees humanely", tells soldiers that "you must never engage in reprisals or acts of revenge against any persons, enemy or civilian, whom you capture or detain in combat".[457]

409. The US Operational Law Handbook provides that:

> The following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity:
>
> . . .
>
> m. Reprisals against persons or property protected by the Geneva Conventions, to include . . . prisoners of war, detained personnel . . .[458]

410. The US Naval Handbook states that "reprisals are forbidden to be taken against: 1. Prisoners of war . . .".[459] It also provides that "prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them".[460]

411. The Annotated Supplement to the US Naval Handbook, with regard to the prohibition of taking reprisals against POWs, states that "in light of the wide acceptance of the 1949 Geneva Conventions by the nations of the world today, this prohibition is part of customary law . . . The taking of prisoners by

[453] US, *Air Force Pamphlet* (1976), § 10-7(b)(1).
[454] US, *Air Force Pamphlet* (1976), § 10-7(b)(2).
[455] US, *Air Force Pamphlet* (1976), § 13-2.
[456] US, *Air Force Commander's Handbook* (1980), § 8-4(c).
[457] US, *Soldier's Manual* (1984), p. 15.
[458] US, *Operational Law Handbook* (1993), p. Q-182.
[459] US, *Naval Handbook* (1995), § 6.2.3.2.
[460] US, *Naval Handbook* (1995), § 11.7.1.

way of reprisal for acts previously committed (so-called 'reprisal prisoners') is likewise forbidden."[461]

412. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . prisoners of war".[462]

National Legislation

413. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[463]

414. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[464]

National Case-law

415. In the *Priebke case* in 1995, Argentina's Public Prosecutor of First Instance, dealing with a Italy's request to extradite the accused, held that the alleged killing in reprisal of 330 civilians and POWs committed by German soldiers in the Ardeatine Caves in Italy during the Second World War was "an act which must be qualified as a war crime".[465]

416. In its judgement in the *Rauter case* in 1949, the Special Court of Cassation of the Netherlands, dealing with the limits to reprisals, stated that "among the limits referred to, the prohibition should especially be mentioned of taking reprisals against prisoners of war, as this was expressly prohibited by Art. 2 of the 1929 [Geneva POW] Convention".[466]

417. In its judgement in the *Dostler case* in 1945, in which a German commander had been accused of having ordered, in March 1944, the shooting of 15 American POWs in violation of the 1907 HR, the US Military Commission at Rome referred to Article 2, third paragraph, of the 1929 Geneva POW Convention and held that from this provision followed that under the law as codified by this Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, could be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal. Referring to the decision of the German Reichsgericht in the *Dover Castle case*, the US Military Commission of Rome stated that through the express provision of Article 2, third paragraph, of the 1929 Geneva POW Convention the decision of the German Reichsgericht in the said case had lost

[461] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.2, footnote 45.
[462] SFRY (FRY), *YPA Military Manual* (1988), § 31(1).
[463] Colombia, *Penal Code* (2000), Article 158.
[464] Italy, *Law of War Decree as amended* (1938), Article 8.
[465] Argentina, Hearing of the Public Prosecutor of the First Instance, *Priebke case*, 1995, Section V.2.
[466] Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.

even such little persuasive authority as it may have had at the time it was rendered.[467]

Other National Practice

418. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that "the Geneva Conventions of 1949 prohibit reprisals against certain categories of persons such as . . . prisoners of war".[468]

419. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[469]

420. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . prisoners of war . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."[470]

421. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[471]

422. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949."[472]

423. At the CDDH, the FRG, with respect to the French proposal on reprisals according to which "the measures may not involve any actions prohibited by the Geneva Conventions of 1949", stated that this provision "was the most important in the whole of the proposal since it really did protect prisoners of war".[473]

[467] US, Military Commission at Rome, *Dostler case*, Judgement, 8–12 October 1945.
[468] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.
[469] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[470] Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
[471] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
[472] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[473] FRG, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 84, § 6.

424. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals "must not be directed, in any way, against . . . prisoners of war . . ., but [have] to be confined to purely military targets".[474]

425. According to the Report on the Practice of Israel, the IDF does not condone nor conduct reprisals against persons or objects protected by the Geneva Conventions.[475]

426. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal".[476]

427. In 1984, during a debate in the UN Security Council, Lebanon stated with respect to Israeli practices that it deplored the fact that the "occupying authorities often resort to inhuman reprisals . . . against the detainees, practices which are in violation of articles 27 and 32 of the fourth Geneva Convention and article 46 of [the 1907 HR]".[477]

428. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[478]

429. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the [Geneva] Conventions and by the present Protocol are prohibited'."[479]

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

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.[480]

431. In April 1965, when a North Vietnamese prisoner was sentenced to death by a South Vietnamese court, the communist rebel group announced that if the sentence was carried out, it would kill an American aid officer in their hands. Neither of the executions was carried out. Three months later, a North Vietnamese prisoner was executed apparently after having been tried, convicted and sentenced by a South Vietnamese special military tribunal. A few days

[474] Report on the Practice of Iraq, 1998, Chapter 2.9, referring to the reply from the Ministry of Defense to a questionnaire, July 1997.
[475] Report on the Practice of Israel, 1997, Chapter 2.9.
[476] Report on the Practice of Jordan, 1997, Chapter 2.9.
[477] Lebanon, Statement before the UN Security Council, UN Doc. S/PV.2552, 29 August 1984, § 22.
[478] Report on the Practice of the Philippines, 1997, Chapter 2.9.
[479] Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[480] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

later, it was announced that an American sergeant held as a POW had been executed in reprisal. In September 1965, three North Vietnamese prisoners were executed, again apparently after having been tried, convicted and sentenced. The execution of two American POWs in reprisal was announced a few days later.[481] The US refused to accept that the executions were justified as reprisals and the acts were denounced as "two more acts of brutal murder". The ICRC was asked to take all possible action with respect to these violations.[482] North Vietnam also threatened to treat captured US pilots as war criminals subject to trial. The US charged that the threat was to justify reprisals for executions by the South Vietnamese of North Vietnamese prisoners as terrorists.[483]

432. An instruction card issued to all US troops engaged in Vietnam directed soldiers always to treat prisoners humanely, adding that "all persons in your hands, whether suspects, . . . or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind".[484]

433. At the 20th International Conference of the Red Cross in 1965, the US delegate declared that his government had been "shocked and deeply saddened by the brutal murder of prisoners of war as acts of reprisals" in the Vietnam War and that it was "profoundly concerned that other prisoners may be executed in violation of international law".[485]

434. According the Report on US Practice, "the United States does not regard the summary execution of persons in custody as a lawful means of reprisals".[486]

III. Practice of International Organisations and Conferences

United Nations

435. In 1980, in a statement by its President regarding the capture and killing of two UNIFIL soldiers by the *de facto* forces in southern Lebanon after the UN had been warned that reprisals would be taken if there were any victims following UNIFIL actions, the UN Security Council stated that "the members of the Security Council are shocked and outraged at the report that the Council has received on . . . the cold-blooded murder of peace-keeping soldiers" and denounced the "unprecedented, barbaric act".[487]

436. In a resolution adopted in 1991 on the situation of human rights in Afghanistan, the UN General Assembly urged all parties to the conflict "to

[481] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 295–305.
[482] US, *Department of State Bulletin*, Vol. LIII, No. 1373, 18 October 1965, p. 635.
[483] *N.Y. Times Index*, 1965, p. 1098.
[484] US, The enemy in your hands, Reproduction of 3x5 instruction card issued to all troops, reprinted in George. S. Prugh, *Law at War: Vietnam 1964–1973*, Department of the Army, Vietnam Studies, 1975, Appendix H. III.
[485] US, *Department of State Bulletin*, Vol. LIII, No. 1375, 1 November 1965, p. 725.
[486] Report on US Practice, 1997, Chapter 2.9.
[487] UN Security Council, Statement by the President, UN Doc. S/PV.2217, 18 April 1980, § 15.

protect all prisoners of war from acts of reprisals".[488] It reiterated this appeal in 1992.[489]

437. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[490]

438. In a resolution adopted in 1989 on the question of human rights and fundamental freedoms in Afghanistan, the UN Commission on Human Rights urged all parties to the conflict "to treat all prisoners in their custody in accordance with the internationally recognized principles of humanitarian law and to protect them from all acts of reprisal and violence".[491] It reiterated these appeals in 1990, 1991 and 1992.[492]

439. In 1980, the UN Secretary-General reported to the Security Council that two UNIFIL soldiers had been captured and killed by the *de facto* forces in southern Lebanon. UNIFIL had been warned that if there were any victims following UNIFIL actions, reprisals would be taken.[493] A few days later, the UN Under Secretary-General for Special Political Affairs told the Security Council that "this murder of unarmed soldiers can only be described as a killing in cold blood, following on repeated threats by the *de facto* forces against the lives of members of UNIFIL".[494]

440. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 13 GC III and 44 AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (c) Prisoners of war".[495] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in

[488] UN General Assembly, Res. 46/136, 17 December 1991, § 6.
[489] UN General Assembly, Res. 47/141, 18 December 1992, § 5.
[490] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[491] UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11.
[492] UN Commission on Human Rights, Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.
[493] UN Secretary-General, Oral report before the UN Security Council, UN Doc. S/PV.2212, 13 April 1980, § 8.
[494] UN Under Secretary-General, Statement before the UN Security Council, UN Doc. S/PV.2217, 18 April 1980, § 14.
[495] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[496]

Other International Organisations

441. No practice was found.

International Conferences

442. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that irrespective of GC III,

> the international community has consistently demanded humane treatment for prisoners of war, including identification and accounting for all prisoners, provision of an adequate diet and medical care, authorization for prisoners to communicate with each other and with the exterior, the prompt repatriation of seriously sick or wounded prisoners, and protection at all times from physical and mental torture, abuse and reprisals.[497]

IV. Practice of International Judicial and Quasi-judicial Bodies

443. No practice was found.

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

444. The US protest against the execution of two American POWs during the Vietnam War, which had been justified as a reprisal, was forwarded to the adversary by the ICRC.[498]

445. In 1980, the ICRC reminded an armed opposition group of its commitment to respect the fundamental rules of IHL, in particular that "nobody will be held responsible for acts he didn't commit", which according to the ICRC, "excludes from the outset every recourse to acts of reprisals".[499]

VI. Other Practice

446. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle

[496] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[497] 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.
[498] ICRC, *Annual Report 1965*, Geneva, 1966, pp. 8–17; *Annual Report 1966*, Geneva, 1967, pp. 16–28.
[499] ICRC archive document.

that "captured combatants . . . shall be protected against all acts of violence and reprisals".[500]

447. Kalshoven notes that "none of the parties to the conflict in Vietnam have so much hinted at the argument that common Article 3 [of the 1949 Geneva Conventions] would not prohibit reprisals".[501]

Wounded, sick and shipwrecked in the power of the adversary

I. Treaties and Other Instruments

Treaties

448. Article 46 GC I states that "reprisals against the wounded [and] sick . . . protected by the Convention are prohibited".

449. Article 47 GC II provides that "reprisals against the wounded, sick and shipwrecked persons . . . protected by the Convention are prohibited".

450. Article 20 AP I, figuring in a part of AP I which gives a more extensive definition of the terms "wounded", "sick" and "shipwrecked", provides that "reprisals against the persons and objects protected by this Part are prohibited". Article 20 AP I was adopted by consensus.[502]

451. Upon ratification of AP I and AP II, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[503]

452. Upon ratification of AP I, Germany stated that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[504]

453. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[505]

454. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that "any

[500] ICRC archive document.
[501] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 305.
[502] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[503] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[504] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.
[505] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

measures thus taken by the United Kingdom . . . will not involve any action prohibited by the Geneva Conventions of 1949".[506]

Other Instruments

455. Section 7.2 of the 1999 UN Secretary-General's Bulletin, which deals under Section 7.1 with the protection of "persons placed *hors de combat* by reason of sickness [or] wounds . . .", states that "the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: . . . reprisals".

456. Section 9.6 of the 1999 UN Secretary-General's Bulletin states that "the United Nations force shall not engage in reprisals against the wounded [and] the sick . . .".

457. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

458. Australia's Commanders' Guide, referring to Articles 46 GC I, 47 GC II and 20 AP I, states that "protected persons, such as . . . wounded and sick . . . should not be the subject of reprisals".[507]

459. Australia's Defence Force Manual provides that "reprisals against the wounded, sick, shipwrecked . . . are forbidden".[508] It further states that "protected persons, such as . . . wounded and sick . . . should not be the subject of reprisals".[509]

460. Belgium's Law of War Manual, citing several examples of jurisprudence, states that "the persons protected by the Geneva Conventions (wounded and sick, shipwrecked . . .) . . . may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."[510]

461. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[511] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[512]

[506] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).
[507] Australia, *Commanders' Guide* (1994), § 1212.
[508] Australia, *Defence Force Manual* (1994), § 985.
[509] Australia, *Defence Force Manual* (1994), § 1311.
[510] Belgium, *Law of War Manual* (1983), p. 36.
[511] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[512] Benin, *Military Manual* (1995), Fascicule III, p. 13.

462. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".[513]

463. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: ... to engage in reprisals or collective punishments".[514]

464. Canada's LOAC Manual, in a section dealing with the treatment of the wounded, sick and shipwrecked, states that "reprisals against the wounded, sick, and shipwrecked are forbidden".[515] In a section dealing with enforcement measures, the manual further provides that "reprisals are permitted against combatants and against objects constituting military objectives".[516] It adds that "reprisals against the following categories of persons and objects are prohibited: ... a. the wounded, sick ... protected by [G]C I; b. the wounded, sick and shipwrecked persons ... protected by [G]C II".[517]

465. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[518]

466. Croatia's LOAC Compendium states that reprisals are prohibited against the sick, wounded and shipwrecked. It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[519]

467. Ecuador's Naval Manual provides that "reprisals are forbidden to be taken against: ... 2. Wounded, sick and shipwrecked persons."[520]

468. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[521]

469. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits ... methods of warfare which consist in the recourse: ... to reprisals against non-military objectives".[522] The manual further refers to Articles 46 GC I, 47 GC II and 20 AP I and states that "reprisals are prohibited against ... the wounded, sick and shipwrecked".[523]

[513] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[514] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[515] Canada, *LOAC Manual* (1999), p. 9-1, § 7.
[516] Canada, *LOAC Manual* (1999), p. 15-2, § 16.
[517] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[518] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[519] Croatia, *LOAC Compendium* (1991), p. 19.
[520] Ecuador, *Naval Manual* (1989), § 6.2.3.2.
[521] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[522] France, *LOAC Manual* (2001), p. 85.
[523] France, *LOAC Manual* (2001), p. 108.

470. Germany's Soldiers' Manual states that "reprisals against [the wounded, sick and shipwrecked] are prohibited".[524]

471. Germany's Military Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: the wounded, sick and shipwrecked".[525] In a chapter dealing with the "Protection of the Wounded, Sick and Shipwrecked", the manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "reprisals against the wounded, sick and shipwrecked are prohibited".[526]

472. Germany's IHL Manual provides that "reprisals are expressly prohibited against the wounded, sick and shipwrecked".[527]

473. Hungary's Military Manual states that reprisals against the "wounded, sick and shipwrecked" are prohibited. It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[528]

474. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[529]

475. Italy's IHL Manual, providing for the prohibition of reprisals against the wounded, sick and shipwrecked, states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals, such as, for instance, the rules regarding . . . the wounded and the sick".[530]

476. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[531] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . the wounded, sick and shipwrecked".[532]

477. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[533]

478. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[534]

479. The Military Manual of the Netherlands, in the chapter dealing with the protection of the wounded and sick and referring to Article 20 AP I, states that "measures of reprisal are prohibited against . . . the wounded, sick . . . in short against all protected persons and objects".[535]

[524] Germany, *Soldiers' Manual* (1991), p. 5.
[525] Germany, *Military Manual* (1992), § 479.
[526] Germany, *Military Manual* (1992), § 604.
[527] Germany, *IHL Manual* (1996), § 320.
[528] Hungary, *Military Manual* (1992), p. 35.
[529] Indonesia, *Air Force Manual* (1990), § 15(c).
[530] Italy, *IHL Manual* (1991), Vol. I, § 25.
[531] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[532] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[533] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[534] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[535] Netherlands, *Military Manual* (1993), p. VI-9.

480. The Military Handbook of the Netherlands states that "protected persons under the laws of war are: the wounded, sick and shipwrecked, regardless of whether they are military personnel or civilians . . . Reprisals against them must not be taken."[536] In the chapter dealing with the wounded and sick, the Handbook further states that "reprisals against [wounded and sick military personnel who have laid down their arms] are prohibited".[537]

481. New Zealand's Military Manual, in the chapter dealing with the wounded, sick and shipwrecked and referring to Articles 46 GC I, 47 GC II and 20 AP I, states that "reprisals against the wounded, sick, shipwrecked . . . are forbidden".[538] In the chapter dealing with reprisals, the manual states that "reprisals against the following categories of persons and objects are prohibited: a) the wounded, sick . . . protected by [Article 46 GC I]; b) the wounded, sick and shipwrecked persons . . . protected by [Article 47 GC II]".[539]

482. Nigeria's Military Manual, in a part dealing with GC I, states that reprisals "are prohibited 'against the wounded, sick . . . protected by the convention' (Art. 46)".[540]

483. South Africa's LOAC Manual states that "reprisals against . . . the persons and objects of . . . the wounded and sick . . . are prohibited".[541]

484. Spain's LOAC Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, lists among the persons against whom the taking of reprisals is prohibited "the wounded, sick and shipwrecked as well as specially protected persons".[542]

485. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[543]

486. Switzerland's Basic Military Manual referring, *inter alia*, to Article 46 GC I, states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to the wounded and sick".[544]

487. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[545] It

[536] Netherlands, *Military Handbook* (1995), p. 7-38.
[537] Netherlands, *Military Handbook* (1995), p. 7-40.
[538] New Zealand, *Military Manual* (1992), § 1002(7).
[539] New Zealand, *Military Manual* (1992), § 1606(2).
[540] Nigeria, *Military Manual* (1994), p. 14, § 5.
[541] South Africa, *LOAC Manual* (1996), § 34(e).
[542] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[543] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.
[544] Switzerland, *Basic Military Manual* (1987), Article 197(2).
[545] Togo, *Military Manual* (1996), Fascicule III, p. 12.

adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[546]

488. The UK Military Manual, in the part dealing with the sick, wounded and dead, refers to the provisions which GC I and GC II have in common with GC III and states that "the provisions of [GC I] are substantially the same as in the other 1949 [Geneva] Conventions. This applies in particular to such questions as . . . the prohibition of reprisals."[547] In the part dealing with reprisals, and referring to Articles 14 and 46 GC I and 16 and 47 GC II, the manual states that "reprisals against . . . sick, and wounded and against shipwrecked members of the enemy armed forces . . . protected by [GC I and GC II] . . . are . . . prohibited".[548] In a footnote relating to this provision, the manual notes that "the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".[549] In a footnote relating to another provision, the manual moreover states that "reprisals against wounded and sick . . . constitute war crimes".[550]

489. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . the wounded, sick and shipwrecked".[551]

490. The US Field Manual, referring to Articles 13 GC III and 33 GC IV, provides that "reprisals against the persons or property of prisoners of war, including the wounded and sick, . . . are forbidden . . . However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals."[552]

491. The US Air Force Pamphlet, referring to Articles 46 GC I and 47 GC II, provides that:

> Reprisals against the wounded [and] sick . . . protected by [GC I] are prohibited . . .
>
> Reprisals against the wounded, sick and shipwrecked persons . . . protected by [GC II] are prohibited . . .
>
> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.[553]

The Pamphlet further states that:

> Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For

[546] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[547] UK, *Military Manual* (1958), § 385.
[548] UK, *Military Manual* (1958), § 644.
[549] UK, *Military Manual* (1958), § 644, footnote 2.
[550] UK, *Military Manual* (1958), § 647, footnote 1.
[551] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
[552] US, *Field Manual* (1956), § 497(c).
[553] US, *Air Force Pamphlet* (1976), § 10-7(b)(1).

definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.[554]

492. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against . . . the sick and wounded [and] the shipwrecked".[555]
493. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against persons or property protected by the Geneva Conventions, to include the wounded, sick, or shipwrecked."[556]
494. The US Naval Handbook states that "reprisals are forbidden to be taken against: . . . 2. Wounded, sick and shipwrecked persons."[557]
495. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . the sick, the wounded and the shipwrecked".[558]

National Legislation
496. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[559]
497. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[560]

National Case-law
498. No practice was found.

Other National Practice
499. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[561]
500. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against the wounded, sick and shipwrecked . . . The prohibition applies in respect of all weapons. In

[554] US, *Air Force Pamphlet* (1976), § 10-7(b)(2).
[555] US, *Air Force Commander's Handbook* (1980), § 8-4(c).
[556] US, *Operational Law Handbook* (1993), p. Q-182.
[557] US, *Naval Handbook* (1995), § 6.2.3.2.
[558] SFRY (FRY), *YPA Military Manual* (1988), § 31(1).
[559] Colombia, *Penal Code* (2000), Article 158.
[560] Italy, *Law of War Decree as amended* (1938), Article 8.
[561] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."[562]

501. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[563]

502. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read as follows "3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949."[564]

503. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals "must not be directed, in any way, against the injured, sick . . ., but [have] to be confined to purely military targets".[565]

504. According to the Report on the Practice of Israel, the IDF does not condone or conduct reprisals against persons or objects protected by the Geneva Conventions.[566]

505. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal."[567]

506. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[568]

507. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[569]

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[562] Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
[563] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
[564] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[565] Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.
[566] Report on the Practice of Israel, 1997, Chapter 2.9.
[567] Report on the Practice of Jordan, 1997, Chapter 2.9.
[568] Report on the Practice of the Philippines, 1997, Chapter 2.9.
[569] Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

508. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

> During hostilities, it is forbidden to resort to reprisals against . . . the injured [and] the infirm . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[570]

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

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.[571]

510. In 1987, the Deputy Legal Adviser of the US Department of State, mentioning that the protection of the wounded, sick and shipwrecked was an area in which AP I "does contain some useful codifications or improvements of existing rules", affirmed that "we support the principle that all the wounded, sick, and shipwrecked be respected and protected, and not be made the object of attacks or reprisals, regardless of the party to the conflict to which they belong".[572]

511. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US noted that it considered that the provisions of AP I regarding reprisals were "new rules".[573]

III. Practice of International Organisations and Conferences

United Nations

512. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft

[570] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.
[571] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.
[572] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 423.
[573] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[574]

513. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 46 GC I and 47 GC II, stated that "reprisals against the following categories of persons and objects are specifically prohibited: (a) The wounded [and] sick . . . protected by the First Geneva Convention . . .; (b) The wounded, sick and shipwrecked persons . . . protected by the Second Geneva Convention."[575] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[576]

Other International Organisations

514. No practice was found.

International Conferences

515. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

516. No practice was found.

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

517. No practice was found.

VI. Other Practice

518. No practice was found.

[574] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[575] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[576] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

Medical and religious personnel in the power of the adversary

I. Treaties and Other Instruments

Treaties

519. Articles 46 GC I and 47 GC II provide that "reprisals against the ... personnel ... protected by the Convention are prohibited".

520. Article 20 AP I, figuring in a part of AP I which extends the category of persons who cannot be the object of reprisals to the wider range of personnel and objects involved in the care of the wounded, the sick and the shipwrecked, states that "reprisals against the persons and objects protected by this Part are prohibited". Article 20 AP I was adopted by consensus.[577]

521. Upon ratification of AP I and AP II, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[578]

522. Upon ratification of AP I, Germany stated that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I ... with all means admissible under international law in order to prevent any further violation".[579]

523. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I ... with all means admissible under international law in order to prevent any further violation".[580]

524. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that "any measures thus taken by the United Kingdom ... will not involve any action prohibited by the Geneva Conventions of 1949".[581]

Other Instruments

525. Section 9.6 of the 1999 UN Secretary-General's Bulletin which deals under Section 9.4 with the protection of "medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel", states that "the United Nations force shall not engage in reprisals against ... the personnel ... protected under this section".

[577] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[578] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[579] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.
[580] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.
[581] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

526. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

527. Australia's Commanders' Guide, referring to Articles 46 GC I, 47 GC II and 20 AP I, states that "protected persons, such as medical personnel . . . should not be the subject of reprisals".[582]

528. Australia's Defence Force Manual provides that "reprisals against . . . medical personnel . . . are forbidden".[583] It also states that "protected persons, such as medical personnel . . . should not be the subject of reprisals".[584]

529. Belgium's Law of War Manual, citing several examples of jurisprudence, states that "the persons protected by the Geneva Conventions . . . may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."[585]

530. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[586] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[587]

531. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[588]

532. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".[589]

533. Canada's LOAC Manual, in a section dealing with enforcement measures, provides that "reprisals are permitted against combatants and against objects constituting military objectives".[590] In the same section, the manual states that "reprisals against the following categories of persons and objects are prohibited: a. the . . . medical personnel . . . protected by [G]C I; b. the . . . personnel . . . protected by [G]C II".[591]

[582] Australia, *Commanders' Guide* (1994), § 1212.
[583] Australia, *Defence Force Manual* (1994), § 985.
[584] Australia, *Defence Force Manual* (1994), § 1311.
[585] Belgium, *Law of War Manual* (1983), p. 36.
[586] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[587] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[588] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[589] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[590] Canada, *LOAC Manual* (1999), p. 15-2, § 16.
[591] Canada, *LOAC Manual* (1999), p. 15-2, § 15.

534. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo, ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[592]

535. Croatia's LOAC Compendium provides for the prohibition of taking reprisals against "specifically protected persons and objects".[593]

536. Ecuador's Naval Manual provides that "reprisals are forbidden to be taken against: ... 4. Hospitals and medical facilities, personnel, and equipment."[594]

537. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[595]

538. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits ... the methods of warfare which consist in the recourse: ... to reprisals against non-military objectives".[596] The manual refers to Articles 46 GC I, 47 GC II and 20 AP I and states that "reprisals are prohibited against ... the persons and objects particularly protected".[597]

539. Germany's Military Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: ... medical and religious personnel".[598] Referring to Articles 46 GC I and 47 GC II, the manual further provides that "reprisals against chaplains are prohibited. This prohibition shall protect chaplains from any restriction of the rights assigned to them."[599]

540. Germany's IHL Manual provides that "reprisals are expressly prohibited against ... medical and religious personnel".[600]

541. Hungary's Military Manual provides for the prohibition of reprisals against "specifically protected persons and objects".[601]

542. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[602]

543. Italy's IHL Manual, providing for the prohibition of reprisals against protected medical personnel and protected persons, states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[603]

[592] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[593] Croatia, *LOAC Compendium* (1991), p. 19. [594] Ecuador, *Naval Manual* (1989), § 6.2.3.2.
[595] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[596] France, *LOAC Manual* (2001), p. 85. [597] France, *LOAC Manual* (2001), p. 108.
[598] Germany, *Military Manual* (1992), § 479. [599] Germany, *Military Manual* (1992), § 814.
[600] Germany, *IHL Manual* (1996), § 320. [601] Hungary, *Military Manual* (1992), p. 35.
[602] Indonesia, *Air Force Manual* (1990), § 15(c). [603] Italy, *IHL Manual* (1991), Vol. I, § 25.

544. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[604] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . medical and religious personnel".[605]

545. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[606]

546. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[607]

547. The Military Manual of the Netherlands, in the chapter dealing with the protection of the wounded and sick, states that "measures of reprisal are prohibited against . . . medical and religious personnel . . . in short against all protected persons and objects".[608]

548. The Military Handbook of the Netherlands states that "protected persons under the laws of war are: . . . medical personnel, both military and civil; religious personnel with the armed forces . . . Reprisals against them must not be taken."[609]

549. New Zealand's Military Manual, in the chapter dealing with the wounded, sick and shipwrecked and referring to Articles 46 GC I, 47 GC II and 20 AP I, states that "reprisals against medical personnel, buildings and equipment are forbidden".[610] In the chapter dealing with reprisals, the manual further states that "reprisals against the following categories of persons and objects are prohibited . . . a) the . . . personnel . . . protected by [Article 46 GC I]; b) the . . . personnel . . . protected by [Article 47 GC II]".[611]

550. Nigeria's Military Manual, in a part dealing with GC I, states that reprisals "are prohibited 'against the . . . personnel . . . protected by the convention' (Art. 46)".[612]

551. Nigeria's Manual on the Laws of War, which states that "it is prohibited to take measures of reprisal against prisoners of war as a retaliation for [a] violation of the Laws of War by the enemy", also provides for the same protection and benefits to be granted, as a minimum, to medical personnel and military chaplains captured by the enemy.[613]

[604] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[605] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[606] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[607] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[608] Netherlands, *Military Manual* (1993), p. VI-9.
[609] Netherlands, *Military Handbook* (1995), p. 7-38.
[610] New Zealand, *Military Manual* (1992), § 1002(7).
[611] New Zealand, *Military Manual* (1992), § 1606(2).
[612] Nigeria, *Military Manual* (1994), p. 14, § 5.
[613] Nigeria, *Manual on the Laws of War* (undated), §§ 33 and 37.

552. Spain's LOAC Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, lists among the persons against whom the taking of reprisals is prohibited "specially protected persons".[614]

553. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[615]

554. Switzerland's Basic Military Manual, referring, *inter alia*, to Article 46 GC I, states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to ... medical personnel".[616]

555. Togo's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".[617] It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".[618]

556. The UK Military Manual, in a footnote relating to a provision which refers to Articles 14 and 46 GC I and 16 and 47 GC II, notes that "reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".[619]

557. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against ... medical and religious personnel".[620]

558. The US Air Force Pamphlet, referring to Articles 46 GC I and 47 GC II, provides that:

> Reprisals against the ... personnel ... protected by [GC I] are prohibited ...
> Reprisals against ... the persons protected by [GC II] are prohibited ...
> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.[621]

The Pamphlet further states that:

> Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For

[614] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[615] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.
[616] Switzerland, *Basic Military Manual* (1987), Article 197(2).
[617] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[618] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[619] UK, *Military Manual* (1958), § 644, footnote 2.
[620] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
[621] US, *Air Force Pamphlet* (1976), § 10-7(b)(1).

definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.[622]

559. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against . . . medical personnel".[623]
560. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against persons or property protected by the Geneva Conventions."[624]
561. The US Naval Handbook states that "reprisals are forbidden to be taken against: . . . 4. Hospitals and medical facilities, personnel, and equipment."[625]
562. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . medical personnel, medical units".[626]

National Legislation
563. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . medical organisations and their personnel . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[627]

564. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[628]
565. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[629]

National Case-law
566. No practice was found.

622 US, *Air Force Pamphlet* (1976), § 10-7(b)(2).
623 US, *Air Force Commander's Handbook* (1980), § 8-4(c).
624 US, *Operational Law Handbook* (1993), p. Q-182.
625 US, *Naval Handbook* (1995), § 6.2.3.2.
626 SFRY (FRY), *YPA Military Manual* (1988), § 31(2).
627 Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
628 Colombia, *Penal Code* (2000), Article 158.
629 Italy, *Law of War Decree as amended* (1938), Article 8.

Other National Practice

567. At the CDDH, Australia proposed an amendment to Article 20 of draft AP I which read: "Measures in the nature of reprisals against the persons and objects protected by this Part are prohibited."[630] However, the Australian delegation noted that "the law concerning reprisals was far from settled and it might be found not to be applicable to peoples fighting wars of self-determination to which draft [AP I] had now been extended".[631]

568. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that "the Geneva Conventions of 1949 prohibit reprisals against certain categories of persons such as medical personnel".[632]

569. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[633]

570. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . medical services and personnel . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."[634]

571. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[635]

572. According to the Report on the Practice of Egypt, military communiqués issued during the Middle East War in 1973 and Egypt's declaration upon ratification of AP I highlight Egypt's position according to which reprisals should not be directed against protected persons and objects, but that this would not prevent Egypt from resorting to reprisals "in the most strict limits possible".[636]

573. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The

[630] Australia, New proposal concerning Article 20 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/214, 13 February 1975, p. 97.
[631] Australia, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.23, 24 February 1975, § 13.
[632] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.
[633] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[634] Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
[635] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
[636] Report on the Practice of Egypt, 1997, Chapter 2.9.

measures may not involve any actions prohibited by the Geneva Conventions of 1949."[637]

574. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals should not be directed against civilians and civilian objects, but only against military targets.[638]

575. According to the Report on the Practice of Israel, the IDF does not condone or conduct reprisals against persons or objects protected by the Geneva Conventions.[639]

576. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal".[640]

577. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[641]

578. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[642]

579. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands in 1994, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

> During hostilities, it is forbidden to resort to reprisals against medical installations, transportation and units . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[643]

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

[637] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[638] Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.
[639] Report on the Practice of Israel, 1997, Chapter 2.9.
[640] Report on the Practice of Jordan, 1997, Chapter 2.9.
[641] Report on the Practice of the Philippines, 1997, Chapter 2.9.
[642] Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[643] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.[644]

581. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 12–20 AP I, affirmed that "we . . . support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks or reprisals".[645]
582. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US noted that it considered that the provisions of AP I regarding reprisals were "new rules".[646]

III. Practice of International Organisations and Conferences

United Nations
583. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[647]
584. In 1994 in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 46 GC I and 47 GC II, stated that "reprisals against the following categories of persons and objects are specifically prohibited: (a) The . . . personnel . . . protected by the First Geneva Convention . . .; (b) The . . . personnel . . . protected by the Second Geneva Convention."[648] It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in

644 UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.
645 US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 423.
646 US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.
647 UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
648 UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[649]

Other International Organisations
585. No practice was found.

International Conferences
586. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

587. No practice was found.

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

588. No practice was found.

VI. Other Practice

589. No practice was found.

Civilians in the power of the adversary

I. Treaties and Other Instruments

Treaties
590. Article 33, third paragraph, GC IV provides that "reprisals against protected persons . . . are prohibited".
591. In its reservations and declarations made upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that "any measures thus taken by the United Kingdom . . . will not involve any action prohibited by the Geneva Conventions of 1949".[650]

[649] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[650] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

592. Section 7.2 of the 1999 UN Secretary-General's Bulletin which deals under Section 7.1 with the protection of "persons not, or no longer, taking part in military operations, including civilians . . . and persons placed *hors de combat* by reason of . . . detention", states that "the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: . . . reprisals".

593. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

594. Argentina's Law of War Manual (1969), in the chapter dealing with the "Protection of civilian persons in times of war", which contains "provisions common to the territories of the belligerent parties and occupied territories", states that "measures of reprisal with respect to protected persons and their property remain equally prohibited".[651]

595. Argentina's Regulation for the Treatment of POWs, in a part dealing with interned civilians, states that "reprisals against innocent interned [persons] are prohibited".[652]

596. Argentina's Law of War Manual (1989), in a part dealing with the "Treatment given to protected persons", which contains "provisions common to the territories of the belligerent parties and occupied territories", refers to Article 33 GC IV and provides that "remain absolutely prohibited: . . . measures of reprisal against protected persons and their objects".[653] In an annex containing a list of "Fundamental rules of International Humanitarian Law applicable in armed conflict", the manual provides that "civilian persons who find themselves in the hands of the adversary . . . will be protected against all acts of violence and reprisals".[654]

597. Australia's Commanders' Guide refers to Article 33 GC IV and states that "protected persons, such as . . . civilians . . . should not be the subject of reprisals".[655]

598. Australia's Defence Force Manual, in a provision entitled "Effects of occupation on the population", provides that "measures for the control of the population which are prohibited include: . . . reprisals or collective penalties".[656]

[651] Argentina, *Law of War Manual* (1969), § 4.012(3).
[652] Argentina, *Regulation for the Treatment of POWs* (1985), § 4.02(5).
[653] Argentina, *Law of War Manual* (1989), § 4.29(5).
[654] Argentina, *Law of War Manual* (1989), Annex 10, § 4.
[655] Australia, *Commanders' Guide* (1994), § 1212.
[656] Australia, *Defence Force Manual* (1994), § 1221(c).

599. Belgium's Law of War Manual, citing several examples of jurisprudence and referring to Articles 4 and 33 GC IV, states that "the persons protected by the Geneva Conventions (... civilians)... may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."[657]

600. Benin's Military Manual states that "the following prohibitions must be respected:... to launch reprisals against protected persons and property".[658] It adds that reprisals "may only be used if:... they are carried out only against combatants and military objectives".[659]

601. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat:... to take hostages, to engage in reprisals or collective punishments".[660]

602. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat:... to engage in reprisals or collective punishments".[661]

603. Canada's LOAC Manual, in a chapter entitled "Treatment of civilians in the hands of a party to the conflict or an occupying power" and, more specifically, in a section containing "Provisions common to the territories of the parties to the conflict and to occupied territories", refers to GC IV and states that "the following are expressly prohibited:... the taking of reprisals against protected persons and their property".[662] In a section dealing with enforcement measures, the manual further provides that "reprisals are permitted against combatants and against objects constituting military objectives".[663] In the same section, it also states that "reprisals against the following categories of persons and objects are prohibited:... d. civilians in the hands of a party to the conflict of which they are not nationals, including inhabitants of occupied territory".[664]

604. Colombia's Circular on Fundamental Rules of IHL provides that "civilian persons under the authority of the adversary... shall be protected against... reprisals".[665]

605. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo... it is prohibited [to soldiers in combat]:... to take hostages, to engage in reprisals or collective punishments".[666]

[657] Belgium, *Law of War Manual* (1983), p. 36.
[658] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[659] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[660] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[661] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[662] Canada, *LOAC Manual* (1999), p. 11-4, § 33.
[663] Canada, *LOAC Manual* (1999), p. 15-2, § 16.
[664] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[665] Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.
[666] Congo, *Disciplinary Regulations* (1986), Article 32(2).

606. The Military Manual of the Dominican Republic, under the heading "Treat all captives and detainees humanely", states that "you must never carry out reprisals or acts of vengeance against any person, enemy or civilian, you have taken prisoner or detained during the fighting". It also provides that "the Geneva Convention prohibits reprisals against civilians for the acts of enemy soldiers".[667]

607. Ecuador's Naval Manual provides that "reprisals may be taken against enemy armed forces, [and] enemy civilians other than those in occupied territory".[668]

608. Ecuador's Naval Manual further provides that "reprisals are forbidden to be taken against: . . . 3. Civilians in occupied territory."[669] The manual also provides that "interned civilians . . . may not be subjected to collective punishment or acts of reprisal".[670]

609. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".[671]

610. France's LOAC Summary Note provides that "civilians in the power of the adversary must be protected against violence and reprisals".[672]

611. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".[673] The manual further refers to Articles 33 GC IV and 20 AP I and states that "reprisals are prohibited against civilian persons".[674]

612. Germany's Military Manual, in the chapter dealing with reprisals, refers to Articles 33 GC IV and 51 AP I and provides that "it is expressly prohibited by agreement to make reprisals against: . . . civilians".[675] Referring to Articles 33 GC IV and 20 and 51 AP I, the manual further states that "reprisals against the civilian population . . . are prohibited".[676] In a chapter entitled "Belligerent occupation", the manual, referring to Articles 33 GC IV and 20 and 51 AP I, states that "reprisals against civilians . . . are prohibited".[677]

613. Hungary's Military Manual provides for the prohibition of taking reprisals against "specifically protected persons and objects".[678]

667 Dominican Republic, *Military Manual* (1980), pp. 7 and 10.
668 Ecuador, *Naval Manual* (1989), § 6.2.3.
669 Ecuador, *Naval Manual* (1989), § 6.2.3.2.
670 Ecuador, *Naval Manual* (1989), § 11.9.
671 France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
672 France, *LOAC Summary Note* (1992), § 2.1.
673 France, *LOAC Manual* (2001), p. 85.
674 France, *LOAC Manual* (2001), p. 108.
675 Germany, *Military Manual* (1992), § 479.
676 Germany, *Military Manual* (1992), § 507.
677 Germany, *Military Manual* (1992), § 535.
678 Hungary, *Military Manual* (1992), p. 35.

614. India's Manual of Military Law prohibits reprisals. This provision is in a section relative to the action by a commander acting in aid of civil authorities for the handling of crowds and mobs. It adds that action is preventive and not punitive and that no soldier can punish a civilian, except under martial law.[679]
615. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[680]
616. Italy's IHL Manual, in a chapter dealing with occupied territory, states that "in occupied territories, civilian persons have the following rights: ... they may not be ... made the object of reprisals".[681]
617. Kenya's LOAC Manual states that "it is forbidden: ... (e) to carry out reprisals against protected persons or property".[682] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives ... The Geneva Conventions and [AP I] prohibit reprisals against ... civilians".[683]
618. Madagascar's Military Manual, in the part dealing with civilian persons, instructs soldiers to "protect them against ill-treatment". It states that "acts of vengeance ... are prohibited".[684] The manual further instructs soldiers to refrain from all acts of revenge.[685] In its attached list of "Fundamental rules of international humanitarian law applicable in armed conflicts", the manual states that "captured combatants and civilians who are under the authority of the adverse party ... will be protected against any act of violence and reprisals".[686]
619. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".[687]
620. The Military Manual of the Netherlands, in the chapter dealing with the protection of the civilian population and referring to Article 33 GC IV, states that "a protected person cannot be punished for acts which he/she has not personally committed. Collective punishments are also prohibited."[688]
621. New Zealand's Military Manual, in the chapter dealing with civilians and referring to Articles 32–34 GC IV, states that "the following are ... prohibited: ... the taking of reprisals against protected persons and their property".[689] In the chapter dealing with reprisals and referring to Articles 33 GC IV and 73 AP I, the manual states that "reprisals against the following categories of persons and objects are prohibited ... d) civilians in the hands of a

[679] India, *Manual of Military Law* (1983), Vol. 1, Chapter VII, § 8.
[680] Indonesia, *Air Force Manual* (1990), § 15(c).
[681] Italy, *IHL Manual* (1991), Vol. I, § 41(f).
[682] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[683] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[684] Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 23(3).
[685] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[686] Madagascar, *Military Manual* (1994), p. 91, Rule 4.
[687] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[688] Netherlands, *Military Manual* (1993), p. VIII-2.
[689] New Zealand, *Military Manual* (1992), § 1116(2)(d).

Party to the conflict of which they are not nationals, including inhabitants of occupied territory".[690]

622. South Africa's LOAC Manual states that "reprisals against the persons and property of . . . protected civilians are prohibited".[691]

623. Spain's LOAC Manual lists among the persons against whom the taking of reprisals is prohibited "civilian persons and objects". It refers, however, to Article 46 GC I.[692]

624. Sweden's IHL Manual, referring to Article 33 GC IV, states that:

> Protected persons may not be punished for actions they have not themselves performed. Collective punishment of a whole group is also prohibited. Also, the occupying power may not punish protected persons . . . in reprisal for some action directed against the occupying power. If disturbances occur, the occupant may not attempt to restore order by taking innocent persons hostage.[693]

625. Switzerland's Basic Military Manual, in the part dealing with "Hostilities and their limits" refers, *inter alia*, to Articles 33 GC IV and 51, 54 and 55 AP I and states that "reprisals against the civilian population are prohibited".[694] In the part dealing with civilian persons and, more specifically, "civilian persons who are in the power of the troops at the moment of combat", refers to Article 33 GC IV and states that "measures of reprisal or attacks [carried out] as measures of reprisal are prohibited".[695] In the provision dealing with reprisals, the manual, referring to Article 33 GC IV, states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to . . . the civilian population".[696]

626. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[697] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[698]

627. The UK Military Manual, in a chapter dealing with the "treatment of enemy alien civilians" and referring to Articles 32–34 GC IV, states that "the following are prohibited: . . . the taking of reprisals against protected persons and their property".[699] In a chapter dealing with "the occupation of enemy territory", the manual states that "[Article 33 GC IV] effected a change in the law by laying down expressly that no protected person may be punished for an offence he or she has not personally committed and that collective penalties and all measures of intimidation or of terrorism are prohibited".[700] It

[690] New Zealand, *Military Manual* (1992), § 1606(2).
[691] South Africa, *LOAC Manual* (1996), § 34(e).
[692] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[693] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[694] Switzerland, *Basic Military Manual* (1987), Article 25(2).
[695] Switzerland, *Basic Military Manual* (1987), Article 149.
[696] Switzerland, *Basic Military Manual* (1987), Article 197(2).
[697] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[698] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[699] UK, *Military Manual* (1958), § 42.
[700] UK, *Military Manual* (1958), § 553.

goes on to say, with reference to Articles 33 and 34 GC IV, that "[GC IV], provides . . . that 'Reprisals against protected persons and their property are prohibited'."[701] Moreover, in the part dealing with reprisals, the manual states that "reprisals against . . . civilian protected persons and their property in occupied territory and in the belligerent's own territory, are . . . prohibited".[702] In a footnote relating to this provision, the manual, referring to Articles 4 and 33 GC IV, notes that "the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".[703] In a footnote relating to another provision, the manual states that "reprisals against . . . civilians protected under [GC IV], constitute war crimes".[704]

628. The UK LOAC Manual, in a part dealing with the protection of civilians, states that "it is forbidden: . . . to carry out reprisals against protected persons or property".[705] It further states that "the Geneva Conventions and [AP I] prohibit reprisals against . . . enemy civilians in territory controlled by a belligerent".[706]

629. The US Field Manual, referring to Article 33 GC IV, stipulates that "reprisals against . . . protected civilians are forbidden . . . However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals."[707]

630. The US Air Force Pamphlet, referring to Article 33 GC IV, provides that "no protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Reprisals against protected persons . . . are prohibited."[708] The Pamphlet further states that:

> Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted. Also, the prohibition in Article 33, GC [IV], protecting civilians includes all those who . . . at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. (Article 4, GC [IV]).[709]

631. The US Soldier's Manual, under the heading "Treat all captives and detainees humanely", tells soldiers that "you must never engage in reprisals or acts of revenge against any persons, enemy or civilian, whom you capture or detain in combat". In a part dealing with the treatment of civilians and private

[701] UK, *Military Manual* (1958), § 554. [702] UK, *Military Manual* (1958), § 644.
[703] UK, *Military Manual* (1958), § 644, footnote 2.
[704] UK, *Military Manual* (1958), § 647, footnote 1.
[705] UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(e).
[706] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16. [707] US, *Field Manual* (1956), § 497(c).
[708] US, *Air Force Pamphlet* (1976), § 10-7(b)(1). [709] US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

property, the manual further states that "the Geneva Conventions forbid retaliating against civilians for the actions of enemy soldiers".[710]

632. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against ... the inhabitants of occupied territory".[711]

633. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: ... m. Reprisals against persons or property protected by the Geneva Conventions, to include ... civilians."[712]

634. The US Naval Handbook states that "reprisals are forbidden to be taken against: 1. ... interned civilians ... 3. Civilians in occupied territory."[713] It also provides that "all interned civilians ... may not be subjected to reprisal action or collective punishment".[714]

635. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: ... civilian persons and their property".[715]

National Legislation

636. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning civilian persons, medical organisations and their personnel, civilian objectives, civilian property ... During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[716]

637. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event and during armed conflict" are punishable offences.[717]

638. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[718]

[710] US, *Soldier's Manual* (1984), pp. 15 and 23.
[711] US, *Air Force Commander's Handbook* (1980), § 8-4(c).
[712] US, *Operational Law Handbook* (1993), p. Q-182.
[713] US, *Naval Handbook* (1995), § 6.2.3.2.
[714] US, *Naval Handbook* (1995), § 11.8.
[715] SFRY (FRY), *YPA Military Manual* (1988), § 31(1).
[716] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
[717] Colombia, *Penal Code* (2000), Article 158.
[718] Italy, *Law of War Decree as amended* (1938), Article 8.

National Case-law

639. In its judgement in the *Schintlholzer case* in 1988 dealing with the killing of Italian civilians by German soldiers in 1944, Italy's Military Tribunal of Verona stated that the acts

> definitely cannot be seen as falling within the limited system of reprisals or collective punishments; a system which, in any case, refers to the conditions and procedures provided for in international law. However, it seems difficult to deny that systematic violence against the defenceless constitutes a completely unjustified corollary of a military operation carried out by German troops [which had the aim to combat the partisans].[719]

640. In the *Priebke case* in 1995, Argentina's Public Prosecutor of First Instance, dealing with Italy's request to extradite the accused, held that the alleged killing in reprisal of 330 civilians and POWs committed by German soldiers in the Ardeatine Caves in Italy during the Second World War was "an act which must be qualified as a war crime".[720]

641. In the *Calley case* in 1973, a US army officer was convicted of murder for killing South Vietnamese civilians. The US Army Court of Military Review dismissed the argument that the acts were lawful reprisals for illegal acts of the enemy and held that "slaughtering many for the presumed delicts of a few is not a lawful response to the delicts . . . Reprisal by summary execution of the helpless is forbidden in the laws of land warfare."[721]

Other National Practice

642. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[722]

643. In its written comments on other written statements concerning the *Nuclear Weapons case* before the ICJ in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[723]

644. At the CDDH, France made a proposal for a draft Article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

[719] Italy, Military Tribunal of Verona, *Schintlholzer case*, Judgement, 15 November 1988.
[720] Argentina, Hearing of the Public Prosecutor of the First Instance, *Priebke case*, 1995, Section V.2.
[721] US, Army Court of Military Review, *Calley case*, Judgement, 16 February 1973.
[722] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[723] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

"3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949."[724]

645. At the CDDH, the FRG, with regard to a French proposal on reprisals according to which "the measures may not involve any actions prohibited by the Geneva Conventions of 1949", stated that this provision "was the most important in the whole of the proposal since it really did protect . . . the civilian population in occupied territory".[725]

646. According to the Report on the Practice of Israel, the IDF does not condone or conduct reprisals against persons or objects protected by the Geneva Conventions.[726]

647. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal."[727]

648. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[728]

649. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[729]

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

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.[730]

651. An instruction card issued to all US troops engaged in Vietnam directed soldiers always to treat prisoners humanely, adding that "all persons in your hands, whether suspects [or] civilians . . . must be protected against violence, insults, curiosity, and reprisals of any kind".[731]

[724] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[725] FRG, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 84, § 6.
[726] Report on the Practice of Israel, 1997, Chapter 2.9.
[727] Report on the Practice of Jordan, 1997, Chapter 2.9.
[728] Report on the Practice of the Philippines, 1997, Chapter 2.9.
[729] Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[730] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.
[731] US, The enemy in your hands, Reproduction of 3x5 instruction card issued to all troops, reprinted in George. S. Prugh, *Law at War: Vietnam 1964–1973*, Department of the Army, Vietnam Studies, 1975, Appendix H. III.

652. In 1980, in a footnote to a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State stated that:

> In theory, an attempt might also be made to justify the use of chemical weapons in Afghanistan as a lawful reprisal against violations of the general laws of war by Afghan insurgents (such as the summary execution of Soviet prisoners). However, such an argument would face several serious problems. First, the prohibition in the [1925 Geneva Gas] Protocol and in customary international law apparently itself precludes use of chemical weapons in reprisal except in response to enemy use of weapons prohibited by the [1925 Geneva Gas] Protocol . . . Second, reprisals against the civilian population of occupied territories are expressly precluded by the law of war, and this would apply to reprisals against Afghan villages in areas occupied by Soviet forces. See Article 33 of [GC IV].[732]

III. Practice of International Organisations and Conferences

United Nations

653. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[733]

654. In a resolution adopted in 1989 on the question of human rights and fundamental freedoms in Afghanistan, the UN Commission on Human Rights urged all parties to the conflict "to treat all prisoners in their custody in accordance with the internationally recognized principles of humanitarian law and to protect them from all acts of reprisal and violence".[734] It reiterated these appeals in 1990, 1991 and 1992.[735]

655. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 33 GC IV and Article 73 AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (d) Civilians in the hands of a party to the conflict of which they are

[732] US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.

[733] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

[734] UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11.

[735] UN Commission on Human Rights, Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.

not nationals, including inhabitants of occupied territory."[736] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[737]

Other International Organisations

656. No practice was found.

International Conferences

657. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "the Occupying Power [in the conflict between Israel and Palestinians] to refrain from perpetrating any other violation of [GC IV], in particular reprisals against protected persons and their property".[738]

IV. Practice of International Judicial and Quasi-judicial Bodies

658. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that "as for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary".[739]

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

659. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "civilians under the authority of an adverse party . . . shall be protected against all acts of violence and reprisals".[740]

660. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC reminded all those involved in the violence and those in a position to influence the situation that "terrorist acts

[736] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[737] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[738] Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 14.
[739] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 527.
[740] ICRC archive document.

are absolutely and unconditionally prohibited, as are reprisals against the civilian population, indiscriminate attacks and attacks directed against the civilian population".[741]

VI. Other Practice

661. No practice was found.

Civilians in general

I. Treaties and Other Instruments

Treaties

662. Article 51(6) AP I provides that "attacks against the civilian population or civilians by way of reprisals are prohibited". Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.[742]

663. Upon ratification of the 1949 Geneva Conventions, China declared that "Although [GC IV] does not apply to civilian persons outside enemy-occupied areas and consequently does not completely meet humanitarian requirements, it is found to be in accord with the interest of protecting civilian persons in occupied territory and in certain other cases".[743]

664. Upon ratification of AP I and AP II, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[744]

665. Upon ratification of AP I, France stated that it would:

> apply the provisions of [Article 51(8)] to the extent that their interpretation does not hinder, in conformity with international law, the use of such means as it considers indispensable for the protection of its civilian population from grave, manifest and deliberate violations of the Conventions and the Protocol by the enemy.[745]

666. Upon ratification of AP I, Germany stated that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation".[746]

741 ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.
742 CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.
743 China, Reservations made upon ratification of the 1949 Geneva Conventions, 28 December 1956, § 4.
744 Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
745 France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 11.
746 Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

667. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation".[747]
668. Upon signature of the 1949 Geneva Conventions, the USSR stated that "[GC IV] does not cover the civilian population in territory not occupied by the enemy and does not, therefore, completely meet humanitarian requirements". The USSR upheld its reservations upon ratification of the said instruments.[748]
669. Upon ratification of AP I, the UK stated that:

> The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[749]

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

Other Instruments
672. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

[747] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.
[748] USSR, Reservations made upon signature and maintained upon ratification of the 1949 Geneva Conventions, 12 December 1949 and 10 May 1954, § 4.
[749] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

673. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.
674. Section 5.6 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall not engage in reprisals against civilians".
675. Section 7.2 of the 1999 UN Secretary-General's Bulletin which deals in Section 7.1 with the protection of, *inter alia*, "persons not, or no longer, taking part in military operations, including civilians", states that "the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: . . . reprisals".
676. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

677. Australia's Commanders' Guide provides that "specific prohibitions dictate that civilians are not to be made the express object of an attack or reprisal".[750] In another provision, the manual refers to Articles 51–56 AP I and states that "protected persons, such as . . . civilians . . . should not be the subject of reprisals".[751]
678. Australia's Defence Force Manual provides that "reprisal actions against civilians are . . . prohibited".[752] In another provision, the manual states that "reprisals against civilians . . . are prohibited".[753] It further provides that "protected persons, such as . . . civilians . . . should not be the subject of reprisals".[754]
679. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[755] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[756]
680. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[757]

[750] Australia, *Commanders' Guide* (1994), § 604.
[751] Australia, *Commanders' Guide* (1994), § 1212.
[752] Australia, *Defence Force Manual* (1994), § 531.
[753] Australia, *Defence Force Manual* (1994), § 920.
[754] Australia, *Defence Force Manual* (1994), § 1311.
[755] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[756] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[757] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

681. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: ... to engage in reprisals or collective punishments".[758]
682. Cameroon's Instructors' Manual, in a part listing the rules of conduct in combat and referring to "civilian persons", provides that "protect them against ill treatment [and] acts of vengeance. The taking of hostages is prohibited."[759]
683. Canada's LOAC Manual provides that "reprisals against civilians ... are prohibited".[760] In a part dealing with enforcement measures, the manual states that "reprisals against the following categories of persons and objects are prohibited: ... e. civilians".[761]
684. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[762]
685. Croatia's LOAC Compendium provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[763]
686. Croatia's Soldiers' Manual, in a part dealing with civilians, provides that "measures of reprisal and the taking of hostages are prohibited".[764]
687. Ecuador's Naval Manual provides that "reprisals may be taken against enemy armed forces, [and] enemy civilians other than those in occupied territory".[765]
688. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[766]
689. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits ... the methods of warfare which consist in the recourse: ... to reprisals against non-military objectives".[767] The manual further refers to Articles 51–56 AP I and states that "reprisals are prohibited against civilians".[768]
690. Germany's Soldiers' Manual states that "reprisals against the civilian population are prohibited".[769]

[758] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[759] Cameroon, *Instructors' Manual* (1992), p. 151.
[760] Canada, *LOAC Manual* (1999), p. 4-5, § 39.
[761] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[762] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[763] Croatia, *LOAC Compendium* (1991), p. 19.
[764] Croatia, *Soldiers' Manual* (1992), p. 5, § 3.
[765] Ecuador, *Naval Manual* (1989), § 6.2.3.
[766] France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (2).
[767] France, *LOAC Manual* (2001), p. 85.
[768] France, *LOAC Manual* (2001), p. 108.
[769] Germany, *Soldiers' Manual* (1991), p. 4.

691. Germany's Military Manual, in a chapter dealing with "Certain Conventional Weapons" and referring to Article 3(2) of the 1980 Protocol II to the CCW, provides that "it is prohibited to direct the above-mentioned munitions – neither by way of reprisals – against the civilian population as such or against individual civilians".[770] In the chapter dealing with reprisals, the manual, referring to Articles 33 GC IV and 51 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: ... civilians".[771] Referring to Articles 33 GC IV and 20 and 51 AP I, the manual further states that "reprisals against the civilian population ... are prohibited".[772] In a chapter entitled "Belligerent occupation", the manual, referring to Articles 33 GC IV and 20 and 51 AP I, further states that "reprisals against civilians ... are prohibited".[773]

692. Germany's IHL Manual provides that "reprisals are expressly prohibited against ... civilians".[774]

693. Hungary's Military Manual provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[775]

694. India's Manual of Military Law prohibits reprisals. This provision is in a section relative to the action by a commander acting in aid of civil authorities for the handling of crowds and mobs. It adds that action is preventive and not punitive and that no soldier can punish a civilian, except under martial law.[776]

695. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[777] According to the Report on the Practice of Indonesia,

> The meaning of protected persons is not exclusively referring to the Geneva Conventions ... but also referring to the customary sources, such as the moral values which are generally recognized and exist among the international community, and other Conventions ... Reprisals against civilian[s] other than protected civilians under Geneva Convention IV [are] prohibited as far as they are not engage[d in] the conflict and [do] not violate the law[s] and customs of war. The civilian[s] other than protected civilians under Geneva Convention IV will [be] protected ... as necessary.[778]

696. Italy's IHL Manual provides that reprisals cannot be directed against the civilian population, except in case of absolute necessity.[779] However, providing for the prohibition of reprisals against, *inter alia*, protected civilian persons and protected persons, the manual also states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[780]

[770] Germany, *Military Manual* (1992), § 410.
[771] Germany, *Military Manual* (1992), § 479.
[772] Germany, *Military Manual* (1992), § 507.
[773] Germany, *Military Manual* (1992), § 535.
[774] Germany, *IHL Manual* (1996), § 320.
[775] Hungary, *Military Manual* (1992), p. 35.
[776] India, *Manual of Military Law* (1983), Vol. 1, Chapter VII, § 8.
[777] Indonesia, *Air Force Manual* (1990), § 15(c).
[778] Report on the Practice of Indonesia, 1997, Chapter 2.9.
[779] Italy, *IHL Manual* (1991), Vol. I, § 23.
[780] Italy, *IHL Manual* (1991), Vol. I, § 25.

697. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[781] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . civilians."[782]

698. Lebanon's Teaching Manual prohibits reprisals against civilians.[783]

699. Madagascar's Military Manual, in the part of its instructions dealing with civilian persons, instructs soldiers to "protect them against ill treatment". It states that "acts of vengeance and the taking of hostages are prohibited".[784] The manual further instructs soldiers not to take hostages and to refrain from all acts of revenge.[785]

700. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring to Article 51 AP I, states that "attacking the civilian population by measures of reprisal is forbidden".[786]

701. The Military Handbook of the Netherlands states that "protected persons under the laws of war are: . . . personnel of civil defence organisations such as the fire brigade . . . civilians . . . Reprisals against them must not be taken."[787] It further states that "reprisals against the civilian population are prohibited".[788]

702. New Zealand's Military Manual, referring to Article 52(6) AP I, states that "reprisals against the following categories of persons and objects are prohibited . . . e) civilians".[789]

703. South Africa's LOAC Manual states that "reprisals against the persons and property of . . . protected civilians are prohibited".[790]

704. Spain's LOAC Manual lists among the persons against whom the taking of reprisals is prohibited "civilian persons and objects". It refers, however, to Article 46 GC I (relative to the prohibition of reprisals against the wounded, the sick and medical personnel protected under GC I).[791]

705. Sweden's IHL Manual, referring to Article 51(6) AP I and stating that this provision "contains another rule prohibiting reprisal attacks on civilian populations and individual civilians", states that:

> It may appear remarkable that not until the advent of the Additional Protocol was it possible to obtain general protection for civilians against reprisals. Protection for civilians in this respect remains inadequate, however, as long as the majority of states have not ratified the Protocol.

[781] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[782] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[783] Lebanon, *Teaching Manual* (1997), p. 78.
[784] Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 23(3).
[785] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[786] Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-5.
[787] Netherlands, *Military Handbook* (1995), p. 7-38.
[788] Netherlands, *Military Handbook* (1995), p. 7-43.
[789] New Zealand, *Military Manual* (1992), § 1606(2).
[790] South Africa, *LOAC Manual* (1996), § 34(e).
[791] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

The [Swedish] International Humanitarian Law Committee considers that Article 51 can be of great importance in improving protection for civilian populations and civilian objects. It is of the greatest importance for the article to be applied in such a way that the intended humanitarian purpose is achieved as far as possible.[792]

While noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, the manual further states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[793]

706. Switzerland's Basic Military Manual, in the part dealing with "Hostilities and their limits", refers, *inter alia*, to Articles 33 GC IV and 51, 54 and 55 AP I and states that "reprisals against the civilian population are prohibited".[794] In the part entitled "Civilian persons", the manual refers to Articles 33 GC IV and 51 AP I and states that "measures of reprisal or attacks [carried out] as measures of reprisal are prohibited". The provision is placed in the part dealing with civilian persons and, more specifically, "civilian persons who are in the power of the troops at the moment of combat".[795]

707. Togo's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".[796] It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".[797]

708. The UK LOAC Manual, in a part dealing with the protection of civilians, states that "it is forbidden: ... to carry out reprisals against protected persons or property".[798] It further states that "the Geneva Conventions and [AP I] prohibit reprisals against ... enemy civilians in territory controlled by a belligerent".[799] However, the manual also states that "the United Kingdom reserves the right to take proportionate reprisals against an enemy's civilian population or civilian objects where the enemy has attacked our own civilians or civilian objects in violation of [AP I]".[800]

709. The US Air Force Pamphlet, referring to Articles 4 and 33 GC IV, states that "the protection against reprisals expressed in the Conventions ... does not protect civilians who are under the control of their own country".[801]

792 Sweden, *IHL Manual* (1991), Section § 3.2.1.5, pp. 50 and 51.
793 Sweden, *IHL Manual* (1991), Section 3.5, p. 89.
794 Switzerland, *Basic Military Manual* (1987), Article 25(2).
795 Switzerland, *Basic Military Manual* (1987), Article 149.
796 Togo, *Military Manual* (1996), Fascicule III, p. 12.
797 Togo, *Military Manual* (1996), Fascicule III, p. 13.
798 UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(e).
799 UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
800 UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.
801 US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

710. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", lists a number of persons and objects protected under the Geneva Conventions against which it is prohibited to take reprisals, among which are "inhabitants of occupied territory". The Handbook adds, however, that "a Protocol to the 1949 Geneva Conventions would expand this list to include all civilians... The United States signed this Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance."[802]

711. The US Naval Handbook provides that "reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property".[803]

712. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: ... civilian persons and their property".[804]

National Legislation

713. Argentina's Draft Code of Military Justice punishes any soldier who carries out reprisals or orders the carrying out of reprisals against the civilian population.[805]

714. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning civilian persons, medical organisations and their personnel, civilian objectives, civilian property... During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[806]

715. Under Colombia's Penal Code, reprisals against "the civilian population" and against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[807]

716. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or implementing reprisals, in times of war or occupation, is punishable when resulting in grave injury to the physical integrity of the civilian population.[808]

802 US, *Air Force Commander's Handbook* (1980), § 8-4(c).
803 US, *Naval Handbook* (1995), § 6.2.3.
804 SFRY (FRY), *YPA Military Manual* (1988), § 31(1).
805 Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).
806 Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
807 Colombia, *Penal Code* (2000), Articles 144 and 158.
808 Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(5).

717. Under the Czech Republic's Criminal Code as amended, "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: (a) . . . leads an attack against [the civilian population or civilians] for the reason of reprisals" is punishable.[809]
718. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[810]
719. Under Slovakia's Criminal Code as amended, "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: (a) . . . leads an attack against [the civilian population or civilians] for the reason of reprisals" is punishable.[811]
720. Spain's Penal Code provides for the punishment of "anyone who [in the event of armed conflict] should . . . carry out or order . . . reprisals or violent acts or threats in order to terrify [the civilian population]".[812]

National Case-law
721. No practice was found.

Other National Practice
722. At the CDDH, during a discussion in Committee I on a French proposal regarding a provision on reprisals within AP I, Belarus, opposing the French proposal and referring to a number of international instruments, stated that:

> Any toleration of the possibility of taking reprisals, especially against the civilian population, would be in radical conflict with the spirit and meaning of the Geneva Conventions . . . Furthermore, it would run counter to a number of resolutions of the United Nations General Assembly . . . Thus, any attempt to commit reprisals against the civilian population represented . . . a serious blow against the Geneva Conventions, Protocol I . . . and a whole series of international instruments already adopted.[813]

723. At the CDDH, Belarus stated that "the taking of reprisals against a civilian population must be prohibited".[814]
724. At the CDDH, the representative of Canada, with respect to paragraph 4 of draft Article 46 (which became Article 51 AP I), stated that "his delegation could accept a prohibition on reprisals against civilians or the civilian population".[815]

[809] Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(a).
[810] Italy, *Law of War Decree as amended* (1938), Article 8.
[811] Slovakia, *Criminal Code as amended* (1961), Article 262(2)(a).
[812] Spain, *Penal Code* (1995), Article 611.
[813] Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 81, § 62.
[814] Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 94, § 55.
[815] Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 117, § 2.

725. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that:

> Under [the 1949 Geneva Conventions] . . . reprisals directed against the enemy civilian population or property in enemy controlled areas are permissible. [AP I] goes beyond the Geneva Conventions and prohibits reprisals directed against the enemy civilian population or civilian property under all circumstances.[816]

726. In 1973, during a debate in the Sixth Committee of the UN General Assembly relative to respect for human rights in times of armed conflict, China stated that civilians should not be the object of reprisals.[817]

727. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[818]

728. In 1972, during a debate in the Sixth Committee of the UN General Assembly on a resolution relative to measures to prevent international terrorism, Denmark stated that "the legitimacy of the use of force in international life did not in itself legitimize the use of certain forms of violence, especially against the innocent. That principle had long been recognized even in the customary law of war." It concluded that:

> Consequently, even in time of war, acts of a terrorist nature were not a legitimate means of combat. Personally, he was convinced that acts such as the taking of hostages, reprisals and murder aimed at innocent persons had never truly served the struggle for independence and fundamental freedoms.[819]

729. In its written statement before the ICJ in the *Nuclear Weapons case* before the ICJ in 1995, Egypt stated that "reprisals are prohibited against . . . civilians . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."[820]

730. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[821]

[816] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.
[817] China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1450, 29 November 1973, § 32.
[818] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[819] Denmark, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1364, 17 November 1972, § 15.
[820] Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
[821] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

731. At the CDDH, Finland stated that "the main intention of paragraph 4 [of draft Article 46 which became Article 51 of AP I] was to extend the protection to the civilian population as a whole. That was desirable."[822]
732. At the CDDH, France voted against Article 46 of draft AP I (now Article 51), stating, however, that it considered that:

> The provisions of paragraphs 4, 5 and 7 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations.[823]

733. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, in a part dealing with the "eight fundamental rules of international humanitarian law", state that "reprisal attacks against the civilian population are prohibited".[824]
734. At the CDDH, in its explanations of vote on Article 46 of draft AP I (which became Article 51 AP I), the representative of the GDR stated that his delegation:

> gave particular support to paragraph 4 [which became paragraph 6 of Article 51 of AP I], which contained a clear prohibition on attacks against the civilian population or civilians by way of reprisals. That prohibition, he was convinced, had the same importance, and was of the same absolute nature, as the prohibition of reprisals against prisoners of war, the wounded and the sick, which were already contained in the Geneva Conventions. His delegation would therefore regard any reservation on the prohibition as incompatible with the humanitarian object and purpose of the Protocol.[825]

735. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".[826]
736. In 1983, in a letter to the UN Secretary-General, Iran deplored the fact that Iraqi television had announced "a statement by the Iraqi minister of culture and information to the effect that Iraq will bombard Iranian cities in retaliation to Iranian shelling of Iraqi cities".[827]
737. In 1987, in a letter to the UN Secretary-General, Iran stated that:

[822] Finland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 54, § 29.
[823] France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163, § 118.
[824] France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1 June 1995, Section 6, § 66.
[825] GDR, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 167, § 137.
[826] Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.
[827] Iran, Letter dated 5 May 1983 to the UN Secretary-General, UN Doc.S/15747, 5 May 1983.

Because of the polite acquiescence of the relevant international bodies with regard to Iraqi acts of lawlessness . . . Iran has had to take symbolic retaliatory and preventive measures in response to the Iraqi bombardment of civilian areas. Such measures have been adopted with great reluctance and self-restraint. However, should the Iraqi régime persist in its war crimes . . . the armed forces of . . . Iran will be obliged to inflict unprecedented heavy and deadly blows in retaliation. Clearly, the responsibility for the consequences of such retaliatory and preventive measures lies with the aggressor régime of Iraq.[828]

738. In 1987, after an Iraqi Command had stated that the Iraqi forces were ready for reprisal attacks, Iran stated in a letter to the UN Secretary-General that:

While the high-ranking Iraqi officials have openly declared their criminal policies of attacking our civilian areas, the Islamic Republic of Iran adheres to strict observance of all norms of international humanitarian law and continues to remain committed to refraining from attacks on purely civilian quarter . . . Iran has been forced to resort to retaliatory measures against its desire . . . The number of civilian casualties on both sides is a testament to the degree of self-restraint exercised by . . . Iran in taking retaliatory measures . . . We have been consistently asking the international body to take serious action against those attacking civilians.[829]

739. In 1987, in a letter to the UN Secretary-General, the Iranian Minister of Foreign Affairs stated that:

The reluctant but unavoidable retaliatory fire of our Islamic combatants were directed against economic and industrial quarters of Iraq and with ample prior warning to the civilian occupants of the adjacent areas to leave the scene of our intended attacks. The comparatively very low number of civilian casualties in Iraq is testimony to the humanitarian consideration of . . . Iran even in its retaliatory exercises. Nevertheless . . . Iran, based on its position of principle which is in compliance with the universally recognized norms of international law believes in the necessity for strict observance of the rules of law governing the conduct of hostilities.[830]

740. In 1987, in a letter to the UN Secretary-General, Iran stated with respect to Iraqi warplanes allegedly bombarding villages inhabited by civilians in June 1987 that:

The Government of . . . Iran, faced with an enemy who so easily and frequently resorts to illegal tactics, has in the past found it necessary to take, however reluctantly, limited retaliatory measures as the only method of compelling the rulers of Baghdad to respect their international obligations. Should the régime of Baghdad continue its attacks against civilian centres of . . . Iran, the Iranian Government will once again be left with no option other than retaliation in kind.[831]

[828] Iran, Letter dated 2 February 1987 to the UN Secretary-General, UN Doc. S/18648, 2 February 1987.
[829] Iran, Letter dated 24 February 1987 to the UN Secretary-General, UN Doc. S/18721, 25 February 1987.
[830] Iran, Minister of Foreign Affairs, Letter dated 27 February 1987 to the UN Secretary-General, UN Doc. S/18728, 27 February 1987.
[831] Iran, Letter dated 24 June 1987 to the UN Secretary-General, UN Doc. S/18945, 24 June 1987.

741. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran did not resort to reprisals against Iraqi cities until Iraqi bombardments of an Iranian city in 1982. The report refers to military communiqués and a message from the commander of the Joint Staff, which stated that Iran did not consider attacking the cities as being "in conformity with the notion of real war", but after three and a half years of Iraqi attacks on civilian objects and cities, Iran had no option but to resort to reprisals against these attacks. The report also notes that in resorting to reprisals, Iran had always issued statements and asked the Iraqi people to evacuate their city. Furthermore, the report states that the real reason for Iran's attacks on Iraqi cities was Iraq's attacks on civilian centres and that, when Iraqi attacks on civilian targets ceased, Iran stopped its reprisals.[832] The report notes that, in February 1984, Iran announced that it had changed its policy and that Iraqi cities would be attacked as a reprisal measure and that only four holy cities were left immune from such action. Virtually all official communiqués reporting the results of these military operations named military and economic objectives, not civilian objects.[833]

742. In 1983, in a letter to the UN Secretary-General in response to Iranian allegations relative to attacks on civilians and civilian objects by Iraq, Iraq recalled its position according to which the bombardment of cities and economic installations had been initiated by Iran in 1980. It also questioned Iran's statement that "although the Iraqi cities are well within the range of our artillery . . . Iran has no intention of retaliation against civilians".[834]

743. In 1987, in a letter to the UN Secretary-General following a meeting between officials of both parties to the Iran–Iraq War, Iraq stated that:

> Iraq has long hesitated before responding to the cruel and deliberate bombardments of Iraqi towns contemptuously carried out by the Iranian régime; over a period of several months that régime had on numerous occasions fired missiles on Baghdad and pounded Basra, Sulaymaniyah and other Iraqi towns with its heavy artillery. Iraq had not retaliated for those acts of aggression, choosing instead to issue repeated warnings that had gone unheeded. [These acts had forced] Iraq to deter the aggressor . . . The following decisions were taken . . . First: Iraq will halt its bombardment of Iranian towns for two weeks as of . . . Iraq will consider itself released from this commitment and will resume its bombings forcefully and on greater scale if the forces of the Iranian régime shell Iraqi towns and residential areas and if the Iranian régime launches a new assault against Iraqi territory and Iraq's international borders. Secondly: This temporary halt in the bombing of towns is contingent upon the position of the Iranian régime with regard to peace; that régime must unequivocally espouse a new position consistent with international law.[835]

[832] Report on the Practice of Iran, 1997, Chapter 2.9.
[833] Report on the Practice of Iran, 1997, Chapter 1.3.
[834] Iraq, Letter dated 2 May 1983 to the UN Secretary-General, UN Doc.S/15743, 4 May 1983.
[835] Iraq, Letter dated 18 February 1987 to the UN Secretary-General, UN Doc. S/18704, 18 February 1987.

744. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals "must not be directed, in any way, against ... civilians ... but [have] to be confined to purely military targets".[836]

745. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law ... In practice, Jordan never resorted to attacks by way of reprisal."[837]

746. The Report on the Practice of Lebanon notes that an advisor to the Lebanese Ministry of Foreign Affairs stated in an interview that the protection of civilians was not compatible with the principle of reprisals.[838]

747. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Malaysia stated that "civilian populations ... should not be the object of reprisals" and that "attacks against the civilian population or civilians by way of reprisals are prohibited". It referred to paragraph 7 of UN General Assembly Resolution 2675 (XXV) and Article 51(6) AP I.[839]

748. At the CDDH, the Netherlands, introducing an amendment to draft AP I on behalf of its sponsors (Austria, Egypt, Mexico, Netherlands, Norway, Philippines and USSR),[840] stated that:

> In fact, reprisals could rarely be confined to civilian objects alone and the infliction of suffering on the civilian population would be virtually inevitable ... The sponsors of the amendment were in favour of extending [the prohibition of reprisals against civilians] to a complete ban on all reprisals against the civilian population and civilian objects alike.[841]

749. At the CDDH, during discussions on the protection of civilian objects, the Netherlands stated that "reprisals on civilian populations were prohibited by international law".[842]

750. In 1973, during a debate in the Sixth Committee of the UN General Assembly relative to respect for human rights in times of armed conflict, Peru recalled that the General Assembly had reaffirmed in various resolutions that "civilian populations and individual civilians must not be subjected to attacks against their persons as reprisals".[843]

[836] Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.
[837] Report on the Practice of Jordan, 1997, Chapter 2.9.
[838] Report on the Practice of Lebanon, 1998, Chapter 2.9.
[839] Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 18.
[840] Austria, Egypt, Mexico, Netherlands, Norway, Philippines and USSR, New proposal concerning Article 47 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/57, 19 March 1974, p. 210.
[841] Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.14, 6 February 1975, pp. 113–114, § 26.
[842] Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 128, § 8.
[843] Peru, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1453, 4 December 1973, § 15.

751. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[844]

752. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[845]

753. At the CDDH, in its explanation of vote, the representative of Poland stated that the adopted provision of AP I on the protection of civilians (Article 46 of draft AP I which became Article 51 AP I):

> contained the most important provision of the Protocol, such as the prohibition ... of attacks by way of reprisals. The latter often affected the most innocent persons and those who were least able to defend themselves, and gave rise to a mood of desperation which lead to counter-reprisals and to chain reactions which became increasingly difficult to stop.
>
> His delegation therefore welcomed the clear and categorical prohibition of reprisals in [the adopted provision]. The whole article, with its general rules, would fill some of the gaps in existing rules of a more specific character ...[846]

754. In 1973, during a debate in the Sixth Committee of the UN General Assembly relative to respect for human rights in times of armed conflict, Romania stated that:

> International humanitarian law should be developed in two main directions. First, there should be increased protection for the civilian population and non-military objectives ... To that end, it was essential to adopt the broadest possible definition of the civilian population and non-military objectives and to take steps to ensure their effective protection. Such steps should include: ... the prohibition ... of reprisals ... and of any other act of terror directed against the civilian population.[847]

755. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

> During hostilities, it is forbidden to resort to reprisals against ... civilian populations, property and various categories of civilian property which are subject to special protection ... The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties ... A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) ... The prohibition of reprisals in these situations appears also in Principle 1,

[844] Report on the Practice of the Philippines, 1997, Chapter 2.9.
[845] Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[846] Poland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 166, §§ 129 and 130.
[847] Romania, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1451, 1 December 1973, § 8.

paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[848]

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

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited ... The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions ... The Conventions do not preclude the taking of reprisals against the enemy's civilian population ... Additional Protocol I prohibits the taking of reprisals against the civilian population (Article 51(6)) ... The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.[849]

757. At the CDDH, the US stated that:

[AP I] had gone far to remove the deterrent of reprisals, for understandable and commendable reasons and in view of past abuses. In the event of massive and continuing violations of the [1949 Geneva] Conventions and [AP I], however, the series of prohibitions on reprisals might prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying the possibility of such response and not offering any workable substitute, [AP I] was unrealistic and, in that respect, could not be expected to withstand the test of future armed conflicts.[850]

758. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".[851]

759. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support "the prohibition on reprisals in article 51 and subsequent articles" and did not consider it part of customary law.[852] On the same occasion, another Legal Adviser of the US Department of State, explaining

[848] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

[849] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

[850] US, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.58, 9 June 1977, p. 294, § 81.

[851] US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

[852] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

"the position of the United States on current law of war agreements", stated that:

Article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations. Historically, reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.[853]

760. According to an army lawyer who participated in the review of AP I by the US Joint Chiefs of Staff:

Article 51, paragraph 6, and article 52, paragraph 1, of [AP I] prohibit reprisals against the civilian population or civilian objects of an enemy nation, respectively. These provisions are not a codification of customary international law, but, in fact, a reversal of that law. The military review considered whether surrender of these rights would advance the law of war, or threaten the continued respect for the rule of law in war. It was concluded that removal of this legal right placed any further respect for the rule of law by certain nations in jeopardy . . .

The American review recognized the historic pattern for abuse of U.S. and allied prisoners of war by their enemies, and concluded that a broad reservation to the prohibition of reprisals contained in articles 51 and 52 of [AP I] was essential as a legitimate enforcement mechanism in order to ensure respect for the law of war.[854]

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

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including the civilian population or individual civilians (Article 51(6)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.[855]

762. According to the Report on US Practice, during the review of AP I by the US government prior to the decision on whether to seek its ratification, the discussion of the reprisal issue shifted from the need to deter attacks on civilians to the need to protect US POWs by enforcing GC III.[856]

[853] US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 22 January 1987, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 469.

[854] W. Hays Parks, "Air War and the Law of War", *Air Force Law Review*, Vol. 32, 1990, pp. 94 and 97.

[855] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

[856] Report on US Practice, 1997, Chapter 2.9.

III. Practice of International Organisations and Conferences

United Nations

763. In 1986, in a statement by its President, the UN Security Council deplored "the violation of international humanitarian law and other laws of armed conflict" and expressed its deepening concern over the widening of the conflict [between Iran and Iraq] through the escalation of attacks on purely civilian targets".[857]

764. In 1988, in a statement by its President, the UN Security Council strongly deplored "the escalation of hostilities between these two countries [Iran and Iraq], particularly the attacks against civilian targets and cities". The members of the Security Council also insisted that "Iran and Iraq immediately cease all such attacks and desist forthwith from all acts that lead to the escalation of the conflict".[858]

765. General Assembly Resolution 2444 (XXIII) adopted in 1968 affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "it is prohibited to launch attacks against the civilian population as such".[859] This phrase was interpreted by some government experts at the CE (1971) as including a prohibition of reprisals against the civilian population.[860]

766. In Resolution 2675 (XXV) on basic principles for the protection of civilian populations in armed conflicts, unanimously adopted in 1970, the UN General Assembly stated that "civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity".[861]

767. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[862]

768. In a resolution adopted in 1995 on assistance to Somalia in the field of human rights, the UN Commission on Human Rights deplored "continued

[857] UN Security Council, Statement by the President, UN Doc. S/PV.2730, 22 December 1986, p. 3.
[858] UN Security Council, Statement by the President, UN Doc. S/PV.2798, 16 March 1988, p. 2.
[859] UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(b).
[860] ICRC, *Protection of the Civilian Population against the Dangers of Hostilities*, Documents submitted to the First Session of the Conference of Government Experts, Geneva, 24 May–12 June 1971, Vol. III, January 1971, p. 38.
[861] UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 7.
[862] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

attacks, acts of reprisal, abductions and other acts of violence committed against United Nations personnel, personnel of other humanitarian organizations and non-governmental organizations and representatives of the international media in Somalia, sometimes resulting in serious injury or death".[863]

769. In 1984, in a message addressed to the Presidents of Iran and of Iraq, the UN Secretary-General stated that he:

> was profoundly distressed on learning of the heavy civilian casualties caused by the aerial attack on the town of Banesh on 5 June 1984 . . . and the retaliatory and counter-retaliatory attacks that followed on towns in Iran and Iraq.
>
> Deliberate military attacks on civilian areas cannot be condoned by the international community. The initiation of such attacks in the past, and the reprisals and counter-reprisals they provoke, have resulted in mounting loss of life and suffering to innocent and defenceless civilian populations. It is imperative that this immediately cease.[864]

770. In 1993, in a periodic report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that:

> The Special Rapporteur also received allegations of individual murders inspired by ethnic revenge. One concerned Radislav and Marina Komjenac, two elderly civilians – said to be Bosnian Serbs – who were taken from their homes in Sarajevo and summarily executed on 26 June 1993. The killings appear to have been in retaliation for a mortar attack which killed seven Muslim civilians in the old town. Government militia were alleged to be responsible. The Special Rapporteur wrote to the Government on 14 August 1993 expressing concern about the report and asking what steps had been taken to punish the perpetrators.[865]

The Special Rapporteur also noted that in the Serb Krajina, Croats "have frequently been the victims of retaliations for actions of the Croatian armed forces".[866]

771. In 1994, in an interim report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights noted that "in July 1994, some 50 civilians were reportedly killed in an act of revenge for the murder of a prominent commander".[867]

772. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN

[863] UN Commission on Human Rights, Res. 1995/56, 3 March 1995, preamble.

[864] UN Secretary-General, Message dated 9 June 1984 to the Presidents of the Islamic Republic of Iran and the Republic of Iraq, UN Doc. S/16611, 11 June 1984.

[865] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 32.

[866] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 145.

[867] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Interim report, UN Doc. A/49/650, 8 November 1994, § 75.

Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 51(6) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (e) Civilians."[868] It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[869]

Other International Organisations
773. No practice was found.

International Conferences
774. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

775. In the *Tadić case* (Interlocutory Appeal) in 1995, the ICTY Trial Chamber stated that UN General Assembly Resolution 2444 (XXIII) of 1968 and Resolution 2675 (XXV) of 1970 were "declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind".[870]
776. In the review of the indictment in the *Martić case* in 1996 in which the accused was held accountable for having knowingly and wilfully ordered the shelling of Zagreb in May 1995, the ICTY Trial Chamber I held that:

> 15. . . . Does the fact that the attack was carried out as a reprisal reverse the illegality of the attack? The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of the other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 Common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered

[868] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[869] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[870] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 112.

wrongful. The [ICJ] considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law . . .

16. The prohibition on reprisals against the civilian population or individual civilians which is applicable to all armed conflicts, is reinforced by the texts of various instruments. General Assembly resolution 2675, underscoring the need for measures to ensure better protection of human rights in armed conflicts of all types, posits that "civilian populations, or individual members thereof, should not be the object of reprisals". Furthermore, Article 51(6) of Protocol I . . . states an unqualified prohibition because "in all circumstances, attacks against the civilian population or civilians by way of reprisals are prohibited" . . .
17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.[871]

777. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

527. . . . With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977 . . . The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol . . . nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus,* as a result of the . . . Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.
528. The question of reprisals against civilians is a case in point. It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers.

[871] ICTY, *Martić case*, Review of the Indictment, 8 March 1996, §§ 15–17.

529. In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanisation of armed conflict is amongst other things confirmed by the works of the United Nations International Law Commission on State Responsibility . . .
530. It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner . . .
531. Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion.[872]

Considering practice of States, international organisations, the ILC and ICRC, as well as previous practice of the ICTY, the Trial Chamber then stated that:

The aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.[873]

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

778. In a press release issued in 1983 concerning the Iran–Iraq War, the ICRC stressed that "civilians must not be the object of attack, nor of reprisals".[874]
779. In a press release issued in 1984 concerning the Iran–Iraq War, the ICRC, after the bombardment of the Iranian town of Baneh "during which hundreds of civilians were killed or injured", stated that "this murderous raid with its tragic consequences has provoked a spiral of reprisals and counter-reprisals against the inhabitants of Iraqi and Iranian towns". The ICRC called upon "Iran and Iraq to cease immediately their current bombardment of defenceless civilians".[875]
780. In a communication to the press in 2000 in connection with the hostilities in the Near East, the ICRC reminded all those taking active part in the violence that "reprisals against the civilian population" are absolutely and unconditionally prohibited.[876]

[872] ICTY, *Kupreškić case*, Judgement, 14 January 2000, §§ 527–531.
[873] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 533.
[874] ICRC, Press Release No. 1479, Iran/Iraq: ICRC appeals to belligerents, 15 December 1983.
[875] ICRC, Press Release No. 1489, Bombing of Iraqi and Iranian Cities, 7 June 1984.
[876] ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

VI. Other Practice

781. In 1990, in a meeting with the ICRC, an armed opposition group denounced reprisals against the civilian population by soldiers and militiamen of a State.[877]

782. Oppenheim states that:

> In the War of 1914–1918 the illegality, except by way of reprisals, of aerial bombardment directed exclusively against the civilian population for the purpose of terrorisation or otherwise seems to have been generally admitted by the belligerents, – although this fact did not actually prevent attacks on centres of civilian population in the form either of reprisals or of attack against military objectives situated therein.[878]

D. Reprisals against Protected Objects

Civilian objects in general

I. Treaties and Other Instruments

Treaties

783. Article 33, third paragraph, GC IV provides that "reprisals against protected persons and their property are prohibited".

784. Article 52(1) AP I provides that "civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives." Article 52 AP I was adopted by 79 votes in favour, 0 against and 7 abstentions.[879]

785. Upon ratification of AP I and AP II, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[880]

786. Upon ratification of AP I, Germany stated that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation".[881]

[877] ICRC archive document.
[878] Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 414, § 214*ea*.
[879] CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.
[880] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[881] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

787. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation".[882]
788. Upon ratification of AP I, the UK stated that:

> The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[883]

789. Article 3(7) of the 1996 Amended Protocol II to the CCW provides that "it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against . . . civilian objects".

Other Instruments
790. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.
791. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.
792. Section 5.6 of the 1999 UN Secretary-General's Bulletin states that "the United Nations force shall not engage in reprisals against civilians or civilian objects".
793. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals."

[882] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.
[883] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

II. National Practice

Military Manuals

794. Argentina's Law of War Manual (1969), in the chapter dealing with the "Protection of civilian persons in times of war", which contains "provisions common to the territories of the belligerent parties and occupied territories", states that "measures of reprisal with respect to protected persons and their property remain equally prohibited".[884]

795. Argentina's Regulation for the Treatment of POWs states that "reprisals against the property of innocent interned [civilians] are prohibited".[885]

796. Argentina's Law of War Manual (1989), in a part dealing with the "Treatment given to protected persons", which contains "provisions common to the territories of the belligerent parties and occupied territories", refers, *inter alia*, to Article 33 GC IV and provides that "remain absolutely prohibited: ... measures of reprisal against protected persons and their objects".[886] In a part dealing with "property of a civilian character", the manual states that "property of civilian character cannot be made the object of ... reprisals".[887]

797. Australia's Commanders' Guide, referring, *inter alia*, to Articles 51–56 AP I, states that "protected persons, such as ... civilians ... as well as protected buildings and facilities should not be the subject of reprisals".[888]

798. Australia's Defence Force Manual provides that "reprisals are prohibited against ... civilian objects".[889]

799. Belgium's Law of War Manual, citing several examples of jurisprudence and referring to Articles 4 and 33 GC IV, states that "the persons protected by the Geneva Conventions (... civilians) may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."[890]

800. Belgium's Teaching Manual for Soldiers, in the part containing exercises (questions and answers) for the training of soldiers, gives a negative response to the question as to whether civilian property may be destroyed in reprisal.[891]

801. Benin's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".[892] It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".[893]

884 Argentina, *Law of War Manual* (1969), § 4.012(3).
885 Argentina, *Regulation for the Treatment of POWs* (1985), § 4.02(5).
886 Argentina, *Law of War Manual* (1989), § 4.29(5).
887 Argentina, *Law of War Manual* (1989), § 4.45.
888 Australia, *Commanders' Guide* (1994), § 1212; see also *Defence Force Manual* (1994), § 1311.
889 Australia, *Defence Force Manual* (1994), § 920.
890 Belgium, *Law of War Manual* (1983), p. 36.
891 Belgium, *Teaching Manual for Soldiers* (undated), p. 86.
892 Benin, *Military Manual* (1995), Fascicule III, p. 12.
893 Benin, *Military Manual* (1995), Fascicule III, p. 13.

802. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[894]

803. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".[895]

804. Canada's LOAC Manual, in a part dealing with targeting, provides that "reprisals against civilians and civilian objects are prohibited".[896] It further provides that "civil defence buildings and *materiel*, as well as shelters provided for the civilian population, are considered 'civilian objects' and shall not be attacked or subjected to reprisals".[897] In a chapter entitled "Treatment of civilians in the hands of a party to the conflict or an occupying power" and, more specifically, in a section containing "provisions common to the territories of the parties to the conflict and to occupied territories", the manual refers to GC IV and states that "the following are expressly prohibited: . . . the taking of reprisals against protected persons and their property".[898] In the part dealing with enforcement measures, the manual also states that "reprisals against the following categories of persons and objects are prohibited: . . . f. civilian objects".[899]

805. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".[900]

806. Croatia's LOAC Compendium provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[901]

807. The Military Manual of the Dominican Republic, under a provision entitled "No theft or arson against civilian property", states that "the Geneva Convention prohibits reprisals against civilians for acts of enemy soldiers".[902]

808. Ecuador's Naval Manual provides that "reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property".[903] However, it also states that "reprisals are forbidden to be taken against: . . . 3. Civilians in occupied territory."[904] The manual further provides that "interned civilians . . . may not be subjected to collective punishment or acts of reprisal".[905]

[894] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[895] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[896] Canada, *LOAC Manual* (1999), p. 4-5, § 39.
[897] Canada, *LOAC Manual* (1999), p. 4-10, § 95.
[898] Canada, *LOAC Manual* (1999), p. 11-4, § 33.
[899] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[900] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[901] Croatia, *LOAC Compendium* (1991), p. 19.
[902] Dominican Republic, *Military Manual* (1980), p. 10.
[903] Ecuador, *Naval Manual* (1989), § 6.2.3.
[904] Ecuador, *Naval Manual* (1989), § 6.2.3.2.
[905] Ecuador, *Naval Manual* (1989), § 11.9.

809. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".[906]

810. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".[907] It further refers, *inter alia*, to Articles 20 and 51–56 AP I and states that "reprisals are prohibited against . . . civilian property".[908]

811. Germany's Military Manual, in the chapter dealing with reprisals, referring to Articles 33 GC IV and 51 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . civilians . . . private property of civilians on occupied territory and of enemy foreigners on friendly territory".[909] Referring to Articles 33 GC IV and 20 and 51 AP I, the manual further states that "reprisals against the civilian population and its property . . . are prohibited".[910] In a chapter entitled "Belligerent occupation", the manual, referring to Articles 33 GC IV and 20 and 51 AP I, states that "reprisals against civilians and their property are prohibited".[911]

812. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . the private property of civilians in occupied territories".[912]

813. Hungary's Military Manual provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".[913]

814. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[914]

815. Italy's IHL Manual, providing for the prohibition of reprisals against, *inter alia*, "protected civilian persons" and "protected persons and property", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[915]

816. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[916] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . civilians."[917]

817. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[918]

[906] France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).
[907] France, *LOAC Manual* (2001), p. 85.
[908] France, *LOAC Manual* (2001), p. 108.
[909] Germany, *Military Manual* (1992), § 479.
[910] Germany, *Military Manual* (1992), § 507.
[911] Germany, *Military Manual* (1992), § 535.
[912] Germany, *IHL Manual* (1996), § 320.
[913] Hungary, *Military Manual* (1992), p. 35.
[914] Indonesia, *Air Force Manual* (1990), § 15(c).
[915] Italy, *IHL Manual* (1991), Vol. I, § 25.
[916] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[917] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[918] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

818. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[919]
819. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring to, *inter alia*, Article 52 AP I, states that "no reprisals may be undertaken against civilian property".[920]
820. New Zealand's Military Manual, in the chapter dealing with civilians and referring to Articles 32–34 GC IV, states that "the following are . . . prohibited: . . . the taking of reprisals against protected persons and their property".[921] In the chapter dealing with reprisals and referring to Article 52(1) AP I, the manual further states that "reprisals against the following categories of persons and objects are prohibited . . . civilian objects".[922]
821. South Africa's LOAC Manual states that "reprisals against the persons and property of . . . protected civilians are prohibited".[923]
822. Spain's LOAC Manual lists among the persons against whom the taking of reprisals is prohibited "civilian persons and objects". It refers, however, to Article 46 GC I (relative to the prohibition of reprisals against the wounded, the sick and medical personnel protected under GC I).[924] It also refers to Article 52 AP I with regard to the prohibition of reprisals against cultural objects. In another provision, the manual, also referring to Article 52 AP I, states that "property of a civilian character will not be made the object of attacks nor of reprisals".[925]
823. Sweden's IHL Manual, referring to Article 52 AP I, states that:

> The basic rule in Article 52 is that civilian objects and civilian property may not constitute objectives for attack or be subjected to reprisals. The article does not represent any new thinking: but is, rather, a clarification of humanitarian principles established in older conventions."[926]

While noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, the manual states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[927]

[919] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[920] Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-5.
[921] New Zealand, *Military Manual* (1992), § 1116(2)(d).
[922] New Zealand, *Military Manual* (1992), § 1606(2)(f).
[923] South Africa, *LOAC Manual* (1996), § 34(e).
[924] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[925] Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(1).
[926] Sweden, *IHL Manual* (1991), Section § 3.2.1.5, p. 53.
[927] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

Referring to Article 33 GC IV, the manual further states that "protected persons may not be punished for actions they have not themselves performed. Collective punishment of a whole group is also prohibited. Also, the occupying power may not . . . destroy civilian property in reprisal for some action directed against the occupying power."[928]

824. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[929] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[930]

825. The UK Military Manual, in a chapter dealing with the "treatment of enemy alien civilians" and referring to Articles 32–34 GC IV, states that "the following are prohibited: . . . the taking of reprisals against protected persons and their property".[931] In the chapter dealing with "the occupation of enemy territory", the manual, referring to Articles 33 and 34 GC IV, states that "[GC IV] provides . . . that 'Reprisals against protected persons and their property are prohibited'".[932] In the chapter dealing with the "treatment of enemy property", the manual further states that:

> The custom of war formerly permitted as an act of reprisal the destruction, by burning or otherwise, of a house whose inmates, though not possessing the rights of combatants, have fired on enemy troops. However, this practice is no longer lawful. [Article 33 GC IV] prohibits reprisals against protected persons and their property.[933]

Moreover, the manual, in the part dealing with reprisals, states that "reprisals against . . . civilian protected persons and their property in occupied territory and in the belligerent's own territory, are . . . prohibited".[934] In a footnote relating to this provision, the manual, referring to Articles 4 and 33 GC IV, notes that "the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".[935]

826. The UK LOAC Manual, in a part dealing with the protection of civilians, states that "it is forbidden: . . . to carry out reprisals against protected persons or property".[936] It further states that "the Geneva Conventions and [AP I] prohibit reprisals against . . . enemy civilians in territory controlled by a belligerent".[937] However, the manual also states that "the United Kingdom reserves the right to take proportionate reprisals against an enemy's civilian population or civilian

[928] Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.
[929] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[930] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[931] UK, *Military Manual* (1958), § 42.
[932] UK, *Military Manual* (1958), § 554.
[933] UK, *Military Manual* (1958), § 596.
[934] UK, *Military Manual* (1958), § 644.
[935] UK, *Military Manual* (1958), § 644, footnote 2.
[936] UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(e).
[937] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

objects where the enemy has attacked our own civilians or civilian objects in violation of [AP I]".[938]

827. The US Field Manual, referring to Articles 13 GC III and 33 GC IV, stipulates that "reprisals against the persons or property of prisoners of war, including the wounded and sick, and protected civilians are forbidden".[939]

828. The US Air Force Pamphlet, referring to Article 33 GC IV, provides that "no protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Reprisals against protected persons and their property are prohibited."[940] The Pamphlet further provides that:

> Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.[941]

829. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", lists a number of persons and objects protected under the Geneva Conventions against whom reprisals are prohibited. It adds, however, that "a Protocol to the 1949 Geneva Conventions would expand this list to include all civilians and civilian property on land... The United States signed this Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance."[942]

830. The US Soldier's Manual, in the part which deals with the treatment of civilians and private property, states that "the Geneva Conventions forbid retaliating against civilians for the actions of enemy soldiers".[943]

831. The US Operational Law Handbook provides that:

> The following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity:
>
> ...
>
> m. Reprisals against persons or property protected by the Geneva Conventions, to include the wounded, sick, or shipwrecked, prisoners of war, detained personnel, civilians [and] their property.[944]

832. The US Naval Handbook provides that "reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property".[945] It states, however, that "reprisals are forbidden

[938] UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.
[939] US, *Field Manual* (1956), § 497(c).
[940] US, *Air Force Pamphlet* (1976), § 10-7(b)(1). [941] US, *Air Force Pamphlet* (1976), § 10-7(b)(2).
[942] US, *Air Force Commander's Handbook* (1980), § 8-4(c).
[943] US, *Soldier's Manual* (1984), p. 23. [944] US, *Operational Law Handbook* (1993), p. Q-182.
[945] US, *Naval Handbook* (1995), § 6.2.3.

to be taken against: 1. . . . interned civilians . . . 3. Civilians in occupied territory."[946]

833. The Annotated Supplement to the US Naval Handbook, referring to Article 33 GC IV, states that "also immune from reprisals under the Geneva Conventions are the property of such inhabitants [i.e. of occupied territory], enemy civilians in a belligerent's own territory, and the property of such civilians".[947]

834. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . civilian persons and their property".[948]

National Legislation

835. Argentina's Draft Code of Military Justice punishes any soldier who carries out reprisals or orders the carrying out of reprisals against civilian objects, causing their destruction, provided that the said acts do not offer a definite military advantage in the circumstances ruling at the time, and that the said objects do not make an effective contribution to the adversary's military action.[949]

836. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning civilian persons, medical organisations and their personnel, civilian objectives, civilian property . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[950]

837. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[951]

838. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[952]

839. Spain's Penal Code provides that:

[946] US, *Naval Handbook* (1995), § 6.2.3.2.
[947] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 43.
[948] SFRY (FRY), *YPA Military Manual* (1988), § 31(1).
[949] Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(2) in the *Code of Military Justice as amended* (1951).
[950] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
[951] Colombia, *Penal Code* (2000), Article 158.
[952] Italy, *Law of War Decree as amended* (1938), Article 8.

[Shall be punished] whoever, in the event of an armed conflict: . . . attacks or makes the object of reprisals or the object of hostilities civilian objects of the adverse party, causing extensive destruction, provided that the said acts do not offer a definite military advantage in the circumstances of the case or that the said objects do not make an effective contribution to the adverse party's military effort.[953]

National Case-law

840. No practice was found.

Other National Practice

841. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [AP I of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.[954]

842. The Report on the Practice of Australia expressly names open towns, undefended areas, demilitarised zones and humanitarian corridors among the protected objects against which reprisals are prohibited.[955]

843. At the CDDH, Bulgaria stated that "his delegation favoured [an] amendment which sought to prohibit reprisals against civilian objects".[956]

844. At the CDDH, the representative of Canada, with respect to paragraph 4 of draft Article 46 (which became Article 51 AP I), stated that:

His delegation did not wish an unenforceable provision to be adopted, disrespect for which would lead to disrespect for the whole Protocol. His delegation could accept a prohibition on reprisals against civilians or the civilian population, but not on reprisals against civilian objects.[957]

845. At the CDDH, Canada, reverting to a proposed amendment on the prohibition of reprisals against protected objects (sponsored by Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Syria, United Arab Emirates and Yemen),[958] stated that:

[953] Spain, *Penal Code* (1995), Article 613(1)(b).
[954] Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.
[955] Report on the Practice of Australia, 1998, Chapter 2.9.
[956] Bulgaria, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 134, § 31.
[957] Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 55, § 38.
[958] Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Syria, United Arab Emirates and Yemen, New proposal concerning Article 47 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/63, 19 March 1974, p. 211.

If it attempted to provide for a total prohibition of reprisals, the Committee would be drawing up a theoretically ideal document at the humanitarian level, but that such a prohibition would be based on the assumption that the Party or State in question would not retaliate, and it was doubtful whether such would be the case; there had been in fact abuses, not only on the pretext of reprisals, but also on the pretext of the law of war. The question was whether an attempt should be made to curb the victim's desire for vengeance by formulating a rule, or whether that aspect could be left undecided. He thought it was better to lay down a rule.[959]

846. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Foreign Affairs noted that:

Under [the 1949 Geneva Conventions] . . . reprisals directed against the enemy civilian population or property in enemy controlled areas are permissible. [AP I] goes beyond the Geneva Conventions and prohibits reprisals directed against . . . civilian property under all circumstances.[960]

847. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[961]

848. In its written statement before the ICJ in the *Nuclear Weapons case* before the ICJ in 1995, Egypt stated that "reprisals are prohibited against . . . civilians . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."[962]

849. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[963]

850. At the CDDH, Finland stated that:

The main intention of paragraph 4 [of draft Article 46 which became Article 51 of AP I] was to extend the protection to the civilian population as a whole. That was desirable, but it was not sufficient. Civilian objects should also be protected from reprisals everywhere, even in the field of hostilities.[964]

[959] Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 55, § 38.
[960] Canada, Ministry of Foreign Affairs, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.
[961] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[962] Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
[963] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
[964] Finland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 54, § 29.

851. At the CDDH, Finland, with regard to amendments made by other States concerning the prohibition of reprisals, stated that it "accepted [those amendments] which would prohibit reprisals against civilian objects".[965]
852. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949."[966]
853. At the CDDH, during discussions on amendments made by other States concerning the prohibition of reprisals against civilian objects, the GDR stated that it "supported . . . the amendments concerning reprisals".[967]
854. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".[968]
855. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iranian authorities, including the Ministry of Foreign Affairs and the parliament, condemned Iraqi attacks on civilian objects, which Iran always regarded as war crimes. The report points out that Iran always insisted that war must be limited to battlefronts and that it had no intention of attacking civilian objects. When Iraq accused Iran of bombarding civilian targets, Iranian military communiqués denied these allegations and claimed that Iranian attacks were limited to military or economic facilities.[969]
856. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals "must not be directed, in any way, against . . . civilian objects, but [have] to be confined to purely military targets".[970]
857. According to the Report on the Practice of Israel, the IDF does not condone nor conduct reprisals against persons or objects protected by the Geneva Conventions.[971]
858. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal".[972]
859. At the CDDH, the Netherlands, introducing an amendment to draft AP I which read that "attacks against civilian objects by way of reprisals are

[965] Finland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 118, § 7.
[966] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.
[967] GDR, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 130, § 19.
[968] Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.
[969] Report on the Practice of Iran, 1997, Chapter 1.3.
[970] Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.
[971] Report on the Practice of Israel, 1997, Chapter 2.9.
[972] Report on the Practice of Jordan, 1997, Chapter 2.9.

prohibited" on behalf of its sponsors (Austria, Egypt, Mexico, Netherlands, Norway, Philippines, USSR),[973] stated that:

In fact, reprisals could rarely be confined to civilian objects alone and the infliction of suffering on the civilian population would be virtually inevitable . . . The sponsors of the amendment were in favour of extending [the prohibition of reprisals against civilians] to a complete ban on all reprisals against the civilian population and civilian objects alike.[974]

860. At the CDDH, the Netherlands, during discussions on the protection of civilian objects, stated that "reprisals on civilian populations were prohibited by international law".[975]

861. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[976]

862. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[977]

863. At the CDDH, Poland, referring to an amendment on the prohibition of attacks against civilian objects by way of reprisals sponsored by other States, stated that it supported the amendment and pointed out that "it was impossible to carry out reprisals against civilian objects without injuring civilians".[978]

864. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against . . . civilian populations, property and various categories of civilian property which are subject to special protection . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*,

[973] Austria, Egypt, Mexico, Netherlands, Norway, Philippines and USSR, New proposal concerning Article 47 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/57, 19 March 1974, p. 210.

[974] Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.14, 6 February 1975, pp. 113–114, § 26.

[975] Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 128, § 8.

[976] Report on the Practice of the Philippines, 1997, Chapter 2.9.

[977] Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

[978] Poland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 129, § 15.

it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[979]

865. At the CDDH, Sweden, with respect to amendments made by other States concerning the prohibition of attacks against civilian objects by way of reprisals, stated that it was "in favour of such a ban".[980]

866. At the CDDH, the UK, with respect to an amendment concerning the protection of civilian objects, stated that:

> The amendment proposed no ban on reprisals, the intention being to leave intact the existing ban on reprisals against civilian objects in occupied territory which were contained in the [1907 HR] and [GC IV], and to retain the right of reprisal against such objects in enemy territory subject to the existing restraints in customary law, which were considerable. His delegation shared the misgivings expressed by the representative of Canada concerning the proposed ban on reprisals and agreed that such bans would have to be conditional on the improvement of the means of enforcement and supervision of the provisions on protection of the civilian population ... If a ban was introduced, it should not, in his view, be absolute but qualified, so that the right should be retained, subject to strict legal restraint on its exercise, in the circumstances where a Party to the conflict was subjected to persistent attacks on its own civilians and civilian objects which did not cease despite repeated protests. In such circumstances a Party to the conflict would undoubtedly take reprisal measures.[981]

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

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited ... The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions ... The Conventions do not preclude the taking of reprisals against ... civilian objects in enemy territory. Additional Protocol I prohibits the taking of reprisals against ... civilian objects (Article 52(1)) ... The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.[982]

868. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and

[979] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.
[980] Sweden, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 125, § 39.
[981] UK, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, pp. 139–140, §§ 57–58.
[982] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".[983]

869. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that the US did not support "the prohibition on reprisals in article 51 AP I and subsequent articles" and did not consider it part of customary law.[984]

870. According to an army lawyer who participated in the review of AP I by the US Joint Chiefs of Staff:

> Article 51, paragraph 6, and article 52, paragraph 1, of [AP I] prohibit reprisals against the civilian population or civilian objects of en enemy nation, respectively. These provisions are not a codification of customary international law, but, in fact, a reversal of that law. The military review considered whether surrender of these rights would advance the law of war, or threaten the continued respect for the rule of law in war. It was concluded that removal of this legal right placed any further respect for the rule of law by certain nations in jeopardy . . .
>
> The American review recognized the historic pattern for abuse of U.S. and allied prisoners of war by their enemies, and concluded that a broad reservation to the prohibition of reprisals contained in articles 51 and 52 of [AP I] was essential as a legitimate enforcement mechanism in order to ensure respect for the law of war.[985]

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

> Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . civilian objects (Article 52(1)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.[986]

872. At the CDDH, the SFRY stated that "reprisals against civilian objects . . . should be prohibited".[987]

III. Practice of International Organisations and Conferences

United Nations

873. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting

[983] US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

[984] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

[985] W. Hays Parks, Air War and the Law of War, *Air Force Law Review*, Vol. 32, No. 1, 1990, pp. 94 and 97.

[986] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

[987] SFRY, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 127, § 5.

reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[988]

874. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 52(1) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (f) Civilian objects."[989] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[990]

Other International Organisations

875. No practice was found.

International Conferences

876. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "the Occupying Power [in the conflict between Israel and Palestinians] to refrain from perpetrating any other violation of [GC IV], in particular reprisals against protected persons and their property".[991]

IV. Practice of International Judicial and Quasi-judicial Bodies

877. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that "reprisals against civilian objects are outlawed by Article 52(1) of [AP I]".[992]

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

878. No practice was found.

[988] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[989] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[990] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[991] Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 14.
[992] ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 527.

VI. Other Practice

879. No practice was found.

Medical objects

I. Treaties and Other Instruments

Treaties

880. Article 46 GC I provides that "reprisals against the . . . buildings or equipment protected by the Convention are prohibited".

881. Article 47 GC II provides that "reprisals against . . . the vessels or the equipment protected by the Convention are prohibited".

882. Article 20 AP I, which refers, *inter alia*, to Article 12 AP I dealing with the protection of medical units, provides that "reprisals against the persons and objects protected by this Part are prohibited". Article 20 AP I was adopted by consensus.[993]

883. Upon ratification of the Additional Protocols, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[994]

884. Upon ratification of AP I, Germany declared that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[995]

885. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[996]

886. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that "any measures thus taken by the United Kingdom . . . will not involve any action prohibited by the Geneva Conventions of 1949."[997]

[993] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.
[994] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[995] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.
[996] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.
[997] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

887. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

888. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

889. Section 9.6 of the 1999 UN Secretary-General's Bulletin, which deals under Section 9.3 and 9.5 with the protection of "medical establishments or mobile medical units" and "medical equipment [and] mobile medical units", states that "the United Nations force shall not engage in reprisals against . . . establishments and equipment protected under this section".

890. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals."

II. National Practice

Military Manuals

891. Australia's Commanders' Guide, referring, *inter alia*, to Articles 46 GC I, 47 GC II and Article 20 AP I, states that "protected buildings and facilities should not be the subject of reprisals".[998]

892. Australia's Defence Force Manual provides that "reprisals against . . . medical personnel, buildings and equipment are forbidden".[999] In another provision, the manual further states that "protected buildings and facilities . . . should not be the subject of reprisals".[1000]

893. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[1001] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[1002]

894. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[1003]

895. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".[1004]

[998] Australia, *Commanders' Guide* (1994), § 1212.
[999] Australia, *Defence Force Manual* (1994), § 985.
[1000] Australia, *Defence Force Manual* (1994), § 1311.
[1001] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[1002] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[1003] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[1004] Cameroon, *Disciplinary Regulations* (1975), Article 32.

896. Canada's LOAC Manual, in the part dealing with enforcement measures, states that "reprisals against the following categories of persons and objects are prohibited: a. the . . . medical buildings or equipment protected by G[C] I; b. the . . . vessels and equipment protected by G[C] II".[1005]
897. Croatia's LOAC Compendium provides for the prohibition of taking reprisals against "specifically protected persons and objects".[1006]
898. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".[1007]
899. Ecuador's Naval Manual states that "reprisals are forbidden to be taken against: . . . 4. Hospitals and medical facilities . . . and equipment, including [hospital] ships, hospitals, [medical] aircraft and medical vehicles."[1008]
900. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".[1009]
901. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".[1010] The manual refers, *inter alia*, to Articles 46 GC I, 47 GC II and 20 AP I and states that "reprisals are prohibited against . . . the property particularly protected".[1011]
902. Germany's Military Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . medical facilities and supplies".[1012]
903. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . medical establishments and material".[1013]
904. Hungary's Military Manual provides for the prohibition of taking reprisals against "specifically protected persons and objects".[1014]
905. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[1015]
906. Italy's IHL Manual, providing for the prohibition of reprisals against, *inter alia*, "protected persons, medical buildings and material", states that "the observance of international rules which expressly provide for the

[1005] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[1006] Croatia, *LOAC Compendium* (1991), p. 19.
[1007] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[1008] Ecuador, *Naval Manual* (1989), § 6.2.3.2.
[1009] France, *Disciplinary Regulations as amended* (1975), Article 10 bis (2).
[1010] France, *LOAC Manual* (2001), p. 85.
[1011] France, *LOAC Manual* (2001), p. 108.
[1012] Germany, *Military Manual* (1992), § 479.
[1013] Germany, *IHL Manual* (1996), § 320.
[1014] Hungary, *Military Manual* (1992), p. 35.
[1015] Indonesia, *Air Force Manual* (1990), § 15(c).

obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[1016]

907. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[1017] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . medical . . . buildings and equipment."[1018]

908. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[1019]

909. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[1020]

910. The Military Manual of the Netherlands, in the chapter dealing with the protection of the wounded and sick and referring to Article 20 AP I, states that "measures of reprisal are prohibited against . . . medical units and medical means of transportation, in short against all protected persons and objects".[1021]

911. New Zealand's Military Manual states that "reprisals against the following categories of persons and objects are prohibited. a) the . . . buildings or equipment protected by [Article 46 GC I]; b) the . . . vessels and equipment protected by [Article 47 GC II]".[1022]

912. Nigeria's Military Manual, in a part dealing with GC I, states that reprisals "are prohibited 'against the . . . buildings or equipment protected by the convention' (Art. 46)".[1023]

913. Spain's LOAC Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, lists among the persons and objects against whom/which the taking of reprisals is prohibited "the wounded, sick and shipwrecked, as well as specially protected persons and property".[1024]

914. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[1025]

[1016] Italy, *IHL Manual* (1991), Vol. I, § 25.
[1017] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[1018] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[1019] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[1020] Morocco, *Disciplinary Regulations* (1974), Article 25(2).
[1021] Netherlands, *Military Manual* (1993), p. VI-9.
[1022] New Zealand, *Military Manual* (1992), § 1606(2).
[1023] Nigeria, *Military Manual* (1994), p. 14, § 5.
[1024] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[1025] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

915. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[1026] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[1027]

916. The UK Military Manual, in the part dealing with reprisals and referring, *inter alia*, to Articles 14 and 46 GC I and 16 and 47 GC II, states that "reprisals against . . . buildings, equipment and vessels protected by [GC I and GC II] . . . are . . . prohibited".[1028] In a footnote relating to this provision, the manual notes that "the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".[1029]

917. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . medical and religious . . . buildings and equipment".[1030]

918. The US Air Force Pamphlet, referring to Articles 46 GC I and 47 GC III, provides that:

> Reprisals against the . . . buildings or equipment protected by [GC I] are prohibited . . . Reprisals against . . . the vessels or the equipment protected by [GC II] are prohibited. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.[1031]

The Pamphlet further states that:

> Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.[1032]

919. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against hospitals".[1033]

920. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against persons or property protected by the Geneva Conventions."[1034]

[1026] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[1027] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[1028] UK, *Military Manual* (1958), § 644.
[1029] UK, *Military Manual* (1958), § 644, footnote 2.
[1030] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
[1031] US, *Air Force Pamphlet* (1976), § 10-7(b)(1).
[1032] US, *Air Force Pamphlet* (1976), § 10-7(b)(2).
[1033] US, *Air Force Commander's Handbook* (1980), § 8-4(c).
[1034] US, *Operational Law Handbook* (1993), p. Q-182.

921. The US Naval Handbook states that "reprisals are forbidden to be taken against: . . . 4. Hospitals and medical facilities . . . and equipment, including hospital ships, medical aircraft, and medical vehicles."[1035]
922. The Annotated Supplement to the US Naval Handbook, referring to Articles 46 GC I and 47 GC II, states that "fixed establishments and mobile medical units of the medical service, hospital ships, coastal rescue craft and their installations, medical transports, and medical aircraft are immune from reprisal".[1036]
923. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . medical units, medical establishments, medical transports and medical material".[1037]

National Legislation
924. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . medical organisations . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[1038]

925. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[1039]
926. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[1040]

National Case-law
927. In its judgement in the *Dover Castle case* in 1921, the German Reichsgericht held that the accused, the commander of a submarine from which a British hospital ship had been torpedoed, was in the circumstances of the case entitled to hold the opinion that the measures taken by the German authorities against foreign hospital ships were not contrary to international law but were legitimate reprisals. The accused had pleaded that in sinking the ship he had merely carried out an order of the German Admiralty, which, in the belief

[1035] US, *Naval Handbook* (1995), § 6.2.3.2.
[1036] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.2, footnote 50.
[1037] SFRY (FRY), *YPA Military Manual* (1988), § 31(2).
[1038] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
[1039] Colombia, *Penal Code* (2000), Article 158.
[1040] Italy, *Law of War Decree as amended* (1938), Article 8.

that the enemy utilised their hospital ships for military purposes in violation of the 1907 Hague Convention (X), issued a number of orders instructing the submarines to attack hospital ships as vessels of war.[1041]

Other National Practice

928. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

> The extension in [AP I of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.[1042]

929. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[1043]

930. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . medical services and personnel . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."[1044]

931. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[1045]

932. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949."[1046]

[1041] Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.
[1042] Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.
[1043] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[1044] Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
[1045] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
[1046] France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

933. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".[1047]
934. According to the Report on the Practice of Israel, the IDF does not condone nor conduct reprisals against persons or objects protected by the Geneva Conventions.[1048]
935. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law ... In practice, Jordan never resorted to attacks by way of reprisal."[1049]
936. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[1050]
937. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[1051]
938. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

> During hostilities, it is forbidden to resort to reprisals against medical installations, transportation and units ... The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties ... A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) ... The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[1052]

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

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited ... The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.[1053]

[1047] Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.
[1048] Report on the Practice of Israel, 1997, Chapter 2.9.
[1049] Report on the Practice of Jordan, 1997, Chapter 2.9.
[1050] Report on the Practice of Philippines, 1997, Chapter 2.9.
[1051] Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[1052] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.
[1053] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

940. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".[1054]

941. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 12–20 AP I, affirmed that:

> We . . . support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks or reprisals . . . Further, we support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized medical vehicles, hospital ships, and other medical ships and craft, regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23 [AP I].[1055]

942. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US noted that it considered that the provisions of AP I regarding reprisals were "new rules".[1056]

III. Practice of International Organisations and Conferences

United Nations

943. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[1057]

944. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 46 GC I and 47 GC II, stated that "reprisals against the following categories of persons and objects are specifically prohibited: (a) The . . . buildings or equipment protected by the First Geneva

[1054] US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

[1055] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

[1056] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

[1057] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

Convention . . . (b) The . . . vessels and equipment protected by the Second Geneva Convention."[1058] It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[1059]

Other International Organisations
945. No practice was found.

International Conferences
946. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

947. No practice was found.

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

948. No practice was found.

VI. Other Practice

949. No practice was found.

Cultural property

I. Treaties and Other Instruments

Treaties
950. Article 4(4) of the 1954 Hague Convention provides that "[The High Contracting Parties] shall refrain from any act directed by way of reprisals against cultural property".
951. Article 53 AP I provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

[1058] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[1059] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

...

(c) to make such objects [historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples] the object of reprisals.

Article 53 AP I was adopted by consensus.[1060]

952. Upon ratification of the Additional Protocols, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[1061]

953. Upon ratification of AP I, Germany declared that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation".[1062]

954. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation".[1063]

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

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[1064]

[1060] CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 206.
[1061] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[1062] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.
[1063] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.
[1064] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

956. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

957. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

958. Section 6.9 of the 1999 UN Secretary-General's Bulletin, which deals under Section 6.6 with the protection of "monuments of art, architecture or history, archeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples", states that "the United Nations force shall not engage in reprisals against objects and installations protected under this section".

959. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals."

II. National Practice

Military Manuals

960. Argentina's Law of War Manual refers to Articles 53 AP I and 16 AP II, as well as to the 1954 Hague Convention, and provides that "it remains absolutely prohibited . . . to make [cultural property] the object of reprisals".[1065]

961. Australia's Commanders' Guide, under the heading "Protection of Cultural Objects and Places of Worship", provides that:

> LOAC . . . extends immunity [from attack] to cultural property of great importance to cultural heritage. This is irrelevant of origin, ownership or whether the property is movable or immovable. LOAC requires such property to be protected, safeguarded and respected and not made the object of reprisals.[1066]

Referring, *inter alia*, to Articles 51–56 AP I, as well as to Article 4 of the 1954 Hague Convention, the manual further states that "protected buildings and facilities . . . should not be the subject of reprisals".[1067]

962. Australia's Defence Force Manual states that "historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples, are protected from acts of hostility. These objects must not be . . . the subject of reprisals."[1068] The manual further states that "protected buildings and facilities . . . should not be the subject of reprisals".[1069]

[1065] Argentina, *Law of War Manual* (1989), § 4.44.
[1066] Australia, *Commanders' Guide* (1994), § 961.
[1067] Australia, *Commanders' Guide* (1994), § 1212.
[1068] Australia, *Defence Force Manual* (1994), § 928.
[1069] Australia, *Defence Force Manual* (1994), § 1311.

963. Belgium's Law of War Manual, citing several examples of jurisprudence, states that the "property protected by the [1954 Hague Convention] may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."[1070]

964. Benin's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".[1071] It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".[1072]

965. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".[1073]

966. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: ... to engage in reprisals or collective punishments".[1074]

967. Canada's LOAC Manual, in the part dealing with targeting, provides that "reprisals against cultural objects and places of worship are forbidden".[1075] In the part dealing with enforcement measures, the manual states that "reprisals against the following categories of persons and objects are prohibited: ... g. cultural objects and places of worship".[1076]

968. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[1077]

969. Croatia's LOAC Compendium provides for the prohibition of taking reprisals against "specifically protected ... objects".[1078]

970. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: ... it is prohibited [to soldiers in combat] ... to take hostages, to engage in reprisals or collective punishments".[1079]

971. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits ... the methods of warfare which consist in the recourse: ... to reprisals against non-military

[1070] Belgium, *Law of War Manual* (1983), p. 36.
[1071] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[1072] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[1073] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[1074] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[1075] Canada, *LOAC Manual* (1999), p. 4-7, § 71.
[1076] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[1077] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[1078] Croatia, *LOAC Compendium* (1991), p. 19.
[1079] France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).

objectives".[1080] The manual refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against ... property particularly protected".[1081]

972. Germany's Soldiers' Manual states that "cultural property may never be made the object of reprisals".[1082]

973. Germany's Military Manual, referring to Articles 52(1) and 53(c) AP I, as well as to Article 4(4) of the 1954 Hague Convention, provides that "it is expressly prohibited by agreement to make reprisals against: ... cultural objects".[1083] In another provision, the manual, referring to Articles 52(1) and 53(c) AP I, as well as to Article 4(4) of the 1954 Hague Convention, provides that "it is prohibited to make cultural property the object of reprisals".[1084]

974. Germany's IHL Manual provides that "reprisals are expressly prohibited against ... cultural property".[1085]

975. Hungary's Military Manual provides for the prohibition of reprisals against "specifically protected ... objects".[1086]

976. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".[1087] According to the Report on the Practice of Indonesia,

> The meaning of ... the protected objects is not only referring to the Geneva Conventions ... but also referring to the customary sources, such as the moral values which are generally recognized and exist among the international community, and other Conventions such as the Convention for the protection of the cultural property which [has] already [been] ratified by Indonesia.[1088]

977. Italy's IHL Manual, providing for the prohibition of reprisals, *inter alia*, against "cultural property", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[1089]

978. Kenya's LOAC Manual states that "it is forbidden: ... (e) to carry out reprisals against protected persons or property".[1090] In the chapter dealing with reprisals, the manual provides that reprisals "are carried out only against combatants and military objectives ... The Geneva Conventions and [AP I] prohibit reprisals against ... religious ... buildings and equipment ... cultural objects."[1091]

979. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 53 AP I, states that "no reprisals

[1080] France, *LOAC Manual* (2001), p. 85.
[1081] France, *LOAC Manual* (2001), p. 108.
[1082] Germany, *Soldiers' Manual* (1991), p. 8.
[1083] Germany, *Military Manual* (1992), § 479.
[1084] Germany, *Military Manual* (1992), § 909.
[1085] Germany, *IHL Manual* (1996), § 320.
[1086] Hungary, *Military Manual* (1992), p. 35.
[1087] Indonesia, *Air Force Manual* (1990), § 15(c).
[1088] Report on the Practice of Indonesia, 1997, Chapter 2.9.
[1089] Italy, *IHL Manual* (1991), Vol. I, § 25.
[1090] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[1091] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

may be undertaken against cultural objects (historical monuments, works of art, places of worship, etc.)".[1092]

980. The Military Handbook of the Netherlands states that "reprisals against cultural property are prohibited".[1093]

981. New Zealand's Military Manual, referring to Article 53(c) AP I, states that "reprisals against the following categories of persons and objects are prohibited: . . . cultural objects and places of worship".[1094]

982. Spain's LOAC Manual, referring to Articles 52 and 53 AP I and Article 4 of the 1954 Hague Convention, lists "cultural objects" among the persons and objects against whom/which the taking of reprisals is prohibited.[1095] In another provision, the manual states that "combatants must remember that it is prohibited to commit acts of hostility, to execute reprisals . . . against the property which constitutes the cultural or spiritual heritage of peoples, regardless of whether it is public or private property".[1096]

983. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[1097]

984. Switzerland's Basic Military Manual, referring, *inter alia*, to Articles 53 AP I and 4 of the 1954 Hague Convention, states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to . . . cultural property".[1098]

985. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[1099] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[1100]

986. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . cultural objects".[1101]

987. The US Air Force Pamphlet provides that "reprisals against protected cultural property are not taken because of their questionable legality".[1102]

[1092] Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-7.
[1093] Netherlands, *Military Handbook* (1995), p. 7-43.
[1094] New Zealand, *Military Manual* (1992), § 1606(2)(g).
[1095] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[1096] Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(2).
[1097] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.
[1098] Switzerland, *Basic Military Manual* (1987), Article 197(2).
[1099] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[1100] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[1101] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
[1102] US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

988. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", lists a number of persons and objects protected under the Geneva Conventions against whom reprisals are prohibited. It adds, however, that "a Protocol to the 1949 Geneva Conventions would expand this list to include ... cultural property ... The United States signed this Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance."[1103]

989. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: ... m. Reprisals against ... religious or cultural edifices."[1104]

990. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: ... cultural monuments, historical monuments and buildings, establishments used for science, the arts, education or humanitarian purposes".[1105]

National Legislation

991. Argentina's Draft Code of Military Justice provides for the punishment of making cultural property or places of worship which constitute the cultural or spiritual heritage of peoples the object of reprisals.[1106]

992. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning ... civilian objectives, civilian property, historical monuments, art works, places of worship ... During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[1107]

993. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[1108]

994. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[1109]

[1103] US, *Air Force Commander's Handbook* (1980), § 8-4(c).
[1104] US, *Operational Law Handbook* (1993), p. Q-182.
[1105] SFRY (FRY), *YPA Military Manual* (1988), § 31(3).
[1106] Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(1) in the *Code of Military Justice as amended* (1951).
[1107] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
[1108] Colombia, *Penal Code* (2000), Article 158.
[1109] Italy, *Law of War Decree as amended* (1938), Article 8.

995. Spain's Penal Code provides that:

[Shall be punished] whoever, in the event of an armed conflict: a) attacks or makes the object of reprisals or the object of hostilities clearly recognizable cultural objects or places of worship which constitute the cultural or spiritual heritage of peoples and upon which, by virtue of special agreements, protection is conferred, causing, as a consequence, extensive destruction of such objects, and provided that such objects are not situated in the immediate proximity of military objectives or are not used in support of the military effort of the adversary.[1110]

996. Switzerland's Law on the Protection of Cultural Property contains a provision which stipulates, *inter alia*, that "respect for cultural property involves . . . the prohibition of reprisals with regard to cultural property".[1111]

National Case-law

997. No practice was found.

Other National Practice

998. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [AP I of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.[1112]

999. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[1113]

1000. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[1114]

[1110] Spain, *Penal Code* (1995), Article 613(1)(a).
[1111] Switzerland, *Law on the Protection of Cultural Property* (1966), Article 2(3).
[1112] Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.
[1113] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[1114] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

1001. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".[1115]
1002. In 1995, in response to a private inquiry, the Department of Legal Affairs of the German Ministry of Defence stated that "according to international conventional law, reprisals are expressly prohibited against ... cultural property".[1116]
1003. At the CDDH, Greece, with regard to an amendment sponsored by Greece, Jordan and Spain which read that "historic monuments and ... works of art which constitute the cultural heritage of a country ... shall not be made the object of reprisals",[1117] stated that "the principle of the prohibition of reprisals incorporated in the amendment only reaffirmed Article 33 [GC IV]".[1118]
1004. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran offered a special protection to four Iraqi holy cities. Each time Iran resorted to reprisals against Iraqi cities, it issued a statement asking Iraqi people to leave the cities to be attacked and go to the protected holy cities. According to the report, it committed itself not to attack these historic sites.[1119]
1005. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law ... In practice, Jordan never resorted to attacks by way of reprisal.."[1120]
1006. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[1121]
1007. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[1122]
1008. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against ... various categories of civilian property which are subject to special protection ... The prohibition

[1115] Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.
[1116] Germany, Ministry of Defence, Response of the Department of Legal Affairs to a private inquiry, 19 December 1995, Doc. VR II 3-Az 39-61-18.
[1117] Greece, Jordan and Spain, Amendment concerning a new Article 47(3) draft AP I, CDDH, *Official Records*, Vol. III, CDDH/III/17/Rev.1, 18 March 1974, p. 213.
[1118] Greece, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 118, § 6.
[1119] Report on the Practice of Iran, 1997, Chapter 4.3.
[1120] Report on the Practice of Jordan, 1997, Chapter 2.9.
[1121] Report on the Practice of the Philippines, 1997, Chapter 2.9.
[1122] Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *ius ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[1123]

1009. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . Additional Protocol I prohibits the taking of reprisals against historic monuments (Article 53(c)) . . . The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.[1124]

1010. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".[1125]

1011. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support "the prohibition on reprisals in article 51 AP I and subsequent articles" and did not consider it part of customary law.[1126]

1012. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . cultural objects and places of worship (Article 53(c)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.[1127]

[1123] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

[1124] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

[1125] US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

[1126] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

[1127] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

III. Practice of International Organisations and Conferences

United Nations

1013. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[1128]

1014. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 53(c) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (g) Cultural objects and places of worship."[1129] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[1130]

Other International Organisations

1015. No practice was found.

International Conferences

1016. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1017. In the *Tadić case* in 1995, the ICTY Appeals Chamber stated that Article 19 of the 1954 Hague Convention was part of customary law.[1131]

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

1018. No practice was found.

[1128] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[1129] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[1130] UN Commission of Experts established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[1131] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

VI. Other Practice

1019. No practice was found.

Objects indispensable to the survival of the civilian population

I. Treaties and Other Instruments

Treaties

1020. Article 54(4) AP I provides that "objects [indispensable to the survival of the civilian population] shall not be made the object of reprisals". Article 54 AP I was adopted by consensus.[1132]

1021. Upon ratification of the Additional Protocols, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[1133]

1022. Upon ratification of AP I, Germany declared that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[1134]

1023. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[1135]

1024. Upon ratification of AP I, the UK stated that:

> The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the

[1132] CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.
[1133] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[1134] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.
[1135] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[1136]

Other Instruments

1025. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1026. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1027. Section 6.9 of the 1999 UN Secretary-General's Bulletin, which deals under Section 6.7 with the protection of "objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies", states that "the United Nations force shall not engage in reprisals against objects and installations protected under this section".

1028. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals."

II. National Practice

Military Manuals

1029. Australia's Commanders' Guide, referring, *inter alia*, to Articles 51–65 AP I, states that "protected buildings and facilities . . . should not be the subject of reprisals".[1137]

1030. Australia's Defence Force Manual states that "protected buildings and facilities . . . should not be the subject of reprisals".[1138]

1031. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[1139] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[1140]

1032. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[1141]

[1136] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).
[1137] Australia, *Commanders' Guide* (1994), § 1212.
[1138] Australia, *Defence Force Manual* (1994), § 1311.
[1139] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[1140] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[1141] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

1033. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".[1142]
1034. Canada's LOAC Manual, in the part dealing with targeting, provides that "objects indispensable to the survival of the civilian population shall not be made subject to reprisals".[1143] In the part dealing with enforcement measures, the manual states that "reprisals against the following categories of persons and objects are prohibited: . . . h. objects indispensable to the survival of the civilian population".[1144]
1035. Croatia's LOAC Compendium provides for the prohibition of reprisals against "objects indispensable to the survival of the civilian population".[1145]
1036. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".[1146]
1037. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".[1147]
1038. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".[1148] The manual refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against . . . objects indispensable to the survival of the civilian population".[1149]
1039. Germany's Military Manual, referring, however, to Article 55(2) AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . objects indispensable to the survival of the civilian population".[1150]
1040. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . objects indispensable to the survival of the civilian population".[1151]
1041. Hungary's Military Manual provides for the prohibition of reprisals against "objects for [the] survival of [the] civilian population".[1152]
1042. Italy's IHL Manual, providing for the prohibition of reprisals, *inter alia*, against "objects indispensable for the survival of the civilian population", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[1153]

[1142] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[1143] Canada, *LOAC Manual* (1999), p. 4-8, § 81.
[1144] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[1145] Croatia, *LOAC Compendium* (1991), p. 19.
[1146] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[1147] France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).
[1148] France, *LOAC Manual* (2001), p. 85.
[1149] France, *LOAC Manual* (2001), p. 108.
[1150] Germany, *Military Manual* (1992), § 479.
[1151] Germany, *IHL Manual* (1996), § 320.
[1152] Hungary, *Military Manual* (1992), p. 35.
[1153] Italy, *IHL Manual* (1991), Vol. I, § 25.

1043. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[1154] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . objects indispensable for the survival of the civilian population."[1155]

1044. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[1156]

1045. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 54 AP I, states that "no reprisals my be undertaken against objects indispensable for the survival of the civilian population (*inter alia*, foodstuffs, crops, livestock and drinking water installations)".[1157]

1046. New Zealand's Military Manual, referring to Article 54(4) AP I, states that "reprisals against the following categories of persons and objects are prohibited: . . . objects indispensable to the survival of the civilian population".[1158]

1047. Spain's LOAC Manual lists "objects indispensable to the survival of the civilian population" among the persons and objects against whom/which the taking of reprisals is prohibited.[1159]

1048. Sweden's IHL Manual, referring to Article 54 AP I, provides that "the article also states . . . that the property [i.e. "such property as is essential for the survival of a civilian population"] may not be subjected to reprisal attacks".[1160] While noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, the manual states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[1161]

1049. Switzerland's Basic Military Manual, in the part dealing with "Hostilities and their limits" and, more specifically, in a provision regarding the prohibition of the taking of reprisals against the civilian population, refers, *inter alia*, to Article 54 AP I.[1162] It further provides that "objects vital to the civilian population, such as drinking water, foodstuffs, crops and livestock as well as agricultural areas, must not . . . be made the object of reprisals".[1163]

[1154] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[1155] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[1156] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[1157] Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-8.
[1158] New Zealand, *Military Manual* (1992), § 1606(2)(h).
[1159] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[1160] Sweden, *IHL Manual* (1991), Section § 3.2.1.5, p. 60.
[1161] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.
[1162] Switzerland, *Basic Military Manual* (1987), Article 25(2).
[1163] Switzerland, *Basic Military Manual* (1987), Article 35.

1050. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[1164] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[1165]

1051. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . objects indispensable for the survival of the civilian population".[1166]

1052. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against . . . items such as food stuffs and livestock essential to the survival of the civilian population."[1167]

National Legislation

1053. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[1168]

1054. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[1169]

National Case-law

1055. No practice was found.

Other National Practice

1056. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

> The extension in [AP I of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.[1170]

1057. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[1171]

[1164] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[1165] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[1166] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
[1167] US, *Operational Law Handbook* (1993), p. Q-182.
[1168] Colombia, *Penal Code* (2000), Article 158.
[1169] Italy, *Law of War Decree as amended* (1938), Article 8.
[1170] Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.
[1171] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

1058. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[1172]

1059. In 1990, in a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".[1173]

1060. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law ... In practice, Jordan never resorted to attacks by way of reprisal."[1174]

1061. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[1175]

1062. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[1176]

1063. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

> During hostilities, it is forbidden to resort to reprisals against ... various categories of civilian property which are subject to special protection ... The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties ... A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) ... The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[1177]

[1172] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
[1173] Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.
[1174] Report on the Practice of Jordan, 1997, Chapter 2.9.
[1175] Report on the Practice of the Philippines, 1997, Chapter 2.9.
[1176] Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[1177] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

1064. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . Additional Protocol I prohibits the taking of reprisals against . . . objects indispensable to the survival of the civilian population (Article 54(4)) . . . The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.[1178]

1065. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".[1179]

1066. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support "the prohibition on reprisals in article 51 AP I and subsequent articles" and did not consider it part of customary law.[1180]

1067. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

> Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . objects indispensable to the survival of the civilian population (Article 54(4)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.[1181]

III. Practice of International Organisations and Conferences

United Nations

1068. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments

[1178] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

[1179] US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

[1180] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

[1181] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

"without prejudice to the question of their future adoption or other appropriate action".[1182]

1069. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 54(4) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (h) Objects indispensable to the survival of the civilian population."[1183] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[1184]

Other International Organisations

1070. No practice was found.

International Conferences

1071. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1072. No practice was found.

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

1073. No practice was found.

VI. Other Practice

1074. No practice was found.

[1182] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[1183] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[1184] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

Natural environment

I. Treaties and Other Instruments

Treaties

1075. Article 55(2) AP I provides that "attacks against the natural environment by way of reprisals are prohibited". Article 55 AP I was adopted by consensus.[1185]

1076. Upon ratification of the AP I and AP II, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[1186]

1077. Upon ratification of AP I, Germany declared that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[1187]

1078. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[1188]

1079. Upon ratification of AP I, the UK stated that:

> The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[1189]

[1185] CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.
[1186] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[1187] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.
[1188] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.
[1189] UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

1080. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1081. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1082. Section 13 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict states that "attacks against the natural environment by way of reprisals are prohibited for States party to Protocol I additional to the Geneva Conventions".

1083. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

1084. Australia's Defence Force Manual states that "attacks against the environment by way of reprisals are prohibited".[1190]

1085. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[1191] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[1192]

1086. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".[1193]

1087. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".[1194]

1088. Canada's LOAC Manual, in a part dealing with targeting, provides that "attacks against the natural environment by way of reprisals are prohibited".[1195] In the part dealing with enforcement measures, the manual further states that "reprisals against the following categories of persons and objects are prohibited: . . . i. the natural environment".[1196]

[1190] Australia, *Defence Force Manual* (1994), § 545(f).
[1191] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[1192] Benin, *Military Manual* (1995), Fascicule III, p. 13.
[1193] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[1194] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[1195] Canada, *LOAC Manual* (1999), p. 4-9, § 85.
[1196] Canada, *LOAC Manual* (1999), p. 15-2, § 15.

1089. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".[1197]

1090. Croatia's LOAC Compendium provides for the prohibition of reprisals against the "natural environment".[1198]

1091. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".[1199]

1092. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".[1200] The manual further refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against . . . the natural environment".[1201]

1093. Germany's Military Manual, referring to Article 55(2) AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . the natural environment".[1202]

1094. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . the natural environment".[1203]

1095. Hungary's Military Manual provides for the prohibition of reprisals against the "natural environment".[1204]

1096. Italy's IHL Manual, providing for the prohibition of reprisals, *inter alia*, against "the natural environment", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[1205]

1097. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".[1206] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . the natural environment."[1207]

1098. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[1208]

[1197] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[1198] Croatia, *LOAC Compendium* (1991), p. 19.
[1199] France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).
[1200] France, *LOAC Manual* (2001), p. 85.
[1201] France, *LOAC Manual* (2001), p. 108.
[1202] Germany, *Military Manual* (1992), § 479.
[1203] Germany, *IHL Manual* (1996), § 320.
[1204] Hungary, *Military Manual* (1992), p. 35.
[1205] Italy, *IHL Manual* (1991), Vol. I, § 25.
[1206] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[1207] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[1208] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

1099. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 55 AP I, states that "attacks against the natural environment by way of reprisal are prohibited".[1209]
1100. New Zealand's Military Manual, referring to Article 55(2) AP I, states that "reprisals against the following categories of persons and objects are prohibited: ... the natural environment".[1210]
1101. Spain's LOAC Manual lists among the persons and objects against whom/which the taking of reprisals is prohibited "the natural environment" and refers to Article 55 AP I.[1211]
1102. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[1212]

1103. Switzerland's Basic Military Manual, in the part dealing with "Hostilities and their limits" and, more specifically, in a provision regarding the prohibition of the taking of reprisals against the civilian population, refers, *inter alia*, to Article 55 AP I.[1213] The manual further states, with reference to, *inter alia*, Article 55 AP I, that "by virtue of the Geneva Conventions and their additional Protocols, [reprisals] are prohibited with regard to ... the environment".[1214]
1104. Togo's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".[1215] It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".[1216]
1105. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against ... the natural environment".[1217]
1106. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", lists a number of persons and objects protected under the Geneva Conventions against whom reprisals are prohibited. It adds, however, that "a Protocol to the 1949 Geneva Conventions would expand this list to include ... the natural environment. The United States signed this

[1209] Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-9.
[1210] New Zealand, *Military Manual* (1992), § 1606(2)(i).
[1211] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[1212] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.
[1213] Switzerland, *Basic Military Manual* (1987), Article 25(2).
[1214] Switzerland, *Basic Military Manual* (1987), Article 197(2).
[1215] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[1216] Togo, *Military Manual* (1996), Fascicule III, p. 13.
[1217] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance."[1218]

1107. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . the natural environment".[1219]

National Legislation

1108. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

> The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . [the] natural environment . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[1220]

1109. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[1221]

1110. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[1222]

National Case-law

1111. No practice was found.

Other National Practice

1112. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

> The extension in [AP I of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.[1223]

[1218] US, *Air Force Commander's Handbook* (1980), § 8-4(c).
[1219] SFRY (FRY), *YPA Military Manual* (1988), § 31(5).
[1220] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
[1221] Colombia, *Penal Code* (2000), Article 158.
[1222] Italy, *Law of War Decree as amended* (1938), Article 8.
[1223] Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.

1113. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[1224]

1114. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . the natural environment. The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."[1225]

1115. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[1226]

1116. In 1990, in a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".[1227]

1117. In 1992, prior to the adoption of a UN General Assembly resolution on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum entitled "International Law Providing Protection to the Environment in Times of Armed Conflict" which provided, *inter alia*, that:

> For States parties the following principles of international law, as applicable, provide additional protection for the environment in times of armed conflict: Article 55(2) of Additional Protocol I prohibits States parties from attacking the natural environment by way of reprisals.[1228]

1118. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal."[1229]

1119. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[1230]

[1224] Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
[1225] Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
[1226] Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
[1227] Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.
[1228] Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(d).
[1229] Report on the Practice of Jordan, 1997, Chapter 2.9.
[1230] Report on the Practice of the Philippines, 1997, Chapter 2.9.

1120. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[1231]

1121. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

> During hostilities, it is forbidden to resort to reprisals against . . . various categories of civilian property which are subject to special protection . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *Jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[1232]

1122. At the CDDH, Ukraine stated that it "agreed with those who had mentioned the need to prohibit reprisals and damage to the natural environment".[1233]

1123. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . Additional Protocol I prohibits the taking of reprisals against . . . the natural environment (Article 55(2)) . . . The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.[1234]

1124. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".[1235]

[1231] Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[1232] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.
[1233] Ukraine, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 140, § 59.
[1234] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.
[1235] US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

1125. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support "the prohibition on reprisals in article 51 AP I and subsequent articles" and did not consider it part of customary law.[1236]

1126. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

> Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . the natural environment (Article 55(2)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.[1237]

III. Practice of International Organisations and Conferences

United Nations

1127. In a resolution adopted in 1992 on the protection of the environment in times of armed conflict, the UN General Assembly recognised the importance of the provisions of international law applicable to the protection of the environment in times of armed conflict, referring, *inter alia*, to the provisions of AP I. Moreover, it urged "all States to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict" and appealed "to all States that have not yet done so to consider becoming parties to the relevant international conventions".[1238]

1128. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

> all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.[1239]

1129. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . (o)bligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note

[1236] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

[1237] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

[1238] UN General Assembly, Res. 47/37, 25 November 1992, preamble and §§ 1 and 2.

[1239] UN General Assembly, Res. 49/50, 9 December 1994, § 11.

of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[1240]

1130. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 55(2) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (i) The natural environment."[1241] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[1242]

Other International Organisations

1131. No practice was found.

International Conferences

1132. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1133. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ observed that any right of recourse to reprisals would, like self-defence, be governed by the principle of proportionality. The Court noted that:

> Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.
>
> These are powerful constraints for all the States having subscribed to these provisions.[1243]

[1240] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[1241] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.
[1242] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[1243] ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 31.

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

1134. The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict provides that "attacks against the natural environment by way of reprisals are prohibited".[1244]

VI. Other Practice

1135. No practice was found.

Works and installations containing dangerous forces

I. Treaties and Other Instruments

Treaties

1136. Article 56(4) AP I provides that "it is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 [namely dams, dykes and nuclear electrical generating stations] the object of reprisals". Article 56 AP I was adopted by consensus.[1245]

1137. Upon ratification of the AP I and AP II, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[1246]

1138. Upon ratification of AP I, France made a reservation concerning works and installations containing dangerous forces, in which it stated that:

> The Government of France cannot guarantee absolute protection for works and installations containing dangerous forces, which can contribute to the war effort of the adverse party, or for the defenders of such installations. It will nevertheless take all necessary precautions in conformity with the provisions of Article 56, Article 57 paragraph 2 (a) (iii) and Article 85 paragraph 3 (c), in order to avoid severe collateral losses among the civilian population, including in the case of eventual direct attacks.[1247]

1139. Upon ratification of AP I, Germany declared that "the Federal Republic of Germany will react against serious and systematic violations of the

[1244] ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, § 13, annexed to UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, p. 26.
[1245] CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.
[1246] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[1247] France, Reservation made upon ratification of AP I, 11 April 2001, § 15.

obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[1248]

1140. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation".[1249]

Other Instruments

1141. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1142. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1143. Section 6.9 of the 1999 UN Secretary-General's Bulletin, which deals under Section 6.8 with the protection of "installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations", states that "the United Nations force shall not engage in reprisals against objects and installations protected under this section".

1144. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals."

II. National Practice

Military Manuals

1145. Australia's Commanders' Guide provides that "no reprisals may be taken against the works or installations [containing dangerous forces]".[1250] Referring, *inter alia*, to Articles 51–56 AP I, the manual further provides that "protected buildings and facilities . . . should not be the subject of reprisals".[1251]

1146. According to Australia's Defence Force Manual "protected buildings and facilities . . . should not be the subject of reprisals".[1252]

1147. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".[1253] It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".[1254]

[1248] Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.
[1249] Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.
[1250] Australia, *Commanders' Guide* (1994), § 962.
[1251] Australia, *Commanders' Guide* (1994), § 1212.
[1252] Australia, *Defence Force Manual* (1994), § 1311.
[1253] Benin, *Military Manual* (1995), Fascicule III, p. 12.
[1254] Benin, *Military Manual* (1995), Fascicule III, p. 13.

1148. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".[1255]

1149. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: ... to engage in reprisals or collective punishments".[1256]

1150. Canada's LOAC Manual, in the part dealing with targeting, provides that "no reprisals may be taken against dams, dykes, nuclear electrical generating stations, or legitimate targets located at or in the vicinity of such installations".[1257] In the part dealing with enforcement measures, the manual further states that "reprisals against the following categories of persons and objects are prohibited: ... j. works and installations containing dangerous forces".[1258]

1151. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo ... it is prohibited [to soldiers in combat]: ... to take hostages, to engage in reprisals or collective punishments".[1259]

1152. Croatia's LOAC Compendium provides for the prohibition of reprisals against "specifically protected ... objects".[1260]

1153. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: ... it is prohibited [to soldiers in combat] ... to take hostages, to engage in reprisals or collective punishments".[1261]

1154. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits ... the methods of warfare which consist in the recourse: ... to reprisals against non-military objectives".[1262] The manual refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against ... objects particularly protected".[1263]

1155. Germany's Military Manual, referring to Article 56(4) AP I, provides that "it is expressly prohibited by agreement to make reprisals against: ... works and installations containing dangerous forces".[1264]

1156. Germany's IHL Manual provides that "reprisals are expressly prohibited against ... works and installations which constitute a source of danger".[1265]

1157. Hungary's Military Manual prohibits reprisals against "specifically protected ... objects".[1266]

[1255] Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).
[1256] Cameroon, *Disciplinary Regulations* (1975), Article 32.
[1257] Canada, *LOAC Manual* (1999), p. 4-8, § 77.
[1258] Canada, *LOAC Manual* (1999), p. 15-2, § 15.
[1259] Congo, *Disciplinary Regulations* (1986), Article 32(2).
[1260] Croatia, *LOAC Compendium* (1991), p. 19.
[1261] France, *Disciplinary Regulations as amended* (1975), Article 10 bis (2).
[1262] France, *LOAC Manual* (2001), p. 85.
[1263] France, *LOAC Manual* (2001), p. 108.
[1264] Germany, *Military Manual* (1992), § 479.
[1265] Germany, *IHL Manual* (1996), § 320.
[1266] Hungary, *Military Manual* (1992), p. 35.

1158. Italy's IHL Manual, providing for the prohibition of reprisals against, *inter alia*, "works and installations containing dangerous forces", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".[1267]

1159. Kenya's LOAC Manual states that "it is forbidden: ... (e) to carry out reprisals against protected persons or property".[1268] In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives ... The Geneva Conventions and [AP I] prohibit reprisals against ... works or installations containing dangerous forces".[1269]

1160. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.[1270]

1161. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 56 AP I, states that "reprisals against dams, dikes and nuclear power plants are forbidden".[1271]

1162. New Zealand's Military Manual, referring to Article 56(4) AP I, states that "reprisals against the following categories of persons and objects are prohibited: ... works and installations containing dangerous forces".[1272]

1163. Spain's LOAC Manual lists "works and installations containing dangerous forces" among the persons and objects against whom/which the taking of reprisals is prohibited and refers to Article 56 AP I.[1273]

1164. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

> Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.[1274]

1165. Togo's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".[1275] It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".[1276]

[1267] Italy, *IHL Manual* (1991), Vol. I, § 25.
[1268] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.
[1269] Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.
[1270] Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.
[1271] Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-10.
[1272] New Zealand, *Military Manual* (1992), § 1606(2)(j).
[1273] Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).
[1274] Sweden, *IHL Manual* (1991), Section 3.5, p. 89.
[1275] Togo, *Military Manual* (1996), Fascicule III, p. 12.
[1276] Togo, *Military Manual* (1996), Fascicule III, p. 13.

1166. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . works containing dangerous forces".[1277]
1167. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . buildings and installations containing dangerous forces (dams, dykes, nuclear power stations and similar)".[1278]

National Legislation
1168. Argentina's Draft Code of Military Justice provides for the punishment of:

making works or installations containing dangerous forces the object of reprisals, if such attacks may cause the release of such [dangerous] forces and consequent severe losses among the civilian population, except if such works or installations are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.[1279]

1169. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . dangerous installations. During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.[1280]

1170. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.[1281]
1171. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".[1282]
1172. Spain's Penal Code provides that:

[Shall be punished] whoever, in the event of an armed conflict: . . . attacks or makes the object of reprisals works or installations containing dangerous forces, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population, except if such works or installations are used in regular,

[1277] UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.
[1278] SFRY (FRY), *YPA Military Manual* (1988), § 31(4).
[1279] Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(4) in the *Code of Military Justice as amended* (1951).
[1280] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.
[1281] Colombia, *Penal Code* (2000), Article 158.
[1282] Italy, *Law of War Decree as amended* (1938), Article 8.

significant and direct support of military operations and if such attack is the only feasible way to terminate such support.[1283]

National Case-law

1173. No practice was found.

Other National Practice

1174. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

> The extension in [AP I of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.[1284]

1175. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".[1285]

1176. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against ... installations containing dangerous forces ... The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks".[1286]

1177. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

> Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.[1287]

1178. In 1990, in a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".[1288]

1283 Spain, *Penal Code* (1995), Article 613(1)(d).
1284 Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.
1285 Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.
1286 Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.
1287 Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.
1288 Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

1179. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal."[1289]
1180. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".[1290]
1181. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."[1291]
1182. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

> During hostilities, it is forbidden to resort to reprisals against . . . various categories of civilian property which are subject to special protection . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.[1292]

1183. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

> To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . Additional Protocol I prohibits the taking of reprisals against . . . works and installations containing natural forces (Article 56(4)). The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.[1293]

1184. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and

[1289] Report on the Practice of Jordan, 1997, Chapter 2.9.
[1290] Report on the Practice of Philippines, 1997, Chapter 2.9.
[1291] Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.
[1292] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.
[1293] UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".[1294]

1185. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support "the prohibition on reprisals in article 51 AP I and subsequent articles" and did not consider it part of customary law. He added that it did not support Article 56 AP I and that the US did not consider it to be customary law.[1295]

1186. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

> Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . works and installations containing dangerous forces (Article 56(4)). These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.[1296]

III. Practice of International Organisations and Conferences

United Nations

1187. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[1297]

1188. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 65(4) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (j) Works and installations containing dangerous forces."[1298] It further stated that:

> In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the

[1294] US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

[1295] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 426 and 427.

[1296] US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

[1297] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

[1298] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.[1299]

Other International Organisations
1189. No practice was found.

International Conferences
1190. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1191. No practice was found.

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

1192. No practice was found.

VI. Other Practice

1193. No practice was found.

E. Reprisals in Non-international Armed Conflicts

I. Treaties and Other Instruments

Treaties
1194. Article 4(4) of the 1954 Hague Convention provides that the High Contracting Parties "shall refrain from any act directed by way of reprisals against cultural property". Article 19(1) of the same Convention states that:

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

1195. Article 8(4) of draft AP II submitted by the ICRC to the CDDH provided that "measures of reprisals against [all persons whose liberty has been restricted by capture or arrest for reasons in relation to the armed conflict] are prohibited".[1300]

[1299] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.
[1300] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 36.

1196. Article 19 of draft AP II submitted by the ICRC to the CDDH provided that "measures of reprisals against the wounded, the sick, and the shipwrecked as well as against medical personnel, medical units and means of medical transport are prohibited".[1301]
1197. Article 26(4) of draft AP II submitted by the ICRC to the CDDH provided that "attacks against the civilian population or civilians by way of reprisals are prohibited".[1302]
1198. Upon ratification of AP I and AP II, Egypt stated that:

> The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.[1303]

Other Instruments
1199. Paragraph 6 the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.
1200. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

II. National Practice

Military Manuals
1201. Cameroon's Instructors' Manual, in a part dealing with "victims of civil war", states that "during all military operations, offensive or defensive, certain forms of conduct are prohibited and remain contrary to the law of war. Examples [are] . . . to carry out reprisals against populations."[1304]
1202. India's Manual of Military Law prohibits reprisals. The provision is in a section relative to the actions of a commander acting in aid of civil authorities for the handling of crowds and mobs. The manual adds that action is preventive and not punitive and that no soldier can punish a civilian, except under martial law.[1305]

National Legislation
1203. No practice was found.

[1301] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 38.
[1302] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.
[1303] Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.
[1304] Cameroon, *Instructors' Manual* (1992), p. 150, § 532(1).
[1305] India, *Manual of Military Law* (1983), Vol. 1, Chapter VII, § 8.

National Case-law
1204. No practice was found.

Other National Practice
1205. At the CDDH, in its explanation of vote concerning draft Article 10 *bis* AP II, the Australian delegation stated that it had abstained from voting because it considered that the article "did no more than prohibit in internal conflicts acts that violate the provisions of the Protocol and that the article was not concerned with reprisals", whereas "many delegations interpreted the article as a prohibition of reprisals, which they claimed found no place in the law applicable to internal armed conflicts". Australia further stated that delegations of other States "also saw the article as an interference with the sovereignty of the State". The Australian delegation expressed its disappointment that the provision had not been acceptable to a majority of States.[1306]
1206. At the CDDH, the representative of the Belarus said that he fully supported the opinion of GDR and Poland in favour of draft Article 10 *bis* AP II.[1307]
1207. At the CDDH, the Belgian delegation stated that it "regretted that [draft] Articles 6 to 8 [of draft AP II] did not include a strict prohibition of reprisals. The term was doubtless less important then the deed". The Belgian delegation also stated that "the words 'are, and shall remain prohibited at any time and at any place whatsoever' which already appeared in Article 3 common to the four Geneva Conventions of 1949 . . . should serve as a rule of conduct and an absolute prohibition of recourse to reprisals in the Articles of Part II.[1308] It announced that it would abstain from voting on draft Article 10 *bis* AP II. However, as to the fundamental guarantees within draft AP II, the Belgian delegation stated that "the question of reprisals could not arise, since under the terms of that article, persons who did not take a direct part or who had ceased to take part in hostilities, were in all circumstances to be treated humanely".[1309]
1208. At the CDDH, in its explanation of vote on draft Article 10 *bis* AP II, the delegation of Cameroon stated that it had:

voted for this provision in the belief that a blanket prohibition of reprisals would not be feasible. No State could reasonably be asked to stand by and allow grave and repeated breaches of the Conventions or the Protocols by its adversary. The

[1306] Australia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 119.
[1307] Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 16.
[1308] Belgium, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.40, 14 April 1975, p. 425, §§ 21–22.
[1309] Belgium, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109, § 11.

prohibition of reprisals should . . . be limited to certain well-defined cases, restrictively enumerated.[1310]

1209. At the CDDH, Canada proposed an amendment to draft AP II which read, *inter alia*, that "measures of reprisal against [persons whose liberty has been restricted by capture or otherwise for reasons relative to the armed conflict] are prohibited".[1311]

1210. At the CDDH, the Canadian delegation submitted a proposal for a new Article 9(4) AP II which read: "Acts of retaliation comparable to reprisals against [all persons who do not take a direct part or who have ceased to take a part in hostilities, whether or not their liberty has been restricted] are prohibited."[1312] It further proposed a new Article 17 which read: "Acts of retaliation comparable to reprisals against the wounded and sick and the shipwrecked as well as against medical personnel, medical units and means of medical transports are prohibited."[1313] A proposal for a new Article 22(3) read: "Attacks against the civilian population or civilians by way of acts of retaliation comparable to reprisals are prohibited."[1314]

1211. At the CDDH, Canada made another draft proposal for an article to be inserted in AP II, which provided that:

> If a Party to the conflict persistently violates the provisions of the Protocol and refuses to comply with those provisions after being called upon to do so, then, except concerning the persons protected by articles . . . [footnote: these would be the articles that concern, in particular, the protection of persons within the power of one of the Parties to the conflict], the adverse Party may nevertheless resort to measures which are in breach of the Protocol, provided it had warned the offending party that such action will be resorted to if the offensive acts are not terminated within a specific time [footnote: As is clear from the language of the proposal, this is intended to be of general application affecting the entire Protocol].[1315]

1212. At the CDDH, during discussions on Article 10 *bis* of draft AP II, the Canadian representative stated that:

> As his delegation regarded the concept of reprisals as appertaining to international law, it considered that there was no place for that concept in Protocol II. There was a risk that the introduction of such a concept in Protocol II might increase the danger of reprisals followed by counter-reprisals and result in an escalation of

[1310] Cameroon, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 455.

[1311] Canada, Article 8 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/37, 14 March 1974, pp. 23–24.

[1312] Canada, Article 9(4) of draft amendment concerning AP II as a whole submitted to the CDDH, *Official Records*, Vol. IV, CDDH/212, 4 April 1975, p. 196.

[1313] Canada, Article 17 of draft amendment concerning AP II as a whole submitted to the CDDH, *Official Records*, Vol. IV, CDDH/212, 4 April 1975, p. 199.

[1314] Canada, Article 22(3) of draft amendment concerning AP II as a whole submitted to the CDDH, *Official Records*, Vol. IV, CDDH/212, 4 April 1975, p. 201.

[1315] Canada, New proposal concerning an Article to be introduced in AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.

hostilities. Its conclusion might also inhibit some States from becoming Parties to the Protocol.[1316]

1213. In 1986, in an annex to a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence stated that:

It should be noted that the ... limitations on the use of reprisals apply only in the event of an international armed conflict. Common Article 3 of the [1949] Geneva Conventions, which is the only treaty law concerning internal armed conflict other than [AP II], does not make any explicit reference to reprisals ...

[AP II], concerned with internal armed conflicts, does not contain the word "reprisal" or any similar expression.[1317]

1214. At the CDDH, Colombia, supported by a representative of the delegation of Indonesia, supported the view that draft Article 10 *bis* AP II should be deleted.[1318]

1215. At the CDDH, Finland proposed an amendment concerning the provision of fundamental guarantees within AP II (Part II, Article 6) according to which "measures of reprisal" should have been prohibited.[1319] With respect to this proposal, the delegation of Finland declared that:

[A] reference to measures of reprisals should be included in [AP II], so that civilian populations would have at least minimum guarantees against inhumane treatment by the parties to non-international armed conflicts ... The amendment by the Finnish delegation was aimed at adding a new subparagraph [in the draft provision of AP II dealing with fundamental guarantees] in order to place a general prohibition on reprisals, as had been done in Article 33 of [GC IV].[1320]

The representative of Finland explained further that:

Contrary to what was often stated, reprisals were not limited to times of war or other types of armed conflict, but were also exercised in times of peace. Reprisals should never in any circumstances be used against the civilian populations. They could possibly be employed between States or Parties to a conflict. For example, they could be regarded as legitimate in the event of destruction of public property or a violation of international law by one or other Party to a conflict. But there was universal agreement that reprisals of an inhumane nature were inadmissible. That was why innocent civilians should be protected against such acts in times both of war and peace.[1321]

[1316] Canada, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 428, § 9.

[1317] Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, §§ 5 and 9.

[1318] Colombia (supported by Indonesia), Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 14.

[1319] Finland, New proposal concerning Article 6 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/93, 4 October 1974, p. 18.

[1320] Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 324, § 7.

[1321] Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 324, § 8.

The representative of Finland also stated that:

> With regard to the word "reprisals", he still considered that there was no reason why it should not be used also in connexion with non-international armed conflicts; but his delegation would be willing to accept another word, provided that the content [i.e. of the proposal prohibiting reprisals] was not changed.[1322]

1216. At the CDDH, in its explanation of vote concerning draft Article 10 *bis* AP II, the delegation of Finland stated that "as the article was put to the vote . . . the Finnish delegation had to cast a favourable vote in view of its consistent support throughout the Conference for the prohibition of reprisals or measures in kind in armed conflicts, whether international or non-international".[1323]

1217. At the CDDH, the delegation of France, in its explanation of vote concerning draft Article 10 *bis* AP II, stated that it had voted against the retention of the provision, without, however, expressing any views on the substance of the provision.[1324]

1218. At the CDDH, the FRG proposed an amendment to Article 8 of draft AP II which read, *inter alia*: "Amend Article 8 to read: . . . 2. . . . (b) measures of reprisals against [all persons whose liberty has been restricted by capture or arrest for reasons in relation to the armed conflict] are prohibited".[1325]

1219. At the CDDH, in discussing the Finnish proposal to introduce an explicit prohibition of reprisals in AP II, the FRG stated:

> Was it advisable to use the word "reprisal" in draft Protocol II? Perhaps it would be possible to find another term where non-international armed conflicts were concerned. There were no objections from the legal point of view to the use of the word "reprisal", but from the political point of view it could be inferred that its use gave the Parties to a conflict a status under international law which they had no right to claim. He suggested that another formulation, for example "measures of retaliation comparable to reprisals", might not meet with the same objections.[1326]

1220. At the CDDH, the GDR delegation expressed its strong support for draft Article 10 *bis* AP II.[1327]

1221. At the CDDH, in the run-up to the vote on draft Article 10 *bis* AP II, Greece supported the views expressed by the representative of Mexico, whose

[1322] Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 339, § 79.
[1323] Finland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 119.
[1324] France, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.
[1325] FRG, New proposal concerning Article 8 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/236, 13 March 1975, p. 25.
[1326] FRG, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 325, § 11.
[1327] GDR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 428, § 10.

delegation objected to any provision that would authorise reprisals either directly or *a contrario*.[1328]

1222. At the CDDH, the Holy See expressed its favourable position concerning the inclusion of draft Article 10 *bis* in AP II.[1329] In its explanation of vote concerning the draft Article, the Holy See declared that it had voted for the retention of the article, "because it provided for the prohibition of reprisals".[1330]

1223. At the CDDH, India said that it supported the view of a US representative according to which Article 10 *bis* should be deleted and also prepared to vote against the provision. Nevertheless, it expressed the opinion that while compromises were to be appreciated, they tended to jeopardise the national sovereignty of States.[1331]

1224. At the CDDH, a representative of Indonesia supported the view of the delegation of Colombia that draft Article 10 *bis* AP II should be deleted.[1332]

1225. At the CDDH, Iran submitted a new proposal to be included in draft AP II, according to which "acts of vengeance likely to affect the humanitarian rights conferred upon persons protected by this Part are prohibited".[1333]

1226. At the CDDH, Iran stated that "it had reservations concerning the addition of the word 'reprisals', which was not appropriate in a protocol concerning non-international armed conflicts".[1334]

1227. At the CDDH, Iran stated that it "supported the Canadian representative's view that the concept of reprisals should not be included in Protocol II".[1335]

1228. At the CDDH, Iraq, considering draft Article 19 AP II, stated that "in any case, the question of reprisals had no place in Protocol II, for the Conference was not entitled to legislate for the treatment of citizens of sovereign States".[1336]

1229. At the CDDH, Italy submitted the following proposal to be included in draft AP II to the effect that "the provisions of the present Part must be observed at all times and in all circumstances, even if the other Party to the conflict is guilty of violating the provisions of the present Protocol".[1337]

[1328] Greece, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 20.
[1329] Holy See, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 428, § 12.
[1330] Holy See, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.
[1331] India, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 108, § 8.
[1332] Indonesia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 14.
[1333] Iran, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.
[1334] Iran, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 330, § 37.
[1335] Iran, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, § 15, p. 429.
[1336] Iraq, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 326, § 16.
[1337] Italy, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 110.

1230. At the CDDH, when Article 10 *bis* was rejected, Italy, in its explanation of vote, stated that:

> The Italian delegation abstained in the vote leading to the deletion of Article 10 bis, which provided that certain articles of Protocol II "shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol".
>
> A majority of delegations decided to delete Article 10 bis because of the widely felt need to simplify Protocol II as far as possible, in order to render it clear, to the point, well balanced and thus acceptable to a large number of countries . . .
>
> . . .
>
> . . . Protocol II contains many provisions mentioning obligations which must be respected "in all circumstances", or rules which must be followed "as a minimum". The language is very clear, highlighting the need for unconditional respect for those obligations and rules, even if the other Party to the conflict does not respect them. This is to be expected, since what is involved are elementary human rights, to which a basic morality (much older than the legal rule) ascribes absolute value . . .
>
> . . .
>
> Moreover, everything in Protocol II which represents a development of the common Article 3 of the 1949 Geneva Conventions, is subject to the conditions and rules set out in that article. And that article specifically mentions rules which must be applied "as a minimum" or "at any time and in any place whatsoever"; this clearly shows that these rules (and thence the rules derived from them in the present Protocol) must be understood as requiring unconditional respect.[1338]

1231. At the CDDH in 1976, in an explanation of vote concerning Article 10 *bis* AP II, Mexico stated that it "had opposed the adoption of article 10 *bis*, because it introduced the notion of reprisals in internal conflicts, which was unacceptable".[1339]

1232. At the CDDH in 1977, Mexico reiterated "its formal objection to any provision that would authorize reprisals either directly or *a contrario*".[1340] With regard to draft Article 10 *bis* of draft AP II, Mexico re-emphasised that it "objected to any provision that would authorize reprisals either directly or indirectly".[1341] In its explanation of vote on draft Article 74 of draft AP I and draft Article 10 *bis* of draft AP II, Mexico explained that it had voted against draft Article 10 *bis* AP II on the basis of its conviction that "experience shows that reprisals do not lead the enemy to respect humanitarian law, but result in an increase in violations and hostilities". Mexico believed that the draft provision, as well as the French and Polish proposals, would have authorised reprisals (the Polish in an *a contrario sensu*) and that "the mandatory nature of humanitarian law does not depend on the observance of its rules by the adverse Party, but

[1338] Italy, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, pp. 120–121.

[1339] Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.64, 7 June 1976, p. 318, § 80.

[1340] Mexico, Statement at the CDDH, *Official Records*, Vol. X, CDDH/I/349/Rev.1, published as CDDH/405/Rev.1, 17 March–10 June 1977, p. 231, § 43.

[1341] Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 13.

stems from the inherently wrongful nature of the act prohibited by international humanitarian law", and therefore voted against these provisions.[1342]

1233. At the CDDH, a representative of New Zealand suggested that the Finnish amendment concerning reprisals in Part II of draft AP II should be accepted.[1343]

1234. At the CDDH, the representative of Nigeria stated that "he was unhappy about the use of the word 'reprisals', but might endorse the Finnish amendment if another term were found, as for example 'retaliation' or 'vengeance'".[1344] In its explanation of vote concerning draft Article 10 *bis* AP II, Nigeria stated that:

> This article is no less and no more than a disguised article on reprisals. Right from the beginning . . . the Nigerian delegation had repeatedly opposed the inclusion of an article on reprisals in this additional Protocol II. We are of the firm conviction that reprisals as a legal notion properly belongs to international legal relations as between sovereign States and should have no place in a Protocol dealing with internal armed conflicts. Also, the inclusion of an article on reprisals in this Protocol could lead Governments and States into embarrassing situations. This is because it is not inconceivable that in the course of an internal conflict, rebels may deliberately commit acts to which the normal reaction would be in the nature of reprisals but because of a prohibitory article such as this, Governments would feel bound to fold their arms while dissident groups go on a rampage killing and maiming innocent civilians and burning dwellings and food crops. No responsible Government can allow such a situation to develop, but if this article had been adopted this is the kind of scenario that would repeat itself time and again.[1345]

1235. In introducing Resolution 2675 (XXV) (providing for the prohibition of reprisals against civilian populations or individual members thereof), which it cosponsored, in the Third Committee of the UN General Assembly in 1970, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts".[1346]

1236. At the CDDH, Pakistan made the following new proposal in order to prohibit reprisals:

> Isolated cases of disrespect of the provisions of the present Protocol by one party shall not in any circumstances authorize the non-compliance by the other party

[1342] Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 449–450.
[1343] New Zealand, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 331, § 44.
[1344] Nigeria, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 327, § 21.
[1345] Nigeria, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 122.
[1346] Norway, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1785, 11 November 1970, p. 281.

with the provisions of [the relevant Part], even for the purpose of inducing the adverse party to comply with its obligations.[1347]

In a later statement, Pakistan stated that "after consultations between various delegations, groups and inter-regional groups, it had been proposed, as a compromise, that [draft] Article 10 bis should be deleted".[1348]

1237. At the CDDH, the Philippines made the following new proposal for an Article in draft AP II concerning the prohibition of "reprisals" in the context of non-international armed conflicts which read: "Failure of one Party to the conflict to comply with the provisions of the present Protocol shall not authorize the other party to employ counter measures for the purpose of enforcing the provisions".[1349]

1238. At the CDDH, the delegation of Poland, in its explanation of vote on articles of draft Protocols I and II relating to reprisals, stated that it had withdrawn an earlier proposed amendment which envisaged a general prohibition of reprisals, while stressing that if a group of persons should not be covered by specific provisions prohibiting reprisals, "there should be no attempt to prove by an *a contrario* argument that such a group is outside the prohibition of reprisals" and that this would be, in its understanding, "an argument in bad faith directed against the very spirit of the Geneva Law".[1350]

1239. At the CDDH, in her comments on the Finnish proposal to prohibit all measures of reprisal in draft Article 6 AP II, the Swedish representative recalled approvingly a statement by the UK representative expressing the view that the phrase "at any time and in any place whatsoever" excluded the possibility of reprisals against the categories of persons in question. Questioning why this should not be stated explicitly, she supported the Finnish proposal.[1351]

1240. At the CDDH, the delegation of Syria, in its explanation of vote on draft Article 10 *bis* AP II, expressed regret that Poland had withdrawn an amendment prohibiting reprisals. It stated that "the reasons of expediency should not be interpreted, by an *a contrario* reasoning, as opening up the possibility of such measures". It further stated that "humanitarian law is dependent on *jus cogens* and it is therefore unthinkable that an inhuman act should provoke a similar act involving innocent persons".[1352]

[1347] Pakistan, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.

[1348] Pakistan, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 107, § 4.

[1349] Philippines, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.

[1350] Poland, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 452.

[1351] Sweden, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 331, § 45.

[1352] Syria, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 453.

1241. At the CDDH, a representative of the UK stated that the provision of draft Article 6(2) "'at any time and in any place whatsoever' was so comprehensive that it would probably not leave room for the operation of reprisals in any form". Draft Article 6(2) contained a detailed list of specially prohibited acts directed against persons in the power of the parties to the conflict.[1353]

1242. At the CDDH, a representative of the US stated that "he hoped that ... Article 10 bis would be rejected, since the whole concept of reprisals had no place in Protocol II".[1354]

1243. In 1987, the Deputy Legal Adviser of the US Department of State stated that:

> The basic core of Protocol II is, of course, reflected in common article 3 of the 1949 [Geneva] Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence toward persons taking no active part in hostilities, hostagetaking, degrading treatment, and punishment without due process.[1355]

1244. At the CDDH, the delegation of the SFRY, in its explanation of vote on draft Article 10 *bis* AP II, stated that "it goes without saying ... that reprisals are already forbidden against protected persons and objects, that is to say, against persons and objects in the power of the adversary". Moreover, it expressed its view that "this rule of customary law ... was codified in 1949 in the Geneva Conventions". Nevertheless, it stated that the SFRY still felt that "reprisals on the field of battle against an unscrupulous adversary who uses illicit methods and means of combat remain permissible under customary law, as a last resort against lawless conduct". Nonetheless, the representative stated that "it seems both unjust and pointless to make non-combatants, women and children, pay for breaches for which they are in no way responsible".[1356]

1245. Notwithstanding the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, according to which these States agreed to abide by the prohibition of reprisals contained in Articles 51 and 52 AP I, in 1991, the YPA issued a general warning to the attention of the Croatian authorities, stating that "a number of impudent crimes has been committed against the members of the Y.P.A. ... Family members of the Y.P.A. are being maltreated, persecuted and destroyed in many different ways. This cannot be tolerated any longer." The YPA therefore warned that:

[1353] UK, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 330, § 40.

[1354] US, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 108, § 7.

[1355] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 430–431.

[1356] SFRY, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 456 and 457.

1. For every attacked and seized object of the [YPA] – an object of vital importance for the Republic of Croatia will be destroyed immediately.
2. For every attacked and occupied garrison – an object of vital importance to the town in which the garrison is located will be destroyed. This is, at the same time, a warning to civilian persons to abandon such settlement in time.[1357]

According to the Report on the Practice of the SFRY (FRY):

This warning calls for detailed analysis, but arguably it can be classified as a threat of the use of belligerent reprisals. In any event, a question may be raised whether the approach of the YPA Supreme Command reflected the position that belligerent reprisals may be freely carried out in internal conflicts as well, without the IHL restrictions that apply to international conflicts. The text of the Supreme Command warning leads to this conclusion.[1358]

III. Practice of International Organisations and Conferences

United Nations

1246. UN General Assembly Resolution 2444 (XXIII) adopted in 1968 affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "it is prohibited to launch attacks against the civilian population as such".[1359] This phrase was interpreted by some government experts at the CE (1971) as including a prohibition of reprisals against the civilian population.[1360]

1247. In 1970, the UN General Assembly, "bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types", adopted Resolution 2675 (XXV) on basic principles for the protection of civilian populations in armed conflicts in which it is stated that "civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity".[1361]

1248. In a resolution on Afghanistan adopted in 1993, the UN General Assembly urged all the Afghan parties "to protect all civilians from acts of reprisal".[1362] It reiterated this appeal in another resolution in 1994.[1363]

1249. In a resolution adopted in 1993 on the situation of human rights in Afghanistan, the UN Commission on Human Rights urged all the Afghan parties "to respect accepted humanitarian rules, as set out in the [1949] Geneva

[1357] SFRY, Headquarters of the Supreme Command of the Armed Forces of the SFRY, Warning to the attention of the President of Croatia, the Government of Croatia and the General Staff of the Croatian Army, 1 October 1991.
[1358] Report on the Practice of the SFRY (FRY), 1997, Chapter 2.9.
[1359] UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(b).
[1360] ICRC, *Protection of the Civilian Population against the Dangers of Hostilities*, Documents submitted to the First Session of the Conference of Government Experts, 24 May–12 June 1971, Vol. III, Geneva, January 1971, p. 38.
[1361] UN General Assembly, Res. 2675 (XXV), 9 December 1970, preamble and § 7.
[1362] UN General Assembly, Res. 48/152, 20 December 1993, § 8.
[1363] UN General Assembly, Res. 49/207, 23 December 1994, § 9.

Conventions . . . and the Additional Protocols thereto . . ., [and] to protect all civilians from acts of reprisal and violence".[1364] The same appeal was reiterated in 1994.[1365]

1250. In a resolution adopted in 1995 on the situation of human rights in Afghanistan, the UN Commission on Human Rights noted "with deep concern that the civilian population is still the target of . . . acts of reprisal". It urged "all Afghan parties fully to respect accepted humanitarian rules, as set out in the [1949] Geneva Conventions . . . and the Additional Protocols thereto . . . to halt the use of weapons against the civilian population and to protect all civilians".[1366]

1251. In 1993, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights noted, with respect to Chad, that:

> Numerous killings were said to have taken place during counter-insurgency operations and reprisal attacks against persons perceived by government security forces as members or supporters of rebel groups because of their ethnic origin or place of residence.
>
> The Special Rapporteur received alarming reports about massive killings of civilians by security forces in the regions of Moyen-Chari and Logone Oriental during the first half of 1993. A number of these killings were said to have been committed in retaliation for earlier attacks on security forces by armed opposition groups.[1367]

In a subsequent report in 1994, the Special Rapporteur noted that:

> The Special Rapporteur continued to receive alarming reports of extrajudicial, summary or arbitrary executions of civilians by members of the Chadian army. According to the information received, the authorities did not take any steps to prevent such acts. On 26 August 1994, the Special Rapporteur sent an urgent appeal to the Government after receiving reports of the extrajudicial execution of more than 25 villagers in the Kaga district between 12 and 14 August 1994. The victims were said to have included at least two minors, Justin Helkom (15) and Raymond Ekoudjewa (16). According to the reports received, the killings were reprisal actions by the army after the death of five soldiers during armed confrontations between the security forces and the rebel Forces Armées pour la République Fédérale (Armed Forces for the Federal Republic, FARF).[1368]

1252. In 1994, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission stated with respect to Turkey that:

[1364] UN Commission on Human Rights, Res. 1993/66, 10 March 1993, § 6.
[1365] UN Commission on Human Rights, Res. 1994/84, 9 March 1994, § 8.
[1366] UN Commission on Human Rights, Res. 1995/74, 8 March 1995, preamble and § 6.
[1367] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, §§ 190 and 192.
[1368] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, § 88.

The reports and allegations received by the Special Rapporteur indicate that violations of the right to life continued to occur during 1994 in the context of the armed conflict between government security forces and guerrillas of the Partiya Karkeren Kurdistan (Kurdish Workers' Party, PKK) in the south-eastern parts of Turkey . . .

The Special Rapporteur sent four urgent appeals to the Government. Fears had been expressed for the lives of [individuals], who were said to have been detained during a raid by the security forces at their village, allegedly in reprisal for the refusal of the villagers to participate in the village guard system for fear of reprisal attacks from the PKK.[1369]

The report also noted that, following the urgent appeals, "the Government [of Turkey] replied to the [Special Rapporteur], informing him that shots had been fired from within the village of Payamli against gendarmes performing a field operation in the vicinity of the village".[1370]

1253. In 1994, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights stated with respect to Mali that:

The Special Rapporteur transmitted to the Government allegations he had received according to which . . . civilians and members of the Tuareg ethnic group . . . were killed in April 1994 by members of the Malian armed forces, reportedly in reprisal for the killing on the previous day of two soldiers by former Tuareg fighters who had joined the army . . .

On 4 August 1994, the Government informed the Special Rapporteur that [s]ome of the former MFUA combatants, who had been integrated into the army in 1991, reportedly deserted and committed acts of violence against their former colleagues and civilians.[1371]

1254. In 1994, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights noted that "the new Government [of Rwanda] pledges not only to refrain from taking measures or acts of reprisal but also to punish any persons engaging in such acts".[1372]

1255. In 1995, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights deplored the fact that "in Rwanda, genocide and reprisals are dialectically linked: genocide seems inevitably to lead to reprisals . . . All the acts committed [violations of property rights, of the right to personal safety and of the right to life] taken together would appear to constitute reprisals by the victims of genocide".[1373]

[1369] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, §§ 308–309.

[1370] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, § 311.

[1371] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, §§ 213–214.

[1372] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/12, 12 August 1994, § 30.

[1373] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/71, 17 January 1995, §§ 29–34.

1256. In 1995, in a joint report on the situation in Colombia, the Special Rapporteurs of the UN Commission on Human Rights on Torture and on Extrajudicial, Summary or Arbitrary Executions reported that:

> One of the most salient recent cases of human rights violations by members of the security forces was the killing of 10 civilians, mostly fishermen, from the village of Puerto Lleras by soldiers from the Artillery Group No. 19 Revéiz Pizarro of the Colombian Army on 3 January 1994. The massacre was said to have been carried out in reprisal for a guerrilla attack against a military base earlier on the same day, in which three soldiers had died.[1374]

1257. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights reported that, in Lutabura, "FAZ, with the help of civilians, killed some 100 Banyamulengue as a reprisal for [a] massacre . . . in Epombo".[1375]

1258. In 1995, in a report concerning the conflict in Guatemala, MINUGUA recommended to the URNG that "it should also prevent any retaliatory attacks against civilian persons or property".[1376] In a subsequent report, MINUGUA urged the URNG "to refrain from attacks on civilian property, such as its destruction of installations on rural estates in retaliation against agricultural producers who refuse to pay the so-called 'war tax', and any other kind of reprisal".[1377] In two further reports, MINUGUA reiterated its denunciations of actions against civilian property or reprisals as violations of the commitment to end the suffering of the civilian population. These statements were made in the context of the collection of so-called "war taxes".[1378]

Other International Organisations

1259. No practice was found.

International Conferences

1260. At the CDDH, the ICRC suggested an amendment which contained two proposals on draft Article 6(3) (entitled "Fundamental guarantees"). Proposal I stated that "measures comparable with reprisals and violating the provisions of this Protocol against the persons referred to in paragraph 1 are prohibited". Proposal II stated that "countermeasures violating the provisions of this Protocol

[1374] UN Commission on Human Rights, Special Rapporteur on Torture and Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Joint report on the visit by the Special Rapporteurs to Colombia from 17 to 26 October 1994, UN Doc. E/CN.4/1995/111, 16 January 1995, § 59.

[1375] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, § 191.

[1376] MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, § 194.

[1377] MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, Annex, § 198.

[1378] MINUGUA, Director, Third report, UN Doc. A/50/482, 12 October 1995, Annex, §§ 145 and 206; Fourth report, UN Doc. A/50/878, 24 February 1996, Annex, §§ 156 and 170(b).

and taken against the persons referred to in paragraph 1, even when intended to make the adverse Party respect his own obligations, are prohibited".[1379]

1261. At the CDDH, the ICRC submitted a suggested amendment to AP II containing a draft Article 10 *bis* provisionally entitled "Prohibition of reprisals", which read:

> Failure by a Party to the conflict to observe the provisions of this Protocol shall not entitle the adverse Party to take countermeasures infringing the provisions of this Protocol against persons who do not take a direct part or who have ceased to take a part in hostilities, whether or not their liberty has been restricted, and against medical units and transports, even if the aim of such countermeasures is to make the adverse Party respect his own obligations.[1380]

This draft provision was rejected in the plenary session by 41 votes in favour, 20 against and 22 abstentions.[1381]

1262. At the CDDH, the report of the sub-group on reprisals of Working Group B of Committee I on draft AP II contained the following suggested provision: "The provisions of Parts II and III and of articles . . . shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol".[1382] Committee I of the CDDH subsequently adopted a draft Article 10 *bis* AP II in Part II entitled "Humane treatment of persons in the power of the Parties to the conflict". The provision read: "The provisions of Parts II and III and of Articles 26, 26 *bis* and 28 shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol".[1383]

IV. Practice of International Judicial and Quasi-judicial Bodies

1263. In a decision in the *Tadić case* (Interlocutory Appeal) in 1995, the ICTY stated that:

> The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions . . . but also applies to Article 19 of the Hague Convention for the Protection

[1379] ICRC, Suggested amendment to Article 6 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/302, 23 April 1976, p. 19.
[1380] ICRC, Suggested amendment to Article 10 *bis* draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/302, 23 April 1976, p. 37.
[1381] CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.
[1382] CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, Annex II (circulated as Working Group document CDDH/I/GT/95), 17 March–10 June 1977, p. 234.
[1383] CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, Annex IV, 17 March–10 June 1977, p. 283.

of Cultural Property in the Event of Armed Conflict of 14 May 1954, and . . . to the core of Additional Protocol II of 1977.[1384]

According to the ICTY, UN General Assembly Resolutions 2444 (XXIII) of 1968 and 2675 (XXV) of 1970 "were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind".[1385] As to the customary character of the provisions of AP II, the ICTY stated that "many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles".[1386]

1264. In the review of the indictment in the *Martić case* in 1996 in which the accused was held accountable for having knowingly and wilfully ordered the shelling of Zagreb in May 1995, the ICTY Trial Chamber stated that:

> 16. . . . Although [AP II] does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision. Prohibited behaviour must remain so "at any time and in any place whatsoever". The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of "collective punishments" in [Article 4(2)(b) AP II].
> 17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.[1387]

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

1265. In 1980, the ICRC reminded an armed opposition group of its commitment to respect the fundamental rules of IHL, in particular that "nobody will be held responsible for acts he didn't commit", which according to the ICRC, "excludes from the outset every recourse to acts of reprisals".[1388]

1266. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to protect the life, dignity and human rights of combatants and civilians under their authority from all acts of violence or reprisals, on the basis of the Geneva Conventions and AP I.[1389]

[1384] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.
[1385] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 112.
[1386] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 117.
[1387] ICTY, *Martić case*, Review of the Indictment, 8 March 1996, §§ 16–17.
[1388] ICRC archive document.
[1389] Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de enero de 1994, 3 January 1994.

VI. Other Practice

1267. In 1990, the Committee on Justice and Human Rights of the Senate of the Philippines reported that members of the media viewed some military counterinsurgency operations as having been carried out as wanton reprisals, with little or no regard to the social and human costs. These views were expressed in the context of the internal situation.[1390]

1268. According to the Report on the Practice of the Philippines, Human Rights Advocates of Negroes, a Philippine NGO, reported in 1990 that reprisals were frequent in the conduct of counterinsurgency operations. An operation carried out in response to an attack on a military detachment had caused destruction of property and the evacuation and deaths of civilians.[1391]

1269. Kalshoven stated that:

> The question of whether retaliatory actions in the context of armed conflict constitute belligerent reprisals will ... depend on the status of the parties to such actions, that is on whether these can be regarded as a State or similar autonomous entity. This is already apparent in the event of civil war, where the concept of belligerent reprisals can only find application to the extent that the insurgents have succeeded in establishing themselves as an essentially autonomous party, for instance by bringing part of the territory under their effective control.[1392]

With regard to the taking of white hostages by an armed opposition group that occurred in the armed conflict in the Congo (DRC) (Stanleyville) in 1964, Kalshoven stated that:

> [The] episode involving measures on the part of a belligerent ... could at first sight be taken for belligerent reprisals ... The scope of the rebellion and the nature of the actions on both sides were such that the situation could without any doubt be classified as an internal armed conflict ... [The central Government] resorted to the employment of white mercenaries and of bombing aircraft manned by foreign pilots ... On the other hand, the insurgents (who likewise received outside support) took to holding as hostages the white residents whom they found in the areas under their control ... The rebels announced that they would hold all the whites as hostages so long as [the adversary] would not desist from the use of mercenaries.[1393]

However, Kalshoven, further developing the facts, concluded that:

> The taking of hostages, far from serving to enforce the law of war, in reality was designed to exert influence on the progress of the military operations ... Thus, the policy of keeping hostages as applied by the insurgents in Stanleyville lacked the characteristic feature of a belligerent reprisal: it was not so much a means to enforce

[1390] Philippines, Senate, Report of the Committee on Justice and Human Rights, 1990, Report on the Practice of the Philippines, 1997, Chapter 2.9.
[1391] Report on the Practice of the Philippines, 1997, Chapter 2.9, referring to Report of the Human Rights Advocates of Negroes, 1990.
[1392] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 36.
[1393] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 305–306.

the law of war as to guarantee the insurgents a degree of safety and to further their policy objectives.[1394]

Therefore, Kalshoven considered that the actions taken were a violation of common Article 3 of the 1949 Geneva Conventions.[1395]

[1394] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 311.
[1395] Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 315.

CHAPTER 42

RESPONSIBILITY AND REPARATION

A. Responsibility for Violations of International Humanitarian Law

I. Treaties and Other Instruments

Treaties

1. Article 3 of the 1907 Hague Convention (IV) provides that "a belligerent Party which violates the provisions of the [1907 Hague Regulations] shall . . . be responsible for all acts committed by persons forming part of its armed forces".

2. Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV provide that "no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches of these Conventions]".

3. Article 91 AP I provides that "a Party to the conflict which violates the provisions of the Conventions or of this Protocol . . . shall be responsible for all acts committed by persons forming part of its armed forces". Article 91 AP I was adopted by consensus.[1]

4. Article 38 of the 1999 Second Protocol to the 1954 Hague Convention provides that "no provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation".

Other Instruments

5. Article 5 of the 1991 ILC Draft Code of against the Peace and Security of Mankind, entitled "Responsibility of States", provides that "prosecution of an individual for a crime against the peace and security of mankind does not relieve

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344.

a State of any responsibility under international law for an act or omission attributable to it".

6. Article 4 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of States", provides that "the fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law".

7. Article 1 of the 2001 ILC Draft Articles on State Responsibility, entitled "Responsibility of a State for its internationally wrongful acts", provides that "every internationally wrongful act of a State entails the international responsibility of that State".

8. Article 2 of the 2001 ILC Draft Articles on State Responsibility, entitled "Elements of an internationally wrongful act of a State", provides that:

> There is an internationally wrongful act of a State when conduct consisting of an act or omission:
>
> a) Is attributable to the State under international law; and
> b) Constitutes a breach of an international obligation of the State.

This "wrongful act of a State" can be the consequence of the conduct of any State organ (Article 4). The conduct is attributed to the State even if the organ is acting in exceeding its authority or contravening instructions (Article 7). Furthermore, attribution to the State can also be made in the case of the conduct of other entities empowered to exercise elements of the government authority (Article 5), of persons acting in fact under the instructions or, in case of absence or default of the official authorities, on behalf of the State (Articles 8 and 9), of organs placed at its disposal by another State (Article 6), or of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State (Article 10). Moreover, conduct which is not attributable to a State "shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own" (Article 11).

II. National Practice

Military Manuals

9. Argentina's Law of War Manual, referring to Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV, provides that "the contracting States cannot absolve themselves nor absolve any other contracting party of the liabilities incurred with respect to [grave breaches in the meaning of the Geneva Conventions]".[2] Referring to Article 91 AP I, the manual further provides that "the party which violates the Conventions or Protocol I shall . . . be responsible for all acts committed by the members of its armed forces".[3]

[2] Argentina, *Law of War Manual* (1989), § 8.04.
[3] Argentina, *Law of War Manual* (1989), § 8.10.

10. Canada's LOAC Manual provides that "parties to the conflict are responsible for all acts committed by persons forming part of its armed forces".[4] It further states that "no state is allowed to absolve itself of any liability in respect to the Geneva Conventions".[5]

11. Colombia's Basic Military Manual states that:

> As subjects of international law, the States answer to the international community for the violations or failures to act of their agents or civil servants when they have impunity. They are also subject to the political, economic and legal sanctions imposed on them by the international community.[6]

12. Germany's Military Manual, referring to Article 91 AP I and Article 3 of the 1907 Hague Convention (IV), provides that "a party to a conflict which does not comply with the provisions of international humanitarian law . . . shall be responsible for all acts committed by persons forming part of its armed forces".[7]

13. The Military Manual of the Netherlands refers to Article 91 AP I and states that:

> A party to the conflict is responsible for all acts committed by persons who are members of their armed forces. The responsibility applies not only towards those who have suffered damage and towards other parties to the conflict, but also towards the public opinion. This responsibility can result in pressure to respect the accepted rules of humanitarian law of war.[8]

14. New Zealand's Military Manual, referring to Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV, states that "insofar as the liability of the State is concerned, it is important to note that the Geneva Conventions provide that no Contracting Party is able to absolve itself of liability for any grave breach of those Conventions".[9]

15. Nigeria's Manual on the Laws of War provides that "belligerent states are responsible for all acts committed by persons forming part of their armed forces".[10]

16. Russia's Military Manual notes that "IHL lays down: . . . the responsibility of States . . . as regards violations of the rules of IHL".[11]

17. Spain's LOAC Manual, referring to Article 91 AP I, provides that "the State is responsible for all acts committed by persons who are part of its Armed Forces".[12] In another provision, referring to Article 3 of the 1907 Hague Convention (IV) and Article 91 AP I, the manual states that a belligerent party "will be held responsible for the acts committed by persons who are part of its armed forces".[13]

[4] Canada, *LOAC Manual* (1999), p. 15-2, § 9.
[5] Canada, *LOAC Manual* (1999), p. 15-2, § 11.
[6] Colombia, *Basic Military Manual* (1995), p. 35.
[7] Germany, *Military Manual* (1992), § 1214.
[8] Netherlands, *Military Manual* (1993), p. IX-3.
[9] New Zealand, *Military Manual* (1992), § 1605(2).
[10] Nigeria, *Manual on the Laws of War* (undated), § 7.
[11] Russia, *Military Manual* (1990), § 1.
[12] Spain, *LOAC Manual* (1996), Vol. I, § 11.2.
[13] Spain, *LOAC Manual* (1996), Vol. I, § 11.10.f.

18. Switzerland's Basic Military Manual provides that "violations of the laws and customs of war, commonly called war crimes, engage . . . the responsibility of the State to which the authors of the violation belong".[14]
19. The UK Military Manual reproduces Article 3 of the 1907 Hague Convention (IV).[15]
20. The US Field Manual refers to Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV and states that "no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article [war crimes]".[16]
21. The US Air Force Pamphlet, in a provision stating the obligation of States to pay compensation for violations of IHL, states that:

> However, as a general rule, in the absence of some cause for fault such as inadequate supervision or training, no obligation for compensation arises on the part of a state for other violations of the law of armed conflict committed by individual members outside their general area of responsibility.[17]

22. The YPA Military Manual of the SFRY (FRY) establishes the responsibility of parties to conflicts for violations of the law of war regardless of whether the violations were carried out on instructions or with the knowledge of the government or supreme command.[18]

National Legislation
23. No practice was found.

National Case-law
24. In its judgement in the *Reparation Payments case* in 1963 relating to claims for compensation for slave labour during the Second World War, Germany's Federal Supreme Court held that no decision could be reached on the merits of the claim until there was a final reparations agreement between the plaintiff's government and Germany, as it found that the London Agreement on German External Debts of 27 February 1953 had postponed the question of indemnification of individuals to when the issue of reparations more generally had been settled.[19]
25. In the *Distomo case* in 2003, the German Federal Supreme Court stated that the responsibility of States for internationally wrongful acts committed during hostilities "comprises liability for the acts of all persons belonging to the armed forces, and this not only in case these persons commit acts falling

[14] Switzerland, *Basic Military Manual* (1987), Article 191.
[15] UK, *Military Manual* (1958), § 618.
[16] US, *Field Manual* (1956), § 503.
[17] US, *Air Force Pamphlet* (1976), § 10-3.
[18] SFRY (FRY), *YPA Military Manual* (1988), § 19.
[19] Germany, Federal Supreme Court, *Reparation Payments case*, Judgement, 26 February 1963.

within their sphere of competence, but also in case they act without or against orders".[20]

26. In the *Eichmann case* in 1961, Israel's District Court of Jerusalem stated that "it is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own 'acts of State', including the crimes attributed to the accused".[21]

27. In its judgement in the *Priebke case* (Trial of First Instance) in 1996, Italy's Military Tribunal of Rome held that Italy had been responsible for an attack in 1944 perpetrated against German soldiers by Italian partisans. It stated that although the partisans were not legitimate combatants, Italy had encouraged their actions during the war and had officially recognised them after the conflict. Accordingly, the Tribunal concluded, their actions could be ascribed to the State which was thus internationally responsible for the attack.[22]

28. In its judgement in the *J. T. case* in 1949 in which an individual had sued the State for repayment of money taken by the police during the arrest of the claimant during the occupation of the Netherlands by the German army, the District Court of The Hague held that the State of the Netherlands must repay the money to the plaintiff. It held that it was true that the State was not liable for all acts committed by the resistance movement (Binnenlandse Strijdkrachten) which had been organized with the consent of the government in exile during the Second World War, but since it was definitely established that the money had come into the hands of the police, restitution had to be made.[23]

Other National Practice

29. In 1992, during a debate in the UN General Assembly, Argentina recommended that "belligerents engaged in an armed conflict, whether international or non-international, should . . . use those means which were least apt to cause damage to the environment, damage for which they would then be responsible".[24]

30. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Austria stated that "there could be no doubt as to the illegality of the acts committed by Iraq, entailing international responsibility of that State".[25]

[20] Germany, Federal Supreme Court, *Distomo case*, Judgement, 26 June 2003.
[21] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 28.
[22] Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996.
[23] Netherlands, District Court of The Hague, *J. T. case*, Judgement, 13 April 1949.
[24] Argentina, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 23.
[25] Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.19, 23 October 1991, § 5.

31. In 1983, during a debate in the Sixth Committee of the UN General Assembly on the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the representative of China stated that:

> In his delegation's view, such crimes could be committed by both individuals and States and the responsibility of either would vary only as to its character or extent. The 1954 draft Code did not exclude the responsibility of States . . . In addition, that type of crime could not be prevented unless the responsibility of States was established. The argument that it would be repetitive to attribute responsibility to States in the draft Code was not valid, because the Code dealt exclusively with offences against the peace and security of mankind and should be complete on that score.[26]

32. The Report on the Practice of Indonesia, referring to an interview with a senior officer of the armed forces, states that "in case of violations of international humanitarian law incurred by the State or by individuals compatible with the State, the Government of Indonesia will take over such responsibility".[27]

33. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Iran stated that "there were well-established rules of both customary and treaty law which held a party to a conflict responsible for unnecessary damage to the environment".[28]

34. In 1997, during a debate concerning UNIFIL in the Fifth Committee of the UN General Assembly, Israel stated that "Israel's action in providing medical assistance to injured members of UNIFIL had been a purely humanitarian gesture which should under no circumstances be interpreted as an admission of any responsibility" for Israel's attack on a UNIFIL compound at Qana and the costs resulting therefrom.[29]

35. According to the Report on the Practice of Israel, "Israel acknowledges and supports the view that States bear a responsibility under international law, for all violations of the laws of war perpetrated by them or by individuals under their responsibility".[30]

36. At the CDDH, Mexico stated that "the State was responsible for all acts committed by its bodies and not only for acts committed by persons forming part of its armed forces".[31]

37. In 2000, during a debate in the UN Security Council on the protection of UN personnel, associated personnel and humanitarian personnel in conflict

[26] China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/38/SR.52, 23 November 1983, § 25.
[27] Report on the Practice of Indonesia, 1997, Interview with a senior officer of the armed forces, Chapter 6.2.
[28] Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 32.
[29] Israel, Statement before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/51/SR.70, 6 June 1997, § 25.
[30] Report on the Practice of Israel, 1997, Chapter 6.2.
[31] Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344, § 23.

areas, Norway stated that "States need to hold States . . . accountable for their attacks on humanitarian workers operating in territory under their control".[32]

38. In 1993, in a debate in the UN Security Council on draft Resolution 824 on Bosnia and Herzegovina, Pakistan stated that:

> We believe that the Security Council must take immediate appropriate measures, including the authorization of the use of force under Chapter VII of the United Nations Charter, to ensure: . . . the institution of appropriate measures for reparations for the Government of Bosnia and Herzegovina by Serbia and Montenegro; that Serbia and Montenegro is liable, under international law, for any direct loss or damage, including environmental damage, or injury to foreign Governments, nationals and corporations as a result of its aggression against the Republic of Bosnia and Herzegovina.[33]

39. At the First CCW Review Conference in 1995, the observer for Peru, with respect to certain conventional weapons including anti-personnel landmines, stated that "provisions were needed to determine the responsibility of States for injuries suffered by non-combatant victims and for environmental damage".[34]

40. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, commenting on the UN Security Council's finding that Iraq was internationally responsible for environmental damage as a result of its invasion of Kuwait, the Solomon Islands observed that this finding "can only have been based on general international law, as it has evolved following the adoption" of the Additional Protocols, being as Iraq was not a party to the 1976 ENMOD Convention or to AP I.[35]

41. The Report on the Practice of Spain refers to a number of bilateral treaties concluded in the second part of the 19th century between Spain and South American republics which include clauses concerning responsibility in armed conflict. The report states that:

> All these treaties allow either Government of the States Parties to invoke the other Government's responsibility for damages suffered in the territory of the latter and caused by rebels in the case of insurrection, civil war, or sedition or by savage tribes or hordes, if the authorities of the country can be shown . . . to have been at fault or negligence.[36]

[32] Norway, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 10.

[33] Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3208 (Provisional), 6 May 1993, p. 16.

[34] Peru, Statement at the First CCW Review Conference, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR.5, 27 September 1995, § 40.

[35] Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, § 4.92.

[36] Report on the Practice of Spain, 1998, Chapter 6.2, referring to Agreement renewing the suspended relations between Spain and Venezuela, signed in Santander on 12 August 1861, bases 1–6, the Treaty supplementing the treaty of peace and friendship (28 January 1885) between Spain and Ecuador, signed in Madrid on 23 May 1888, Article III, the Treaty supplementing the treaty of peace and friendship (30 January 1881) between Spain and Colombia, signed in Bogotá on 28 April 1894, Article IV and the Treaty supplementing the treaty of peace and friendship (14 August 1879) between Spain and Peru, signed in Lima on 16 July 1897, Article IV.

42. In *France and Others v. Turkey* before the ECiHR in 1983, Turkey argued that:

> For a State to be liable, a violation must . . . continue to exist after the exhaustion of domestic remedies, and so become an act of the State itself. If the State has set up effective machinery to prosecute offences committed by its officials, these offences cannot be imputed to it. It is not correct that incidents which do not amount to administrative practices should be imputed to the Turkish Government. The persons committing such acts are personally responsible.[37]

43. In 1991, in a report to submitted to the UN Security Council on operations in the Gulf War, the UK stated, with respect to the treatment of British POWs by Iraq, that "the Iraqi Ambassador was reminded of the responsibility of his Government . . . for any grave breach of the [Geneva] Conventions".[38]

44. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense referred to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV and stated that "in a separate article common to the four 1949 Geneva Conventions, no nation has the authority to absolve itself or any other nation party to those treaties of any liability incurred by the commission of a Grave Breach".[39] The report also noted that:

> On 15 October [1990], the [US] President warned Iraq of its liability for war crimes. The United States was successful in incorporating into [UN Security Council] Resolution 674 . . . language regarding Iraq's accountability for its war crimes, in particular its potential liability for Grave Breaches of the GC, and inviting States to collect relevant information regarding Iraqi Grave Breaches and provide it to the Security Council.[40]

45. According to the Report on US Practice, it is the *opinio juris* of the US that "in principle, a state is responsible for any unlawful act of its armed forces in the course of an armed conflict, but not for private acts of members of its armed forces".[41]

46. In the *Application of Genocide Convention case (Provisional Measures)* in 1993 brought by Bosnia and Herzegovina against the FRY (Serbia and Montenegro), the latter, in its written observations on the request for the indication of provisional measures, requested the ICJ "'to establish the responsibility of the authorities' of Bosnia-Herzegovina for acts of genocide against the Serb people in Bosnia-Herzegovina".[42]

[37] Turkey, Arguments submitted to the ECiHR, *France and Others v. Turkey*, Decision on the admissibility of the applications, 6 December 1983, Facts II(6).
[38] UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.
[39] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.
[40] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.
[41] Report on US Practice, 1997, Chapter 6.3.
[42] FRY, Written observations on the request for the indication of provisional measures submitted to the ICJ, *Application of Genocide Convention case (Provisional Measures)*, Order, 8 April 1993, § 43.

III. Practice of International Organisations and Conferences

United Nations

47. In a resolution adopted in 1990, the UN Security Council reminded Iraq that "under international law it is liable for any loss, damage, or injury arising in regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."[43]

48. In a resolution adopted in March 1991, the UN Security Council, acting explicitly under Chapter VII of the UN Charter, demanded that:

> Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq . . .
>
> (b) accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.[44]

49. In Resolution 687 adopted in April 1991, the UN Security Council reaffirmed that:

> Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.[45]

50. In a resolution adopted in 1993 in the context of the conflict in the former Yugoslavia, the UN General Assembly reaffirmed that "States are to be held accountable for violations of human rights which their agents commit on their own territory or on the territory of another State".[46]

51. In 2001, the UN General Assembly adopted a resolution entitled "Responsibility of States for internationally wrongful acts", to which the 2001 ILC Draft Articles on State Responsibility were annexed. In the resolution, the UN General Assembly noted that "the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States". In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[47]

52. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General noted that:

[43] UN Security Council, Res. 674, 29 October 1990, § 8.
[44] UN Security Council, Res. 686, 2 March 1991, § 2(b).
[45] UN Security Council, Res. 687, 3 April 1991, § 16.
[46] UN General Assembly, Res. 48/153, 20 December 1993, § 12.
[47] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

Armed groups have a direct responsibility, according to Article 3 common to the four Geneva Conventions of 1949 and to customary international humanitarian law, to protect civilian populations in armed conflict. International instruments require not only Governments but also armed groups to behave responsibly in conflict situations, and to take measures to ensure the basic needs and protection of civilian populations. Where Governments do not have resources and capacities to do this unaided, it is incumbent on them to invoke the support of the international system.[48]

The Secretary-General recommended that "in its resolutions the Security Council should emphasize the direct responsibility of armed groups under international humanitarian law".[49]

53. In 1995, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights, having described several cases of killing, abduction and looting committed by SPLA soldiers, referred to a report of Operation Lifeline Sudan (OLS) noting that "responsibility for the attack clearly lies with SPLA/M and, as such, is a clear violation of the new ground rules". In his conclusions and recommendations, the Special Rapporteur also noted that:

Most of the reported gross violations and atrocities, especially killings and abduction of civilians, looting and hostage taking of relief workers, were committed during 1995 by dissident commanders, mainly those who had split from SSIA in previous years. SPLA bears responsibility for the violations and atrocities committed in 1995 by local commanders from its own ranks, although it has not been proved that they committed these actions on orders from the senior leadership, nor is it known whether they have been or will be pardoned by superiors.[50]

54. In 1996, in a report on a mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences recommended, *inter alia*, that, at the national level:

The Government of Japan should:

(a) Acknowledge that the system of comfort stations set up by the Japanese Imperial Army during the Second World War was a violation of its obligations under international law and accept legal responsibility for that violation.[51]

55. In its report in 1993, the UN Commission on the Truth for El Salvador stated that:

[48] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 7.

[49] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 9.

[50] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/50/569, 16 October 1995, Annex, §§ 65–67 and 73.

[51] UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 137(a).

The State of El Salvador, through the activities of members of the armed forces and/or civilian officials, is responsible for having taken part in, encouraged and tolerated the operations of the death squads which illegally attacked members of the civilian population.[52]

56. In its Commentary on Article 5 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, the ILC stated that "the State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime. It could be obliged to make reparation for injury caused by its agents."[53]

57. Article 14(3) of the 1996 version of the Draft Articles on State Responsibility of the ILC, provisionally adopted on first reading, stated that the fact that the conduct of an organ of an insurrectional movement was not to be considered an act of State "is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law".[54] As to the subsequent deletion of this Article, the ILC's Special Rapporteur stated that:

Turning to the substance of the rules stated in the two articles, the first point to note in that article 14, paragraph 3 deals with the international responsibility of liberation movements which are, *ex hypothesi*, not States. It therefore falls outside the scope of the draft articles and should be omitted. The responsibility of such movements, for example, for breaches of international humanitarian law, can certainly be envisaged, but this can be dealt with in the commentary.[55]

58. In 2001, in its commentary on Article 7 of the Draft Articles on State Responsibility, the ILC stated that:

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made

[52] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 137.

[53] ILC, Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-third Session, *Yearbook of the International Law Commission*, 1991, Vol. II, Part 2, Commentary on Article 5, § 2.

[54] ILC, 1996 Draft Articles on State Responsibility, UN Doc. A/CN.4/L.524, 21 June 1996, p. 4.

[55] ILC, First report on State responsibility by the Special Rapporteur, Addendum, UN Doc. A/CN.4/490/Add.5, 22 July 1998, § 275.

> in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State. In short, the question is whether they were acting with apparent authority.[56]

In its Commentary on Article 8, the ILC further underlines that "in any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it".[57]

Other International Organisations

59. No practice was found.

International Conferences

60. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration stating that "the participating High Contracting Parties recall that according to art. 148 [GC IV] no High Contracting Party shall be allowed to absolve itself of any liability incurred by itself in respect to grave breaches".[58]

IV. Practice of International Judicial and Quasi-judicial Bodies

61. In the *Nicaragua case (Merits)* in 1986, the ICJ, with respect to a possible responsibility of the US for the activities of the *contras*, stated that:

United States participation, even if preponderant and decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operations, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise

[56] ILC, Commentary on Article 7 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd session, UN Doc. A/56/10, New York, 2001, p. 102.
[57] ILC, Commentary on Article 8 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, p. 107.
[58] Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 13.

to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[59]

The ICJ concluded that it did not consider that the assistance given by the US to the *contras* warranted the conclusion that these forces were subject to the US to such an extent that the acts they committed were imputable to the latter.[60]

62. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber held that:

Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.[61]

63. In its judgement on appeal in the *Tadić case* in 1999, the ICTY Appeals Chamber discussed the issue of State responsibility for the actions of irregular troops in great detail, not in order to reach any conclusion concerning the actual responsibility of any State, but in order to determine whether the conflict in Bosnia and Herzegovina was international and, therefore, whether GC IV applied. During its discussion on the topic, the Appeals Chamber had to determine the type of relationship that had to exist between the irregular troops and the State in question for the latter to be considered responsible for the acts of the former. The Appeals Chamber was of the view that:

137. . . . international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations

[59] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 115.
[60] ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 116.
[61] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 142.

of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.
138. Of course, if, as in *Nicaragua*, the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.
139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.
140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.
141. It should be added that international law does not provide only for a test of overall control applying to armed groups and that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a third test. This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions) ...
145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.[62] [emphasis in original]

Applying this test to the facts before it, the Appeals Chamber concluded that in 1992 the YPA exercised the requisite measure of control over the Bosnian Serb army. Such control manifested itself not only by financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities of the army of the Republika Srpska ("VRS").[63]

64. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber, referring to the *Tadić case* (Judgement on Appeal), stated that:

[62] ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, §§ 137–145.
[63] ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, §§ 147–157.

95. Aside from the direct intervention by HV forces, the Trial Chamber observes that Croatia exercised indirect control over the HVO and HZHB.
96. . . . Some degree of control exercised by a Party to a conflict over the perpetrators of the breaches is needed for them to be held criminally responsible on the basis of Article 2 of the Statute. The question of determining the degree of control required then arises.
. . .
99. The Appeals Chamber clearly laid out the three control criteria which allow the acts of individuals or groups to be ascribed to a foreign State, circumstances which transform what at first sight is an internal armed conflict into an international one
. . .
100. The matter is one of possibly imputing the acts of the HVO to the Republic of Croatia which would then confer an international nature upon the conflict played out in the Lasva Valley. It is the third criterion which applies in this instance. This criterion allows the degree of State control required by international law to be determined in order to be able to ascribe to a foreign State the acts of armed forces, militia and paramilitary units (hereinafter "organised groups"). The Appeals Chamber characterised it as a criterion of overall control . . .
101. . . . The factors which permit the existence of overall control to be proved may vary depending on the circumstances.
102. In this instance, the direct intervention of the HV in Bosnia and in the CBOZ has already been demonstrated above. Mention may be made of several other indications of Croatia's involvement in the conflict which rebut the Defence argument that the HV did indeed direct HVO operations, but only between March and June 1992 before the HVO became organised and prior to the outbreak of the conflict in central Bosnia between the Croatian and Muslim forces. The Trial Chamber concurs that the involvement of the HV and Croatia may appear more clear-cut at the start of the period under consideration but deems that it persisted throughout the conflict.
103. This involvement does not seem to be the result only of the particular circumstances prevailing at the time . . .
. . .
112. Croatia was . . . directly involved in the control of the HVO forces which were created on 8 April by the HZHB presidency . . .
. . .
114. The Defence furthermore did not challenge the fact that the HVO shared personnel, often from BH, with the HV . . .
. . .
118. The Bosnian Croat leaders followed the directions given by Zagreb or, at least, co-ordinated their decisions with the Croatian government. Co-ordination was manifest at various levels . . .
119. . . . The evidence demonstrates that there were regular meetings with President Tudjman and that the Bosnian Croat leaders, appointed by Croatia or with its consent, continued to direct the HZHB and the HVO well after June 1992.
120. Apart from providing manpower, Croatia also lent substantial material assistance to the HVO in the form of financial and logistical support . . . Croatia supplied the HVO with large quantities of arms and materiel in 1992, 1993 and 1994 . . . Equipment was also supplied to the ABiH but this ceased in 1993 during the conflict between the HVO and the ABiH. HVO troops were trained in Croatia.
. . .

122. In the light of all the foregoing and, in particular, the Croatian territorial ambitions in respect of Bosnia-Herzegovina detailed above, the Trial Chamber finds that Croatia, and more specifically former President Tudjman, was hoping to partition Bosnia and exercised such a degree of control over the Bosnian Croats and especially the HVO that it is justified to speak of overall control. Contrary to what the Defence asserted, the Trial Chamber concluded that the close ties between Croatia and the Bosnian Croats did not cease with the establishment of the HVO.
123. Croatia's indirect intervention would therefore permit the conclusion that the conflict was international.[64]

65. In its judgement on appeal in the *Aleksovski case* in 2000, the ICTY Appeals Chamber, referring to the *Tadić* and *Nicaragua cases*, stated that:

137. In the *Aleksovski* case, the question was whether the HVO forces, while not being official agents of the Croatian government, could be said to be acting as *de facto* agents of the Croatian State. In seeking to answer this question, the Majority Opinion made the following reference to the decision of the Appeals Chamber in the *Tadić* Jurisdiction Decision:

> The Appeals Chamber in the *Tadić Interlocutory Decision* did not specify the requisite degree of intervention by a foreign State in the territory of another State to internationalise an armed conflict. However, it did provide some guidance on the matter by indicating that the clashes between the Government of Bosnia and Herzegovina and the Bosnian Serb forces should be considered as internal, unless a "direct involvement" of the JNA could be proved, in which case the conflict should be considered to be an international one.

Further indication of the majority's reasoning is garnered from the following paragraph:

> A State can act in international law directly through governmental authorities and officials, or indirectly through individuals or organisations who, while not being official agents of the government, receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents.

138. The phrase "receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents," does, in the opinion of the Appeals Chamber, indicate that the position of the majority was that some kind of instruction was required in order for the requisite relationship between the Bosnian Croats and the Croatian State to be established. This is what the Prosecution refers to as the "specific instructions" test.
139. The Majority Opinion then referred to the ICJ decision in *Nicaragua* in this way:

> According to the International Court of Justice ("the ICJ"), where the relationship of a rebel force to a foreign State is one of such dependence on the one side and control on the other that it would be appropriate to equate the rebel force, for legal purposes, with an organ of that State,

[64] ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 95–123.

> or as acting on behalf of that State, then in such a case the conflict can be seen to be an international one, even if it is *prima facie* internal and there is no direct involvement of the armed forces of the State.

It made further reference to the reliance placed by the majority Judgement of Judge Stephen and Judge Vohrah in the *Tadić* case (first instance), "on the high standard expounded by the ICJ in the *Nicaragua* case in the sense that the international responsibility of a State can arise only if control is exercised ("directed and enforced") with respect to specific military or paramilitary operations."

140. In dealing with the relationship between the HV and HVO forces, the majority commented on a particular aspect of the evidence of the expert witness:

> The expert witness presented an order from the HVO (not the HV) – this distinction is very important – to their soldiers to remove the HV insignias (November–December 1992) because of potential problems to Croatia. While there is a document dated May 1993 which allowed the transfer/promotion of soldiers from the HVO to the HV, this does not in itself prove the dependency of the HVO on the HV.

141. The Appeals Chamber makes two observations about this paragraph. First, the fact that the Majority Opinion goes out of its way to mention that the order came from the HVO, and not the HV, and that the distinction was very important, highlights the weight the Trial Chamber attached to an order or instruction of the controlling State as a prerequisite for the attribution of acts of members of a military group to a State. Secondly, to the extent that the Majority Opinion uses dependency as a criterion, it is not consistent with the decision in the *Tadić* Judgement.
142. Significantly, the Majority Opinion concludes by finding that "the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina."
143. The Appeals Chamber finds that, notwithstanding the express reference to "overall control", the *Aleksovski* Judgement did not in fact apply the test of overall control. Instead, the passages cited show that the majority gave prominence to the need for specific instructions or orders as a prerequisite for attributing the acts of the HVO to the State of Croatia, a showing that is not required under the test of overall control.
144. The test set forth in the *Tadić* Judgement of "overall control" and what is required to meet it constitutes a different standard from the "specific instructions" test employed by the majority in *Aleksovski*, or the reference to "direct involvement" in the *Tadić* Jurisdiction Decision.
145. The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadić* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the ICJ in *Nicaragua*, and the "specific instructions" test used by the Trial Chamber in *Tadić*, the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests.

146. To the extent that it provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure "protection of civilians to the maximum extent possible."[65]

66. In its judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber, referring to the *Tadić*, *Aleksovski* and *Nicaragua cases*, stated that:

13. The Appeals Chamber saw the question of internationality as turning on the issue of whether the Bosnian Serb forces "could be considered as *de iure* or *de facto* organs of a foreign power, namely the FRY". The important question was "*what degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal". The Chamber considered, after a review of various cases including *Nicaragua*, that international law does not always require the same degree of control over armed groups or private individuals for the purpose of determining whether they can be regarded as a *de facto* organ of the State. The Appeals Chamber found that there were three different standards of control under which an entity could be considered *de facto* organ of the State, each differing according to the nature of the entity. Using this framework, the Appeals Chamber determined that the situation with which it was concerned fell into the second category it identified, which was that of the acts of armed forces or militias or paramilitary units.
14. The Appeals Chamber determined that the legal test which applies to this category was the "overall control" test:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields *overall control* over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. [. . .] However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

15. Overall control was defined as consisting of more than "the mere provision of financial assistance or military equipment or training". Further, the Appeals Chamber adopted a flexible definition of this test, which allows it to take into consideration the diversity of situations on the field in present-day conflicts:

> This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing,

[65] ICTY, *Aleksovski case*, Judgement on Appeal, 24 March 2000, §§ 137–146.

training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

16. The Appeals Chamber in *Tadić* considered *Nicaragua* in depth, and based on two grounds, held that the "effective control" test enunciated by the ICJ was not persuasive.
17. Firstly, the Appeals Chamber found that the *Nicaragua* "effective control" test did not seem to be consonant with the "very logic of the entire system of international law on State responsibility", which is "not based on rigid and uniform criteria". In the Appeals Chamber's view, "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities". Thus, regardless of whether or not specific instructions were issued, the international responsibility of the State may be engaged.
18. Secondly, the Appeals Chamber considered that the *Nicaragua* test is at variance with judicial and State practice. Relying on a number of cases from claims tribunals, national and international courts, and State practice, the Chamber found that, although the "effective control" test was upheld by the practice in relation to individuals or unorganised groups of individuals acting on behalf of States, it was not the case in respect of military or paramilitary groups.
19. The Appeals Chamber found that the armed forces of the Republika Srpska were to be regarded as acting under the overall control of, and on behalf of, the FRY, sharing the same objectives and strategy, thereby rendering the armed conflict international.
20. The Appeals Chamber, after considering in depth the merits of the *Nicaragua* test, thus rejected the "effective control" test, in favour of the less strict "overall control" test. This may be indicative of a trend simply to rely on the international law on the use of force, *jus ad bellum*, when characterising the conflict. The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, the "overall control" test is utilised to ascertain the foreign intervention, and consequently, to conclude that a conflict which was *prima facie* internal is internationalised.

...

21. Applying the principle enunciated in the *Aleksovski* Appeal Judgement, this Appeals Chamber is unable to conclude that the decision in the *Tadić* was arrived at on the basis of the application of a wrong legal principle, or arrived at *per incuriam*. After careful consideration of the arguments put forward by the appellants, this Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadić* Appeal Judgement. The "overall control" test set forth in the *Tadić* Appeal Judgement is thus the applicable criteria for determining the existence of an international armed conflict.[66] [emphasis in original]

[66] ICTY, *Delalić case*, Judgement on Appeal, 20 February 200§, §§ 13–20 and 26.

67. In 1995, in *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, the ACiHPR stated that:

> 21. The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.
> 22. In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.[67]

68. In 1993, in a decision concerning the imputability to Turkey of acts committed in the northern part of Cyprus, the ECiHR, with respect to the arrest of the applicants, held that:

> 96. As regards overall control of the arrest operation by Turkey, the Commission recalls that, in its decision on admissibility . . . it was held that the application of the [1950 ECHR] extends beyond national frontiers of the Contracting States and includes acts of State organs abroad. The term "jurisdiction" in Article 1 is not equivalent to or limited to the national territory . . . Authorized agents of a State, including armed forces, not only remain under its jurisdiction when abroad but also bring any other persons "within the jurisdiction" of that State to the extent that they exercise authority over such persons.
> 97. The Commission notes that the Turkish armed forces have entered Cyprus and that they operate under the direction of the Turkish Government and under established rules governing the structure and command of these armed forces. It follows that these armed forces are authorised agents of Turkey and that they bring any other persons in Cyprus "within the jurisdiction" of Turkey, in the sense of Article 1 of the [1950 ECHR], to the extent that they exercise control over such persons. Therefore, in so far as these armed forces, by their acts or omissions, affect such persons' rights or freedoms under the Convention, the responsibility of Turkey is engaged.[68]

However, in its decision as to the applicants' detention and the proceedings against them after their arrest, the Commission stated that:

> 169. The Commission considers that the factual situation is different as regards the subsequent detention of the applicants and the proceedings against them. The Commission has found no indication of control exercised by Turkish

[67] ACiHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, 2 October 1995, §§ 21–22.

[68] ECiHR, *Chrysostomos and Papachrysostomou v. Turkey*, Report, 8 July 1993, §§ 96–97; see also *W. v. Ireland*, Admissibility Decision, 28 February 1983, § 14.

authorities over the prison administration or the administration of justice by Turkish Cypriot authorities in the applicants' case . . .

170. The Commission, . . . finding no indication of direct involvement of Turkish authorities in the applicants' detention, and the proceedings against them, after their arrest . . ., sees no basis under the Convention for imputing these acts to Turkey.[69]

69. In 1988, in the *Velásquez Rodríguez case*, the IACtHR stated that:

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.
177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.[70]

70. In its decision in the *Case of the Riofrío massacre (Colombia)* in 2001, the IACiHR stated that:

48. . . . It must be ascertained whether the acts of the individuals implicated in the incident in violating such fundamental rights as the rights to life and humane treatment are attributable to the State of Colombia and therefore call into question its responsibility in accordance with international law. In this regard, the Inter-American Court has noted that it is sufficient to show that the infringement of the rights recognized in the Convention has been supported or tolerated by the government.
49. First, it should be said that, as noted by the [IACiHR] in its Third Report on the Human Rights Situation in Colombia, the State has played a leading role in developing the paramilitary or self-defense groups, that it allowed them to act legitimately with the protection of the law during the 1970s and 1980s, and that it is generally responsible for their existence and for strengthening them.
50. These groups sponsored or accepted by branches of the armed forces were created mainly to combat armed groups of dissidents. As a result of their

[69] ECiHR, *Chrysostomos and Papachrysostomou v. Turkey*, Report, 8 July 1993, §§ 169–170. (The Council of Ministers agreed with the Commission's findings, Council of Europe, Council of Ministers, Resolution DH (95) 245, 19 October 1995.)
[70] IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, §§ 176–177.

counterinsurgency purposes, the paramilitaries established links with the Colombian army that became stronger over a period of more than twenty years. Eventually, on May 25, 1989, the Supreme Court of Justice declared Decree 3398 unconstitutional, thereby removing all legal support for their ties to national defense. In the wake of this action, the State passed a number of laws to criminalize the activities of these groups and of those that supported them. Despite these measures, the State did little to dismantle the structure it had created and promoted, particularly in the case of groups that carried out counterinsurgency activities and, in fact, the ties remained in place at different levels, which in some instances requested or permitted paramilitary groups to carry out certain illegal acts on the understanding that they would not be investigated, prosecuted, or punished. The toleration of these groups by certain branches of the army has been denounced by agencies within the State itself.

51. As a result of this situation, the Commission has established, for the purposes of determining the international responsibility of the State in accordance with the American Convention, that in cases in which members of paramilitary groups and the army carry out joint operations with the knowledge of superior officers, the members of the paramilitary groups act as agents of the State.
52. In the present case, according to analysis of the facts mentioned above, there is evidence to show that agents of the State helped to coordinate the massacre, to carry it out, and, as discovered by domestic courts, to cover it up. Therefore, the only conclusion is that the State is liable for the violations of the American Convention resulting from the acts of commission or omission by its own agents and by private individuals involved in the execution of the victims.[71]

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

71. The ICRC Commentary on the Additional Protocols notes that the responsibility of the State:

can be imputed not only for acts committed by a person or persons who form part of the armed forces . . . but also for possible omissions. As regards damages which may be caused by private individuals, i.e., by persons who are not part of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.[72]

72. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

[71] IACiHR, *Case of the Riofrío massacre (Colombia)*, Report, 6 April 2001, §§ 48–52.
[72] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3660–3661.

The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following:

(a) the international responsibility of States . . .

Article 1, common to the four Geneva Conventions and to Protocol I, stipulates that the contracting States are under an obligation "to respect and ensure respect for" those instruments. Beyond that, and on a more general level, a State is responsible for every act or omission attributable to it and amounting to a breach of an international obligation incumbent on it, including in the field of the international protection of the environment. States affected by such a breach are entitled to insist on the implementation of such rules of State responsibility, including cessation of the unlawful conduct, restitution and reparation.[73]

73. In a communication to the press issued in 1993 with respect to the conflict in Bosnia and Herzegovina, the ICRC reminded "all the parties to the conflict that they bear full responsibility for all abuses [of IHL] committed by the forces on the territory under their control".[74]

74. In 1996, in a summary report submitted to a State, the ICRC accepted that the use by security forces of auxiliary armed groups was not in itself a contravention of IHL. It emphasised, however, that regular forces bore responsibility for acts committed by these groups. The ICRC asked the State in question "to assume full authority over these groups, in particular by adopting legal measures that clearly specify their subordination to the security forces".[75]

VI. Other Practice

75. In 1987, in the context of an internal armed conflict, an official of a local organisation recognised the problems regarding the tribal militia armed by the government. He admitted that the same rules of conduct should apply to all governmental forces, whether regular forces or militia, on the basis of common Article 3 of the 1949 Geneva Conventions and that the government bore legal, moral and political responsibility each time it distributed arms to civilians to participate in the maintenance of law and order.[76]

76. In 1995, in its comments submitted to the UN Secretary-General on the Declaration of Minimum Humanitarian Standards, the IIHL stated that "it would be important to underline the responsibility for acts which cause suffering". It suggested that an article be inserted which could read: "Any de jure or de facto authority is responsible for the acts committed by their agents,

[73] ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 47.

[74] ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.

[75] ICRC archive document.

[76] ICRC archive document.

including acts which adversely affect the basic human rights of any person in emergency situations".[77]

B. Reparation

General

I. Treaties and Other Instruments

Treaties

77. Article 21 of the 1955 Austrian State Treaty, which in its preamble considers that "on 13 March 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich", provides that "no reparation shall be exacted from Austria arising out of the existence of a state of war in Europe after 1 September 1939".

78. Article 6 of the 1956 Joint Declaration on Soviet-Japanese Relations stipulates that:

> The Union of Soviet Socialist Republics renounces all reparation claims against Japan. The USSR and Japan agree to renounce all claims by either State, its institutions or citizens, against the other State, its institutions or citizens, which have arisen as a result of the war since 9 August 1945.

79. Article 75 of the 1998 ICC Statute provides that "the Court shall establish principles relating to reparations to, or in respect of, victims" and that "nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."

80. Article 38 of the 1999 Second Protocol to the 1954 Hague Convention provides that "no provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation".

Other Instruments

81. The 1946 Paris Agreement on Reparation from Germany was concluded:

> in order to obtain an equitable distribution among [the signatory governments] of the total assets which . . . are or may be declared to be available as reparation from Germany . . . in order to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold.

82. Article 2(A) of Part I of the 1946 Paris Agreement on Reparation from Germany states that:

[77] IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, § 22, reprinted in Report of the UN Secretary-General prepared pursuant to Commission resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 11.

The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war (which are not otherwise provided for).

83. Article 8 of Part I of the 1946 Paris Agreement on Reparation from Germany contains provisions regarding the allocation of a reparation share to non-repatriable victims of German action. Article 8(I) of Part I provides that "nothing in this Article shall be considered to prejudice the claims which individual refugees may have against a future German Government, except to the amount of the benefits that such refugees may have received from the sources referred to . . . above".

84. Article 2 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that "States shall ensure that domestic law is consistent with international legal obligations by: . . . making available adequate, effective and prompt reparation".

85. Article 3 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

> The obligation to respect, ensure respect for and enforce international . . . humanitarian law includes, *inter alia*, a State's duty to:
>
> . . .
>
> (d) Afford appropriate remedies to victims; and
> (e) Provide for or facilitate reparation to victims.

86. Article 31 of the 2001 ILC Draft Articles on State Responsibility provides that:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

II. National Practice

Military Manuals

87. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "if, in the course of legitimate security/police operations, private properties are damaged, measures shall be undertaken whenever practicable, utilizing available unit's manpower and equipment, to repair the damage caused as a matter of AFP/PNP Civic Action Policy".[78]

[78] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(4).

National Legislation
88. No practice was found.

National Case-law
89. No practice was found.

Other National Practice
90. In its views and comments on the 1997 Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, as they were then called, Croatia stated that:

It is clear that the right to claim reparation for violations of human rights and international humanitarian law should be given primarily to the direct victim; in cases where the direct victim is unable to claim or precluded from claiming reparation, such right should be enjoyed by the descendants of the direct victim, and subsidiarily to the persons closely connected with the direct victim.[79]

91. In 1995, in reply to a question from members of the Lower House of Parliament with respect to reparation payments to Greek victims of the German National Socialist regime, the German government stated that:

The . . . alleged claims of Greece with regard to Germany are claims for reparation . . . After 50 years have passed since the end of the war and [after] decades of peaceful, trustingly and fruitful co-operation of the Federal Republic of Germany with the international community of States, the issue of reparations has lost its legitimacy. Since the end of the Second World War, Germany has made reparations to a high degree, which, according to general public international law, the States concerned should use to compensate their nationals . . . Additionally, reparations [made] 50 years after the end of hostilities would constitute an exception without precedence in the practice of public international law.[80]

92. According to the Report on the Practice of Kuwait, it is Kuwait's *opinio juris* that States that cause damage to the environment are under a duty to remedy such damage.[81]

93. In 2001, a draft concurrent resolution was put before the US Congress for it to call upon the government of Japan to "immediately pay reparations to the victims of [sexual enslavement of young women during colonial occupation of Asia and the Pacific Islands during the Second World War, known to the world as 'comfort women']".[82]

[79] Croatia, Views and Comments on the note and revised Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, 19 August 1997, UN Doc. E/CN.4/1998/34, 22 December 1997, § 6.
[80] Germany, Lower House of Parliament, Response by the federal government to a question from members of parliament, Payments in compensation to Greek victims of the National Socialist regime, *BT-Drucksache* 13/2878, 7 November 1995.
[81] Report on the Practice of Kuwait, 1997, Chapter 4.4.
[82] US, House of Representatives, 107th Congress, 1st Session, Concurrent Resolution 195, HCON 195 IH, 24 July 2001.

III. Practice of International Organisations and Conferences

United Nations

94. In a resolution adopted in 1993 concerning the conflict in the former Yugoslavia, the UN General Assembly recognized "the right of victims of 'ethnic cleansing' to receive just reparation for their losses" and urged all parties "to fulfil their agreements to this end".[83]

95. In a resolution adopted in 1994 concerning the conflict in the former Yugoslavia, the UN General Assembly recognized "the right of victims of ethnic cleansing to receive just reparation for their losses" and urged all parties "to fulfil their agreements to this end".[84]

96. In a resolution on Afghanistan adopted in 1996, the UN General Assembly urged the Afghan authorities "to provide efficient and effective remedies to the victims of grave violations of human rights and of accepted humanitarian rules".[85]

97. In 2001, the UN General Assembly adopted a resolution entitled "Responsibility of States for internationally wrongful acts", to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 31 entitled "Reparation", was annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[86]

98. In a resolution adopted in 1998, the UN Commission on Human Rights urged all parties to the conflict in Afghanistan to respect IHL and "to provide sufficient and effective remedies to the victims of grave violations and abuses of human rights and of accepted humanitarian rules".[87]

99. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights recommended that "steps be taken to ensure full reparation for losses suffered as a consequence of aggression and religious and ethnic cleansing".[88]

Other International Organisations

100. No practice was found.

International Conferences

101. No practice was found.

[83] UN General Assembly, Res. 48/153, 20 December 1993, § 13.
[84] UN General Assembly, Res. 49/196, 23 December 1994, § 13.
[85] UN General Assembly, Res. 51/108, 12 December 1996, § 11.
[86] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[87] UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(d); see also Res. 1996/75, 23 April 1996, § 10.
[88] UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, § 8; see also Res. 1995/8, 18 August 1995, § 6.

IV. Practice of International Judicial and Quasi-judicial Bodies

102. In the *Chorzów Factory case (Merits)* in 1928, the PCIJ ruled that:

It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation . . . Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.[89]

103. In 2001, in the *Case of the Riofrío massacre (Colombia)*, the IACiHR stated that:

48. Before turning to the analysis of the alleged violations of the standards of the American Convention, it must be ascertained whether the acts of the individuals implicated in the incident in violating such fundamental rights as the rights to life and humane treatment are attributable to the State of Colombia and therefore call into question its responsibility in accordance with international law. In this regard, the Inter-American Court has noted that it is sufficient to show that the infringement of the rights recognized in the Convention has been supported or tolerated by the government.
49. First, it should be said that, as noted by the IACHR in its *Third Report on the Human Rights Situation in Colombia*, the State has played a leading role in developing the paramilitary or self-defense groups, that it allowed them to act legitimately with the protection of the law during the 1970s and 1980s, and that it is generally responsible for their existence and for strengthening them.
50. These groups sponsored or accepted by branches of the armed forces were created mainly to combat armed groups of dissidents. As a result of their counterinsurgency purposes, the paramilitaries established links with the Colombian army that became stronger over a period of more than twenty years. Eventually, on May 25, 1989, the Supreme Court of Justice declared Decree 3398 unconstitutional, thereby removing all legal support for their ties to national defense. In the wake of this action, the State passed a number of laws to criminalize the activities of these groups and of those that supported them. Despite these measures, the State did little to dismantle the structure it had created and promoted, particularly in the case of groups that carried out counterinsurgency activities and, in fact, the ties remained in place at different levels, which in some instances requested or permitted paramilitary groups to carry out certain illegal acts on the understanding that they would not be investigated, prosecuted, or punished. The toleration of these groups by certain branches of the army has been denounced by agencies within the State itself.
51. As a result of this situation, the Commission has established, for the purposes of determining the international responsibility of the State in accordance with the American Convention, that in cases in which members of paramilitary groups and the army carry out joint operations with the knowledge of superior officers, the members of the paramilitary groups act as agents of the State.
52. In the present case, according to analysis of the facts mentioned above, there is evidence to show that agents of the State helped to coordinate the

[89] PCIJ, *Chorzów Factory case (Merits)*, Judgement, 13 September 1928, p. 29.

massacre, to carry it out, and, as discovered by domestic courts, to cover it up. Therefore, the only conclusion is that the State is liable for the violations of the American Convention resulting from the acts of commission or omission by its own agents and by private individuals involved in the execution of the victims.[90]

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

104. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

Article 1, common to the four Geneva Conventions and to Protocol I, stipulates that the contracting States are under an obligation "to respect and ensure respect for" those instruments. Beyond that, and on a more general level, a State is responsible for every act or omission attributable to it and amounting to a breach of an international obligation incumbent on it, including in the field of the international protection of the environment. States affected by such a breach are entitled to insist on the implementation of such rules of State responsibility, including ... reparation.[91]

105. In 1993, in its report on the protection of war victims, the ICRC, referring to Article 91 AP I, stated that "this article confirms a rule which is today accepted as being part of customary law and was already stated, in almost identical terms, in Article 3 of the Hague Convention No. IV of 1907". Referring to Articles 51 GC I, 52 GC II, 131 GC IV and 148 GC IV, the ICRC further stated that "this provision ... also implies that, irrespective of the outcome of an armed conflict, no decision or agreement can dispense a State from the responsibility to make reparation for damages caused to the victims of breaches of international humanitarian law".[92] It recommended that:

The International Conference for the Protection of War Victims should make it clear that it wishes procedures to be set up to provide reparation for damage inflicted on the victims of violations of international humanitarian law ... so as to enable them to receive the benefits to which they are entitled.[93]

VI. Other Practice

106. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make

[90] IACiHR, *Case of the Riofrío massacre (Colombia)*, Report, 6 April 2001, §§ 48–52.
[91] ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 47.
[92] ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.
[93] ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.

reparation, including in appropriate circumstances restitution or compensation for loss or injury".[94]

107. The Restatement (Third) further provides that:

> A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense
> (a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims;
> (b) in a court or other tribunal of that state pursuant to its law; or
> (c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.[95]

108. The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery recommended that the United Nations and all the states and people thereof "take all steps necessary to ensure that the government of Japan provides full reparations to the victims and survivors and those entitled to recover on account of the violations committed against them".[96]

Compensation

I. Treaties and Other Instruments

Treaties

109. Article 41 of the 1899 HR provides that "a violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained".

110. Article 3 of the 1907 Hague Convention (IV) provides that "a belligerent Party which violates the provisions of the [1907 HR] shall, if the case demands, be liable to pay compensation".

111. Article 41 of the 1907 HR provides that "a violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained".

112. Article 5(5) of the 1950 ECHR provides that "everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".

[94] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 901.

[95] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 906.

[96] Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Final Judgement, 4 December 2001, Recommendations, § 149(i).

113. Article 14(a) of the 1951 Peace Treaty for Japan provides that:

It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations . . .

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

114. Under Article 16 of the 1951 Peace Treaty for Japan, Japan undertook, *inter alia*, to compensate former POWs, in the following terms:

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable.

115. The 1951 Yoshida-Stikker Protocol, concluded between the Netherlands and Japan with respect to Japan's occupation of the Dutch East Indies and the 1951 Peace Treaty for Japan, states that:

The Government of Japan does not consider that the Government of the Netherlands by signing the [1951 Peace Treaty for Japan] has itself expropriated the private claims of its nationals so that, as a consequence thereof, after the Treaty comes into force these claims would be non-existent.

116. Article 1(1) of Chapter Four ("Compensation for Victims of Nazi Persecution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

The Federal Republic [of Germany] acknowledges the obligation to assure . . . adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.

117. Article 4(1) of Chapter Five ("External Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

If property to be restituted has, after identification in Germany, either been utilised or consumed in Germany before return to the claimant or been destroyed, stolen or otherwise disposed before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant, the Federal Republic shall compensate claimants who would otherwise be entitled to restitution . . . or who, at the entry into force of the present Convention, have had their claims for restitution approved by one of the Three Powers.

118. Article 5 of Chapter Six ("Reparation") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

The Federal Republic [of Germany] shall ensure that the former owners of property seized pursuant to measures referred to in Articles 2 and 3 of this Chapter [i.e. of the Three Powers with regard to German external assets or other property for the purpose of reparation] shall be compensated.

119. The 1952 Luxembourg Agreement between Germany and Israel provides that:

Whereas unspeakable criminal acts were perpetrated against the Jewish people during the National-Socialist regime of terror

And whereas by a declaration in the Bundestag on 27th September, 1951, the Government of the Federal Republic of Germany made known their determination, within the limits of their capacity, to make good the material damage caused by these acts,

And whereas the State of Israel has assumed the heavy burden of resettling so great a number of uprooted and destitute Jewish refugees from Germany and from territories formerly under German rule and has on this basis advanced a claim against the Federal Republic of Germany for global recompense for the cost of the integration of these refugees

Now therefore the State of Israel and the Federal Republic of Germany have agreed as follows: –

Article 1

(a) The Federal Republic of Germany shall, in view of the considerations hereinbefore recited, pay to the State of Israel the sum of 3,000 million Deutsche Mark.

(b) In addition, the Federal Republic of Germany shall, in compliance with the obligation undertaken in Article 1 of the [1952 Luxembourg Agreement between Germany and the CJMC], pay to Israel for the benefit of the said [CJMC] the sum of 450 million Deutsche Mark . . .

(c) The provisions hereinafter contained in the present Agreement shall apply to the total sum of 3,450 million Deutsche Mark so arising . . .

Article 2

The Federal Republic of Germany will make available the amount referred to in Article 1, paragraph (c) of the present Agreement for the purchase . . . of such commodities and services as shall serve the purpose of expanding opportunities for the settlement and rehabilitation of Jewish refugees in Israel.

120. By Letter No. 1a of the 1952 Luxembourg Agreement between Germany and Israel, which, according to Article 16(a)(ii) constitutes an integral part of the Agreement, the Israeli Minister for Foreign Affairs conveyed the following to the representatives of Germany:

1. Considering that the Federal Republic of Germany has in the Agreement signed today undertaken the obligation to pay recompense for the expenditure already incurred or to be incurred by the State of Israel in the resettlement of Jewish refugees, the claim of the State of Israel for such recompense shall, in so far as it has been put forward against the Federal Republic of Germany, be regarded by the Government of Israel as having been settled with the coming into force of the said Agreement. The State of Israel will advance no further claims against the Federal Republic of Germany arising out of or in connection with losses which have resulted from National-Socialist persecution.
2. The Government of Israel are here proceeding on the assumption that claims of Israel nationals under legislation in force in the Federal Republic of Germany on internal restitution, compensation, or other redress for National-Socialist wrongs, and the automatic accrual of rights to Israel nationals from any future legislation of this nature, will not be prejudiced by reason of the conclusion of the Agreement.

By Letter No. 1b of the 1952 Luxembourg Agreement between Germany and Israel, which constitutes an integral part of the Agreement, the German Chancellor took note of the content of paragraph 1 of Letter No. 1a and confirmed, with regard to paragraph 2 of this Letter, that the assumption of the government of Israel was correct.

121. Article 26 of the 1955 Austrian State Treaty, which in its preamble considers that "on 13 March 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich", provides that:

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13 March 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.
2. Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organizations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organizations and communities such organizations or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organizations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims

> of persecution by the Axis Powers, it being understood that these provisions do not require Austria to make payments in foreign exchange or other transfers to foreign countries which would constitute a burden on the Austrian economy.

Part IV ("Claims arising out of the War", Articles 21–24) and Part V ("Property, Rights and Interests", Articles 25–28) provide for detailed and comprehensive settlement of all property claims on a State-to-State level.

122. The 1956 Yoshida-Stikker Protocol between Japan and the Netherlands states that:

> Desiring to settle the problem concerning certain types of private claims of Netherlands nationals which the government of Japan might wish voluntarily to deal with, as referred to in the letters of 7th and 8th of September, 1951, exchanged between Minister of Foreign Affairs of the Kingdom of The Netherlands, Dirk U. Stikker, and Prime Minister of Japan, Shigeru Yoshida, Have agreed as follows:
> Article I. For the purpose of expressing sympathy and regret for the suffering inflicted during the Second World War by agencies of the Government of Japan upon Netherlands nationals, the Government of Japan shall voluntarily tender as a solatium the amount of Pounds Sterling equivalent to U.S. $ 10,000,000 to the Government of the Kingdom of The Netherlands on behalf of those Netherlands nationals.
> ...
> Article III. The Government of the Kingdom of The Netherlands confirms that neither itself nor any Netherlands nationals will raise against the Government of Japan any claim concerning the sufferings inflicted during the Second World War by agencies of the Government of Japan upon Netherlands nationals.

123. Article 1(1) of the 1959 Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution, concluded between Germany and Norway, provides that:

> The Federal Republic of Germany shall pay the Kingdom of Norway 60 million Deutsche Mark on behalf of Norwegian nationals who were victimized by National Socialist persecution because of their race, beliefs or opinions and whose freedom or health was in consequence impaired, and also on behalf of the survivors of persons who died as a result of such persecution.

124. Article 63(1) of the 1969 ACHR states that:

> If the [IACtHR] finds that there has been a violation of a right or freedom protected by this Convention, the Court ... shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

125. Article 91 AP I provides that "a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation". Article 91 AP I was adopted by consensus.[97]

[97] CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344.

126. Upon ratification of AP I, South Korea declared that:

In relation to Article 91 of Protocol I, a party to the conflict which violates the provisions of the Conventions or of this Protocol shall take the responsibility for paying compensation to the party damaged from the acts of violation, whether the damaged party is a legal party to the conflict or not.[98]

127. Article 2 of the 1990 Implementation Agreement to the German Unification Treaty provides that:

The Federal Government is prepared, in continuation of the policy of the German Federal Republic, to enter into agreements with the Claims Conference [CJMC] for additional Fund arrangements in order to provide hardship payments to persecutees who thus far received no or only minimal compensation according to the legislative provisions of the German Federal Republic.

128. In 1995, Germany and the US concluded the US-Germany Agreement concerning Final Benefits to Certain US Nationals Who Were Victims of National Socialist Measures of Persecution (also known as the Princz Agreement), which provides that:

Article 1
This Agreement shall settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution conducted directly against them. This Agreement shall cover only the claims of persons who, at the time of their persecution, were already nationals of the United States of America and who have to date received no compensation from the Federal Republic of Germany. This Agreement shall, inter alia, not cover persons who were subjected to forced labor alone while not being detained in a concentration camp as victims of National Socialist measures of persecution.
Article 2
1. For the prompt settlement of known cases of compensation claims covered by Article 1, the Government of the Federal Republic of Germany shall pay to the Government of the United States of America three million Deutsche Mark . . .
2. For any possible future cases not known at the present moment, both Governments intend to negotiate two years after the entry into force of this Agreement, an additional lump sum payment based on the same criteria as set forth in Article 1 and derived on the same basis as the amount under paragraph 1.

Article 3
The distribution of the amounts . . . to the individual beneficiaries shall be left to the discretion of the Government of the United States of America.

129. In a diplomatic note relative to the 1995 US-Germany Agreement concerning Final Benefits to Certain US Nationals Who Were Victims of National Socialist Measures of Persecution, the government of Germany stated that "any payment by the Government of the Federal Republic of Germany under this Agreement will be only for the benefit of United States nationals who were

[98] South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 3.

victims of national socialist measures of persecution by reason of their race, their faith or their ideology". In its response, the US government acknowledged receipt of the diplomatic note.

130. Article 1(1) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that "all refugees and displaced persons . . . shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them".

131. By Article VII of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina was established. According to Article XI, the mandate of the Commission was to:

> receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

132. Article XII(2) and (6) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

> Any person requesting compensation in lieu of return who is found by the Commission to be the lawful owner of that property shall be awarded just compensation as determined by the Commission.
>
> . . .
>
> In cases in which the claimant is awarded compensation in lieu of return of the property, the Commission may award a monetary grant or a compensation bond for the future purchase of real property. The Parties welcome the willingness of the international community assisting in the construction and financing of housing in Bosnia and Herzegovina to accept compensation bonds awarded by the Commission as payment, and to award persons holding such compensation bonds priority in obtaining that housing.

133. By Article 1 of the 1999 US-Chinese Agreement on the Settlement of Chinese Claims resulting from the Bombardment of the Chinese Embassy in Belgrade, the parties agreed that the US was to pay US$28 million to China. Article 2 provides that "the agreed amount . . . will constitute a full and final settlement of any and all claims for the property loss and damage suffered by the Chinese side as a result of the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia".

134. By Article 1 of the 1999 US-Chinese Memorandum of Understanding on the Settlement of US Claims resulting from the Bombardment of the Chinese Embassy in Belgrade, the parties agreed that China was to pay US$2.87 million to the US. Article 2 provides that "the agreed amount . . . will constitute a full and final settlement of any and all claims for the property loss and damage suffered by the U.S. side after the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia".

135. The 2000 Agreement on the Foundation "Remembrance, Responsibility and the Future", concluded between Germany and the US, aims to complement the creation of a foundation established under the German Law on the Creation of a Foundation "Remembrance, Responsibility and Future" (as amended) of 2000. Article 1(1) provides that:

The parties agree that the Foundation "Remembrance, Responsibility and the Future" covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.

136. Article 2(1) of the 2000 Agreement on the Foundation "Remembrance, Responsibility and the Future" provides that:

The United States shall, in all cases in which the United States is notified that a claim described in article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest.

137. Article 3 of the 2000 Agreement on the Foundation "Remembrance, Responsibility and the Future" provides that:

(2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era and World War II.
(3) The United States will not raise any reparations claims against the Federal Republic of Germany.

138. In 2000, Austria and the US concluded the Austrian-US Executive Agreement concerning the Austrian Reconciliation Fund, which is intended "to complement the creation of the [Austrian Reconciliation] Fund". In the preamble, the two States recognize:

that Austria has, by adopting legislation approved by the Allied Forces or building on international agreements to which the United States is a party, and in close cooperation with victims' associations and interested governments, provided restitution and compensation to victims of National Socialist persecution, [and note] that, by means of the Austrian Fund for Reconciliation, Peace, and Cooperation ("Fund"), formed under Austrian federal law as an instrumentality of Austria and funded by contributions from Austria and Austrian companies, Austria and Austrian companies wish to respond to and acknowledge the moral responsibility for all claims involving or related to the use of slave or forced labor during the National Socialist era or World War II.

139. In 2000, Austria concluded bilateral agreements with six Central and Eastern European States in order to fulfil the conditions necessary for the coming into force of the Austrian Reconciliation Fund Law: the Austrian-Belarussian Agreement concerning the Austrian Reconciliation Fund, the

Austrian-Czech Agreement concerning the Austrian Reconciliation Fund, the Austrian-Hungarian Agreement concerning the Austrian Reconciliation Fund, the Austrian-Polish Agreement concerning the Austrian Reconciliation Fund, the Austrian-Ukrainian Agreement concerning the Austrian Reconciliation Fund, and the Austrian-Russian Agreement concerning the Austrian Reconciliation Fund, all of which provided for cooperation between the respective States in the payment of compensation to former slave labourers and forced labourers by the Austrian Reconciliation Fund via national foundations which were to be established by the respective States.

140. Article 5 of the 2000 Peace Agreement between Eritrea and Ethiopia provides that:

> 1. Consistent with the 1998 OAU Framework Agreement on Eritrea and Ethiopia, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.

141. In the preamble to the 2001 Washington Agreement between France and the US Concerning Payments for Certain Losses Suffered during World War II, the parties recognize that "France, following the end of World War II, enacted legislation that provided restitution and compensation for victims of anti-Semitic persecution during World War II under the authority of the occupying German authorities or the Vichy Government". They also welcomed the various efforts of the French government to legislate with respect to compensation programmes for victims of the French occupation during Second World War, as well as the establishment of a fund of US$ 22.5 million, contributed by the banks, and another commitment of the banks to contribute 100 million Euro to the Foundation for the Memory of the Shoah.

142. Article 1(1) of the 2001 Washington Agreement between France and the US Concerning Payments for Certain Losses Suffered during World War II, the parties agreed that:

> The Commission [for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation], the [Fund of US$22.5 million, contributed by the banks], and the [Foundation for the Memory of the

Shoah] cover, and that it would be in the interest of all concerned for these entities to be the exclusive remedies and fora for the resolution of, any and all claims that have been or may be asserted against the Banks.

By Article 1(4), France agreed "to ensure that the Banks will promptly pay, in full, all claims approved by the [Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation]". In turn, by Article 2 of the Agreement, the US, with respect to pending and future cases concerning claims against one of the banks involved, committed itself to inform its courts through Statements of Interest that:

It would be in the foreign policy interests of the United States for the [Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation], the [Foundation for the Memory of the Shoah], and the [Fund of US$22.5 million, contributed by the banks] to be the exclusive remedies and fora for resolving such claims.

It added that "dismissal of such cases would be in its foreign policy interest".

143. Paragraph 1 of the 2001 Annex A to the Austrian-US Agreement concerning the Austrian General Settlement Fund, reflecting "key elements of the General Settlement Fund ('GSF') . . . and the additional measures for victims of National Socialism that form the basis for the Exchange of Notes between the United States and Austria", provides that:

Immediate Compensation for Survivors: The Austrian Government will make a US $150 million contribution to the National Fund, which will be distributed in its entirety on an expedited basis to all Holocaust survivors originating from or living in Austria . . . This amount will cover 1) apartment and small business leases; 2) household property; 3) personal valuables and effects. This amount will not cover potential claims against Dorotheum . . . or *in rem* claims for works of art. This amount will be credited against the final cap for the GSF.

144. Paragraph 2 of the 2001 Annex A to the Austrian-US Agreement concerning the Austrian General Settlement Fund provides that:

Establishment of a General Settlement Fund: The Austrian Federal Government will propose the necessary legislation to the National Council by April 30, 2001 to establish a GSF. Austria will undertake its best efforts to ensure that this legislation is passed by June 30, 2001. The legislation will enter into force once all contributions have been made available. The GSF will be a voluntary fund that will provide *ex gratia* payments to certain applicants. The GSF will include both a "claims-based" and an "equity-based" component. The GSF will be capped at US $210 million plus interest, at the Euribor rate, accruing to it beginning 30 days after all claims, pending as of June 30, 2001, against Austria and/or Austrian companies arising out of or related to the National Socialist era or World War II are dismissed with prejudice, and such interest shall continue to accrue on the funds available at any given time until the GSF has paid all approved claims. The US $210 million contribution by Austria and Austrian companies (including the Austrian insurance industry) + interest, under the terms described *supra*, will be in addition to the

US $150 million referred to *supra* in para. 1. The distribution of payments by the GSF will be based on decisions of the independent Claims Committee.

145. Article 27(1) of the 2003 Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights states that "if the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

Other Instruments

146. Article 24(5) of the 1923 Hague Rules of Air Warfare contains a provision requiring a belligerent State "to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article [on aerial bombardment]".

147. Article 29 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that "any State committing a breach of this Convention is liable to pay compensation for all damage caused by such breach to a State injured thereby or any of its nationals".

148. Protocol No. 1 of the 1952 Luxembourg Agreement between Germany and the CJMC, concluded at a meeting between the representatives of the FRG and the CJMC at which "the extension of the legislation existing in the Federal Republic of Germany for the redress of National-Socialist wrongs" was discussed and at which the representatives of both parties "agreed on a number of principles for the improvement of the existing legislation as well as on other measures", provides that:

The Government of the Federal Republic of Germany declare that they will take as soon as possible all steps within their constitutional competence to ensure the carrying out of the following programme:

I. Compensation

1. The Government of the Federal Republic of Germany is resolved to supplement and amend the existing compensation legislation by a Federal Supplementing and Coordinating Law (*Bundesergänzungs- und rahmengesetz*) so as to ensure that the legal position of the persecutees throughout the Federal territory be no less favourable than under the General Claims Law now in force in the US Zone.

...

3. Where residence and date-line requirements are applicable under compensation legislation, compensation payments for the deprivation of liberty shall be granted to persons who emigrated before the date-line and had their last German domicile or residence within the Federal territory.
4. Persecutees who were subject to compulsory labour and lived under conditions similar to incarceration shall be treated as if they had been deprived of liberty by reason of persecution.
5. A persecutee who, within the boundaries of the German Reich as of December 31, 1937, lived "underground" under conditions similar to incarceration

or unworthy of human beings shall be treated as if he had been deprived of liberty by reason of persecution, in the meaning of that term under compensation legislation.

6. Where a persecutee died after March 8, 1945, his heirs (children, spouse or parents) shall be entitled to assert his claim for compensation for deprivation of liberty . . .

. . .

9. The Government of the Federal Republic of Germany will provide compensation to persons who suffered losses as officials or employees of Jewish communities or public institutions within the boundaries of the German Reich as of December 31, 1937.

. . .

12. Persons who were persecuted because of their political convictions, race, faith or ideology and who settled in the Federal Republic or emigrated abroad from expulsion areas . . . shall receive compensation for deprivation of liberty and damage to health and limb . . . Compensation in accordance with Paragraph 1 shall also be paid to persecutees who emigrated abroad or settled in the Federal Republic during or after the time the general expulsion took place.

. . .

14. Persons who were persecuted for their political convictions, race, faith or ideology during the National-Socialist regime of terror and who are at present stateless or political refugees and who were deprived of liberty by National-Socialist terror acts shall receive appropriate compensation for deprivation of liberty and damage to health and limb.

149. Protocol No. 2 of the 1952 Luxembourg Agreement between Germany and the CJMC provides that:

Whereas the National-Socialist regime of terror confiscated vast amounts of property and other assets from Jews in Germany and in territories formerly under German rule;

And whereas part of the material losses suffered by the persecutees of National-Socialism is being made good by means of internal German legislation in the fields of restitution and indemnification and whereas an extension of this internal German legislation, in particular in the field of indemnification, is intended;

And whereas considerable values, such as those spoliated in the occupied territories, cannot be returned, and that indemnification for many economic losses which have been suffered cannot be made because, as a result of the policy of extermination pursued by National-Socialism, claimants are no longer in existence;

And whereas [a] considerable number of Jewish persecutees of National-Socialism are needy as a result of their persecution . . .

And having regard to [the 1952 Luxembourg Agreement between Germany and Israel] . . .

[Germany and the CJMC] therefore . . . concluded the following Agreement:

Article 1

In view of the considerations hereinbefore recited the Government of the Federal Republic of Germany hereby undertakes the obligation towards the [CJMC] to enter, in the Agreement with the State of Israel, into a contractual undertaking to pay the sum of 450 million Deutsche Mark to the State of Israel for the benefit of the [CJMC].

Article 2
The Federal Republic of Germany will discharge their obligation undertaken for the benefit of the [CJMC], in the [1952 Luxembourg Agreement between Germany and Israel], by payments made to the State of Israel . . . The amounts so paid and transmitted by the State of Israel to the [CJMC] will be used for the relief, rehabilitation and resettlement of Jewish victims of National-Socialist persecution . . . Such amounts will, in principle, be used for the benefit of victims who at the time of the conclusion of the present Agreement were living outside Israel.

150. Article 19 of the 1992 UN Declaration on Enforced Disappearance provides that:

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.

151. Article 3 of the 1993 CIS Agreement on the Protection of Victims of Armed Conflicts requires States to adopt national measures granting "social security and compensation for material losses to people afflicted by armed conflicts".
152. Article VIII of the 1994 Comprehensive Agreement on Human Rights in Guatemala provides that:

The Parties recognize that it is a humanitarian duty to compensate and/or assist victims of human rights violations. Said compensation and/or assistance shall be effected by means of government measures and programmes of a civilian and socio-economic nature addressed, as a matter of priority, to those whose need is greatest, given their economic and social position.

153. According to Article XI of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords which establishes the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina,

The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

154. Article 2(3) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the right of the victims and their families to seek justice for violations of human rights includes "adequate compensation".
155. Article 23 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;
(b) Lost opportunities, including education;
(c) Material damages and loss of earnings, including loss of earning potential;
(d) Harm to reputation or dignity; and
(e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

156. Sections 2(2), (5) and (6) of UNMIK Regulation No. 2000/60 provide that:

2.2 Any person whose property right was lost between 23 March 1989 and 24 March 1999 as a result of discrimination has a right to restitution in accordance with the present regulation. Restitution may take the form of restoration of the property right (hereafter "restitution in kind") or compensation.
. . .
2.5 Any refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation.
2.6 Any person with a property right on 24 March 1999, who has lost possession of that property and has not voluntarily disposed of the property right, is entitled to an order from the Commission for repossession of the property. The Commission shall not receive claims for compensation for damage to or destruction of property.

157. Article 34 of the 2001 ILC Draft Articles on State Responsibility, dealing with "Forms of reparation", provides that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter".

158. Article 36 of the 2001 ILC Draft Articles on State Responsibility, dealing with compensation as a form of reparation, provides that:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

II. National Practice

Military Manuals

159. Argentina's Law of War Manual (1969), in a provision dealing with the violation of the terms of an armistice by an individual, refers to Article 41 of the 1907 HR and provides that "the violation of the terms of the armistice by private persons acting on their own initiative only entitles [the injured party] to demand the punishment of the offenders or, if necessary, compensation for the damages sustained".[99]

[99] Argentina, *Law of War Manual* (1969), § 6.013.

160. Argentina's Law of War Manual (1989), referring to Article 91 AP I, provides that "the party which violates the Conventions or Protocol I shall, if the case demands, be liable to pay compensation".[100]

161. Canada's LOAC Manual, states that the means of securing observance of the LOAC "include protest and demand for compensation by a belligerent or neutral power".[101] It further provides that "a state which violates the LOAC shall, if the case demands, be liable to pay compensation".[102]

162. Colombia's Basic Military Manual, after mentioning the possibility of taking political, economic and legal sanctions against a State whose agents or civil servants have committed violations of international law, provides that "for the States and their governments, the sanctions entail high costs which represent compensations". After discussing the responsibility of individual members of the armed forces who have committed violations of international law, the manual states that "furthermore, apart from the individual sanctions, the nation can be sentenced, by its highest tribunals, to compensate for the damages and prejudices caused to individuals by arbitrary and illegal conduct of its authorities".[103]

163. Ecuador's Naval Manual, under a provision entitled "Observance of the law of armed conflict", states that "in the event of a clearly established violation of the law of armed conflict, the aggrieved nation may: . . . 2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid."[104]

164. Germany's Military Manual, referring to Article 91 AP I and Article 3 of the 1907 Hague Convention (IV), provides that "a party to a conflict which does not comply with the provisions of international humanitarian law shall be liable to pay compensation".[105]

165. South Korea's Military Law Manual provides that any party injured by a violation of IHL by the enemy can ask for remedies.[106]

166. The Military Manual of the Netherlands, under a provision stating the responsibility of States for violations of IHL committed by members of their armed forces, refers to Article 91 AP I and provides that "a party to a conflict may be obliged to pay compensation" for violations of IHL.[107]

167. New Zealand's Military Manual states that "the only remedy against a State for breaches of the law of armed conflict committed by its authority or by its personnel is by way of compensation".[108]

[100] Argentina, *Law of War Manual* (1989), § 8.10.
[101] Canada, *LOAC Manual* (1999), p. 15-1, § 3.
[102] Canada, *LOAC Manual* (1999), p. 15-2, § 9.
[103] Colombia, *Basic Military Manual* (1995), p. 36.
[104] Ecuador, *Naval Manual* (1989), § 6.2.
[105] Germany, *Military Manual* (1992), § 1214.
[106] South Korea, *Military Law Manual* (1996), pp. 89 and 90.
[107] Netherlands, *Military Manual* (1993), p. IX-3.
[108] New Zealand, *Military Manual* (1992), § 1605(1).

168. Nigeria's Manual on the Laws of War provides that "if the State contravenes the rules of the laws of War, it has to pay compensation".[109]

169. Spain's LOAC Manual, in a chapter dealing with the consequences of "incorrect behaviour" of members of the armed forces, notes that:

> In the event of non-compliance with the rules [of the LOAC], the State is liable insofar as it has the obligation to pay compensation in accordance with any resolutions condemning the acts in question or to adopt any other measures agreed on by the international community.[110]

The manual also states that "the State and ... international organizations may commit illicit acts. However, the responsibility which they incur is not of a criminal nature but compensatory, and is materialized in the obligation to pay an indemnification (art. 91 AP I)."[111] In a further provision entitled "Payment of compensation for war", the manual states that "the belligerent party which violates the rules of the LOAC can be obliged to compensate where appropriate".[112]

170. Switzerland's Basic Military Manual provides that "the belligerent State that is the victim of violations of the Convention can take the following measures: ... if need be it can demand compensation".[113]

171. The UK Military Manual, in a chapter dealing with "Means of securing legitimate warfare", quotes Article 3 of the 1907 Hague Convention (IV).[114] In addition to other means of securing legitimate warfare, the manual lists "compensation" and refers to Article 3 of the 1907 Hague Convention (IV).[115]

172. The US Field Manual, quoting Article 3 of the 1907 Hague Convention (IV), states that:

> In the event of violation of the law of war, the injured party may legally resort to remedial action of the following types: ... Protest or demand for compensation ... Such communications may be sent through the protecting power, a humanitarian organization performing the duties of a protecting power, or a neutral state, or by parlementaire direct to the commander of the offending forces.[116]

173. The US Air Force Pamphlet, quoting Article 3 of the 1907 Hague Convention (IV) and Articles 29 GC I and 12 GC III, states that:

> Under international law, states which violate their obligations are responsible, in appropriate cases, for payment of monetary damages to compensate states for injuries suffered. This principle applies to law of armed conflict violations. State responsibility to compensate victims of violations is an important feature in

[109] Nigeria, *Manual on the Laws of War* (undated), § 7.
[110] Spain, *LOAC Manual* (1996), Vol. I, § 7.6.a.
[111] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.a.
[112] Spain, *LOAC Manual* (1996), Vol. I, § 11.10.f.
[113] Switzerland, *Basic Military Manual* (1987), Article 195(a).
[114] UK, *Military Manual* (1958), § 618.
[115] UK, *Military Manual* (1958), § 620.
[116] US, *Field Manual* (1956), § 495(b).

enforcement measures. Claims for compensation are frequently combined with protests about violations . . . Thus, the violater state's obligation to compensate for violations of the Hague Regulations applies regardless of whether the acts constituting violations were authorized by competent authorities of the violator state . . . However, as a general rule, in the absence of some cause for the fault such as inadequate supervision or training, no obligation for compensation arises on the part of the state for other violations of the law of armed conflict committed by individual members outside of their general area of responsibility.[117]

The Pamphlet further states that "Article 3 [of the 1907 Hague Convention (IV)] concerns a state's obligation to pay compensation for acts committed by its Armed Forces which violate the Hague Regulations. The 1949 Geneva Conventions contain a variety of such obligations."[118]

174. The US Naval Handbook, under a provision dealing with "Enforcement of the law of armed conflict", states that "in the event *of a clearly established violation* of the law of armed conflict, the aggrieved nation may: . . . 2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid."[119] (emphasis in original)

175. The Annotated Supplement to the US Naval Handbook, which contains a list of cases of demands for compensation involving US forces, states that "it is now generally established that the principle laid down in art. 3 [of the 1907 Hague Convention (IV)] is applicable to the violation of any rule regulating the conduct of hostilities and not merely to violations of the [1907] Hague Regulations".[120]

National Legislation

176. Argentina's Law on Compensation for Political Prisoners provides that:

Article 1 – Persons who, during a state of siege, were put at the disposal of the national executive power, by decree thereof, or civilians who were detained on the basis of orders issued by a military court – whether or not they have undertaken legal proceedings for damage or prejudice suffered – come within the purview of this law, provided they have not already received compensation in accordance with a prior legal ruling concerning the events in question.
Article 2 – In order to come within the purview of this law, the above-mentioned persons must fulfil one of the following conditions:

(a) They must have been put at the disposal of the national executive power prior to 10 December 1983.
(b) In the case of civilians, they must have been deprived of their freedom on the basis of orders issued by a military court, regardless of whether or not they were convicted by that court.[121]

[117] US, *Air Force Pamphlet* (1976), § 10-3.
[118] US, *Air Force Pamphlet* (1976), § 15-2(b).
[119] US, *Naval Handbook* (1995), § 6.2.
[120] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2, footnote 21.
[121] Argentina, *Law on Compensation for Political Prisoners* (1991), Articles 1–2.

177. Argentina's Law on Compensation for Enforced Disappearances provides that:

Article 1 – Persons who, at the time of the enactment of this law, are the victims of enforced disappearance, shall be entitled to receive, by proxy, special damages equal to the monthly salary of a level-A civil servant (coefficient 100), as provided by Decree No. 993/91.[122]

178. In 1995, by its National Fund Law, Austria established a national fund "for the provision of benefits to the victims of National Socialism".[123] The Law provides that:

The Fund shall render benefits to persons

(1) who were persecuted by the National Socialist regime for political reasons, for reasons of birth, religion, nationality, sexual orientation, because of physical or mental disability or on the basis of accusations of allegedly antisocial attitudes, or who in other ways fell victim to typically National Socialist injustice or left the country to escape such persecution,
...
(4) The Fund shall render one-time-only or recurrent financial benefits.[124]

In its 2001 amendment, the Law further provides that:

(1) Without prejudice to [previous contributions], the Federal Government shall contribute to the Fund an amount the total of which shall correspond to the equivalent in Schillings as of 24 October 2000 of 150 million US Dollars and be allocated [to the Fund]. This amount shall be accounted for by the Fund in a special account for benefits paid under Paragraph 2.
(2) This amount shall be used for benefits to be paid to victims of National Socialism ... as a final compensation for the following categories of losses of property:
a) apartment and small business leases;
b) household property;
c) personal valuables and effects.
The present Federal Law shall be without prejudice to the *in rem* return of works of art according to statutory provisions.
(3) Persons ... who were persecuted by the National Socialist regime on political grounds, on grounds of origin, religion, nationality, sexual orientation, or of physical or mental handicap, or who left the country to escape such persecution, and who themselves, or whose parents, suffered a loss of property in one of the categories mentioned in Paragraph 2 as a result of, or in connection with, events in the territory of the present-day Republic of Austria between 13 March 1938 and 9 May 1945 shall be entitled to such benefits. There is no legal right to benefits by the Fund.
...

[122] Argentina, *Law on Compensation for Enforced Disappearances* (1994), Article 1.
[123] Austria, *National Fund Law as amended* (1995), Article 1(1)(1).
[124] Austria, *National Fund Law as amended* (1995), Article 1(2).

(6) The amount mentioned in Paragraph 1 shall be distributed in equal parts among those entitled to benefits.[125]

179. In 2000, Austria adopted the Reconciliation Fund Law establishing a national fund, the goal of which was "to make a contribution toward reconciliation, peace, and cooperation through a voluntary gesture of the Republic of Austria to natural persons who were coerced into slave labor or forced labor by the National Socialist regime on the territory of the present day Republic of Austria".[126] The Law provides that "the Fund shall have moneys in the amount of 6 billion Austrian schillings to carry out its tasks".[127] It further provides that the amounts (one-time payments) are to be paid as follows:

1. 105,000 Austrian schillings to [slave labourers].
2. 35,000 Austrian schillings to [forced labourers] who had to perform forced labor in industry, business, construction, power companies and other commercial enterprises, public institutions, rail transportation or postal service.
3. 20,000 Austrian schillings to [forced labourers] who had to do forced labor exclusively in agriculture or forestry or in the form of personal services (housekeeping, hotel work, etc).
4. Children and minors [who were transported under the age of 12 with one or both parents into the territory of the present day Republic of Austria or who were born here during the mother's period of forced labor] are to receive the amount to which the parent is entitled or would be entitled . . .
5. A supplementary payment of 5,000 Austrian schillings may be made to women who during their time as forced labourers gave birth to children in maternity facilities for eastern workers or who were forced to undergo abortions.[128]

Under another provision, "if the eligible person has died on or after February 15, 2000, then the heirs . . . shall succeed".[129] The Law further provides that "payment of an award is made under the condition that the recipient make a declaration that with the receipt of an award under this federal law he renounces irrevocably any claim for slave labor or forced labor against the Republic of Austria or against Austrian business".[130] The Austrian Reconciliation Fund Law came into force on 27 November 2000 after the signing of bilateral agreements between Austria and six Central and Eastern European countries (Belarus, Czech Republic, Hungary, Poland, Russia, Ukraine), as well as the Executive Agreement with the US, and the securing of the financial resources for the Reconciliation Fund, in fulfilment of the requirements of the law.[131]

180. In 2001, Austria adopted the General Settlement Fund Law by which it established the General Settlement Fund, the purpose of which was "to comprehensively resolve open questions of compensation of victims of National

[125] Austria, *National Fund Law as amended* (1995), Article 1(2b)(1), (2), (3) and (6).
[126] Austria, *Reconciliation Fund Law as amended* (2000), Section 1(2).
[127] Austria, *Reconciliation Fund Law as amended* (2000), Section 6(1).
[128] Austria, *Reconciliation Fund Law as amended* (2000), Section 3(1).
[129] Austria, *Reconciliation Fund Law as amended* (2000), Section 4(2).
[130] Austria, *Reconciliation Fund Law as amended* (2000), Section 5(1).
[131] Austria, *Reconciliation Fund Law as amended* (2000), Section 17.

Socialism for losses and damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era". The Law provides that:

The Fund's purpose shall be to acknowledge, through voluntary payments, the moral responsibility for losses and damages inflicted upon Jewish citizens and other victims of National Socialism as a result of or in connection with the National Socialist Regime. The return of works of art shall be governed by the special legislation presently in force.[132]

The Law further provides that:

To carry out its tasks, the Fund shall be endowed with an amount of 210 million US Dollars. This amount shall be made available, at the latest, 30 days after all claims in the United States pending as of June 30, 2001 against Austria or Austrian companies arising out or related to the National Socialist era or World War II have been dismissed. Excepted therefrom are claims covered by the Reconciliation Fund . . . claims for the return of works of art, as well as claims *in rem* restitution against provinces or municipalities.[133]

In addition , the Law provides that:

(1) Persons (under the claims-based process also associations), who/which were persecuted by the National Socialist regime on political grounds or origin, religion, nationality, sexual orientation, or of physical or mental handicap or of accusations of so-called asociality, or who left the country to escape such persecution, and who suffered losses or damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era shall be eligible to file an application.
(2) In addition . . . heirs of eligible claimants as defined in Paragraph 1 shall also be eligible to file an application. In case of a defunct association, an association which the Claims Committee regards as the legal successor shall be entitled to file an application as well.[134]

The Law expressly states that:

The payments shall be awarded as a final compensation for losses and damages as a result of or in connection with events having occured on the territory of the present-day Republic of Austria during the National Socialist era. There shall be no legal right to these payments.[135]

181. Canada's Crimes against Humanity and War Crimes Act provides that:

There is hereby established a fund, to be known as the Crimes Against Humanity Fund, into which shall be paid

[132] Austria, *General Settlement Fund Law as amended* (2001), Article 1(1)(1) and (2).
[133] Austria, *General Settlement Fund Law as amended* (2001), Article 1(2)(1).
[134] Austria, *General Settlement Fund Law as amended* (2001), Article 1(6).
[135] Austria, *General Settlement Fund Law as amended* (2001), Article 1(7).

(a) all money obtained through enforcement in Canada of orders of the International Criminal Court for reparation or forfeiture or orders of that Court imposing a fine;
(b) all money obtained in accordance with section 31; and
(c) any money otherwise received as a donation to the Crimes Against Humanity Fund.

The Attorney General of Canada may make payments out of the Crimes Against Humanity Fund, with or without a deduction for costs, to the International Criminal Court, the Trust Fund established under article 79 of the Rome Statute, victims of offences under this Act or of offences within the jurisdiction of the International Criminal Court, and to the families of those victims, or otherwise as the Attorney General of Canada sees fit.[136]

The Act goes on to say that:

The Minister of Public Works and Government Services shall pay into the Crimes Against Humanity Fund
(a) the net proceeds received from the disposition of any property referred to in subsections 4(1) to (3) of the Seized Property Management Act that is forfeited to Her Majesty and disposed of by that Minister, if the property was derived as the result of the commission of an offence under this Act; and
(b) amounts paid or recovered as a fine imposed under subsection 462.37(3) of the Criminal Code in relation to proceedings for an offence under this Act.[137]

182. Since the end of Second World War, Germany has adopted several laws relative to the indemnification of victims of the war and the Holocaust, such as: the Law on the Equalization of Burdens as amended (1952); the Law for the Compensation of the Victims of National Socialist Persecution as amended (1953); the Federal Restitution Law as amended (1957) which provides for compensation in case restitution was not possible; the Law on the Reparation of Losses as amended (1969); the Law on the Settlement of Open Property Matters as amended (1990); and the Law on Indemnification of Victims of Nazism as amended (1994).[138]

183. In 2000, the German Bundestag (Lower House of Parliament), with the concurrence of the Bundesrat (Upper House of Parliament), adopted the Law on the Creation of a Foundation "Remembrance, Responsibility and Future", thereby establishing a foundation responsible for making payments to entitled claimants and setting maximum amounts to be awarded to different categories

[136] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 30.
[137] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 31.
[138] Germany, *Law on the Equalization of Burdens as amended* (1952); *Law for the Compensation of the Victims of National Socialist Persecution as amended* (1953); *Federal Restitution Law as amended* (1957); *Law on the Reparation of Losses as amended* (1969); *Law on the Settlement of Open Property Matters as amended* (1990); *Law on Indemnification of Victims of Nazism as amended* (1994).

of claimants.[139] The Law states that "the purpose of the Foundation is to make financial compensation available through partner organizations to former forced laborers and those affected by other injustices from the National Socialist period".[140] Eligible for compensation under this Law are the following persons:

1. persons who were held in a concentration camp . . . or in another place of confinement outside the territory of what is now the Republic of Austria or a ghetto under comparable conditions and were subjected to forced labor;
2. persons who were deported from their homelands into the territory of the German Reich within the borders of 1937 or to a German-occupied area, subjected to forced labor in a commercial enterprise or for public authorities there, and held under conditions other than those mentioned in Number 1, or were subjected to conditions resembling imprisonment or similar extremely harsh living conditions;
. . .
3. persons who suffered property loss as a consequence of racial persecution with essential, direct, and harm-causing collaboration of German businesses . . . The partner organizations may also award compensation from the funds provided to them . . . to those victims of National Socialist crimes who are not members of one of the groups mentioned in Sentence 1, Numbers 1 and 2, particularly forced laborers in agriculture . . . The funds provided for in Section 9, Paragraph 4, Sentence 2, Number 2 are intended to compensate property damage inflicted during the National Socialist regime with the essential, direct, and harm-causing participation of German enterprises, but not inflicted for reasons of National Socialist persecution. The funds referred to in Section 9, Paragraph 3, shall be awarded in cases of medical experiments or in the event of the death of or severe damage to the health of a child lodged in a home for children of forced laborers; in cases of other personal injuries they may be awarded.
. . .

(3) Eligibility cannot be based on prisoner-of-war status.[141]

184. Russia's Constitution provides that "the rights of persons who have sustained harm from crimes and abuses of power shall be protected by the law. The state shall guarantee the victims access to justice and compensation for damage" and that "everyone shall have the right to compensation by the state for the damage caused by unlawful actions (or inaction) of state organs, or their officials".[142] Other Russian legislation of relevance to the question of compensation for victims of violations of IHL are: the Law on Rehabilitation of Victims of Political Persecution as amended; the Law on Rehabilitation of the Repressed Nations; the Decree on the Law on Rehabilitation of the Repressed

[139] Germany, *Law on the Creation of a Foundation "Remembrance, Responsibility and Future" as amended* (2000).
[140] Germany, *Law on the Creation of a Foundation "Remembrance, Responsibility and Future" as amended* (2000), Section 2(1).
[141] Germany, *Law on the Creation of a Foundation "Remembrance, Responsibility and Future" as amended* (2000), Section 11.
[142] Russia, *Constitution* (1993), Articles 52 and 53.

Nations in Relation to the Cossacks; the Resolution on Compensation for Persons Having Suffered Nazi Persecution; the Resolution on Return of Property and Compensation for Victims of Political Persecution; and the Resolution on Compensation for Destruction of Property for Citizens Having Suffered from the Settling of the Crisis in Chechnya and Having Left Chechnya Irrevocably.[143]

185. Spain's Military Criminal Code provides that "the State is the civil authority with subsidiary liability for any offences that are committed by members of the armed forces in the line of duty and that are considered as such by the court".[144]

186. Spain's Penal Code provides that:

> The State, the autonomous community, the province, the island, the municipality or another public authority, depending on the case, has subsidiary liability for damage caused by a person who has committed a fraudulent or culpable act, provided that the person in question is a representative, agent or employee of said authority, or an official acting in the line of duty, that the damage caused was a direct consequence of running the public services entrusted to that person, and that there can be no duplication of the compensation awarded. The aforesaid is without prejudice to the liability associated with the normal or faulty functioning of such services, in keeping with the rules of administrative procedure.[145]

The Code also provides that "if the civil liability of a representative, agent or employee of a public authority, or of an official, is being examined in legal proceedings, a claim must be lodged simultaneously against the administration or public authority presumed to have subsidiary liability".[146]

187. Switzerland's Law on (State) Responsibility as amended provides that "the Confederation shall be liable for any damage unlawfully caused to a third party by an official in the exercise of his or her official duties, regardless of the fault committed by the official".[147] It further provides that:

> If the official has committed a fault resulting in death or bodily harm, the competent authority may, taking into consideration the special circumstances of the case, award the victim or the relatives of the victim adequate moral damages.
>
> Whoever suffers unlawful moral injury has the right, if the official has committed a fault, to be paid damages therefor, provided that this is justified by the gravity of the injury and that compensation has not otherwise been given by the official concerned.[148]

[143] Russia, *Law on Rehabilitation of Victims of Political Persecution as amended* (1991); *Law on Rehabilitation of the Repressed Nations* (1991); *Decree on the Law on Rehabilitation of the Repressed Nations in Relation to the Cossacks* (1992); *Resolution on Compensation for Persons Having Suffered Nazi Persecution* (1994); *Resolution on Return of Property and Compensation for Victims of Political Persecution* (1994); *Resolution on Compensation for Destruction of Property for Citizens Having Suffered from the Settling of the Crisis in Chechnya and Having Left Chechnya Irrevocably* (1997).

[144] Spain, *Military Criminal Code* (1985), Article 48.

[145] Spain, *Penal Code* (1995), Article 121.

[146] Spain, *Penal Code* (1995), Article 121.

[147] Switzerland, *Law on (State) Responsibility as amended* (1958), Article 3(1).

[148] Switzerland, *Law on (State) Responsibility as amended* (1958), Article 6.

188. In 1988, the US passed the Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended) containing a Statement of Congress to the effect that:

(a) With regard to individuals of Japanese ancestry
The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II . . . The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made . . .

(b) With respect to the Aleuts
The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, the Aleut civilian residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island were relocated during World War II to temporary camps in isolated regions of southeast Alaska where they remained, under United States control and in the care of the United States, until long after any potential danger to their home villages had passed. The United States failed to provide reasonable care for the Aleuts, and this resulted in widespread illness, disease, and death among the residents of the camps; and the United States further failed to protect Aleut personal and community property while such property was in its possession or under its control. The United States has not compensated the Aleuts adequately for the conversion or destruction of personal property, and the conversion or destruction of community property caused by the United States military occupation of Aleut villages during World War II. There is no remedy for injustices suffered by the Aleuts during World War II except an Act of Congress providing appropriate compensation for those losses which are attributable to the conduct of United States forces and other officials and employees of the United States.[149]

Title I ("United States Citizens of Japanese Ancestry and Resident Japanese Aliens", also known as "Civil Liberties Act") of the Law establishes the Civil Liberties Public Education Fund and, under a provision entitled "Restitution", provides that "the Attorney General shall, subject to the availability of funds appropriated to the Fund for such purpose, pay out of the Fund to each eligible individual the sum of $20,000, unless such individual refuses . . . to accept the payment".[150] Title II ("Aleutian and Pribilof Islands Restitution") establishes the Aleutian and Pribilof Islands Restitution Fund and, under a provision entitled "Compensation for community losses", provides that "subject to the availability of funds appropriated to the Fund, the Secretary shall make payments from the Fund, in accordance with this section, as restitution for certain Aleut

[149] US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Statement of the Congress, Section 1989a.

[150] US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title I, §§ 1989b-3(a) and 1989b-4(a)(1).

losses sustained in World War II".[151] Under a provision entitled "Individual compensation of eligible Aleuts", Title II further provides that "the Secretary shall, in accordance with this section, make per capita payments out of the Fund to eligible Aleuts. The Secretary shall pay, subject to the availability of funds appropriated to the Fund for such payments, to each eligible Aleut the sum of $12,000."[152] With respect to Attu Island, Title II also provides that:

The public lands on Attu Island, Alaska, within the National Wildlife Refuge System have been designated as wilderness . . . In order to make restitution for the loss of traditional Aleut lands and village properties on Attu Island, while preserving the present designation of Attu Island lands as part of the National Wilderness Preservation System, compensation to the Aleut people, in lieu of the conveyance of Attu Island, shall be provided.[153]

189. A provision of the California Code of Civil Procedure as amended dealing with compensation for slave and forced labour states that:

Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.[154]

National Case-law

190. In 1952, the German Administrative Court of Appeal of Münster heard a claim for compensation for injuries suffered by a German national as a result of a road accident with a vehicle belonging to the occupying powers. The Court held that the liability of occupying powers for injuries caused by their personnel was strict and that:

The plaintiff's claim for damages derives not only from public municipal law but also from international law. By virtue of Article 3 of the [1907 Hague Convention (IV)] a State is liable for all acts committed by persons belonging to its armed forces. According to the wide wording of Article 3, which has been chosen in the interests of the protection of the civilian population, fault on the part of the person who has caused the damage is not a prerequisite of liability. It is therefore an undisputed principle of the doctrine of international law that Article 3 provides for the absolute liability of the Occupant in respect of acts committed by members of its armed forces. Within the framework of this absolute liability for which international law provides, a State is under a duty – according to the views of writers on international

[151] US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title II, §§ 1989c-2(a) and 1989c-4(a).
[152] US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title II, § 1989c-5(a).
[153] US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title II, § 1989c-6(a).
[154] US, *California Code of Civil Procedure as amended* (1873), Section 354.6(b).

law which have, however, not yet been universally accepted – to pay compensation for "incorporeal" damage.[155]

191. In the *Reparation Payments case* in 1963 relating to claims for compensation for slave labour during Second World War, Germany's Federal Supreme Court stated that the claims were in the nature of reparations claims and that "with regard to the inextricable connection with the question of reparations under international public law . . . it is not possible to deny the right to compensation based on civil law from the outset".[156] However, the Court held that no decision could be reached on the merits of the claim until there was a final reparations agreement between the plaintiff's government and Germany, as it found that the London Agreement on German External Debts of 27 February 1953 had postponed the question of indemnification of individuals to when the issue of reparations more generally had been settled.[157]

192. In the *Forced Labour case* in 1996, Germany's Constitutional Court held *obiter* that there did not exist a rule of general international law preventing the payment of compensation to individuals for violations of international law. The Court added that it was therefore not prohibited for a State that has violated international law to allow individuals to bring claims for compensation for events during Second World War through its national courts.[158]

193. In the *Distomo case* in 2003 dealing with killings committed by German soldiers in Greece during the Second World War, Germany's Federal Supreme Court stated that, due to a concept of war as a "relationship from State to State" as it existed during the Second World War, a State which was responsible for crimes committed at that time was only liable to pay compensation vis-à-vis another State but not vis-à-vis the individual victims. According to the Court, international law conferred the right upon States to exercise diplomatic protection of their nationals, and the right to claim compensation was the right of the State. With reference to Articles 2 and 3 of the Hague Convention (IV) and declaring the 1907 HR as being directly applicable, it stated that this was true "at least for the period in question", i.e. for the time of the Second World War.[159]

194. A decision of the Court of First Instance of Leivadia in Greece in 1997 related to a claim for compensation against Germany brought by the prefecture of Voiotia and a number of individual claimants. The claims were based on acts – wilful murder and destruction of private property – committed by German occupation forces in June 1944. The Court rejected the German government's assertion of sovereign immunity on the ground that if a State acted in violation

[155] Germany, Administrative Court of Appeal of Münster, *Personal Injuries case*, Judgement, 9 April 1952.
[156] Germany, Federal Supreme Court, *Reparation Payments case*, Judgement, 26 February 1963.
[157] Germany, Federal Supreme Court, *Reparation Payments case*, Judgement, 26 February 1963.
[158] Germany, Second Chamber of the Constitutional Court, *Forced Labour case*, Judgement, 13 May 1996.
[159] Germany, Federal Supreme Court, *Distomo case*, Judgement, 26 June 2003.

of a rule of *jus cogens*, it lost its right to invoke sovereign immunity. As the Court had previously concluded that the rules of IHL relating to belligerent occupation protecting, *inter alia*, the right to life, family honour, property and religious convictions were part of *jus cogens*, it found that Germany could not claim sovereign immunity. Having rejected Germany's claim of immunity, the Court then determined that the suit was lawful under Article 3 of the 1907 Hague Convention (IV) and Article 46 of the 1907 HR. It also considered that, in the absence of a rule of international law prohibiting this, the claims could be made by the plaintiffs in their individual capacity and not necessarily by their State of nationality. It also held that the words "if the case demands" in Article 3 of the 1907 Hague Convention (IV) specifically underlined that material damage must have been caused as a result of the violations of the conventions. The Court then reviewed the claims, rejecting those which lacked sufficient evidence of the property destroyed or of its value, and made awards of compensation in other cases.[160] In May 2000, the Supreme Court upheld the lower court's decisions, basing its conclusion that Germany was not entitled to sovereign immunity both on a finding that there existed a customary "tort law" exception to the doctrine of sovereign immunity and that as the acts in question violated peremptory norms of international law, they did not attract immunity.[161] However, with regard to the same case, the Greek government refused to give its consent necessary for the execution of the judgement against Germany for reasons of State immunity.[162]

195. In the *Shimoda case* in 1963, the first case in which compensation was sought in Japan for violations of the laws of war, the plaintiffs, residents of Hiroshima and Nagasaki in 1945, brought proceedings against the Japanese government on the ground that, by signing the 1951 Peace Treaty with the Allies, it had waived their right to seek compensation from the US for its use of atomic bombs in violation of the laws of war. The plaintiffs argued, *inter alia*, that the government's waiver of their claims obliged the government to pay them compensation itself. The Tokyo District Court ruled that, even though the aerial bombardment was an illegal act of war, individuals could be considered the subjects of rights under international law only in so far as they had been recognised as such in specific instances, such as, for example, in cases of mixed arbitral tribunals. In light of this determination, the Court concluded that "there is in general no way open to an individual who suffers injuries from an act of hostilities contrary to international law to claim damages on the level of international law, except for the cases mentioned above". The Court went on to consider the question of whether the plaintiffs could seek redress before

[160] Greece, Court of First Instance of Leivadia, *Prefecture of Voiotia case*, Judgement, 30 October 1997.

[161] Greece, Supreme Court, *Prefecture of Voiotia case*, Judgement, 4 May 2000.

[162] Greece, Statement before the ECtHR, *Kalogeropoulou and Others case*, Decision on admissibility, 12 December 2002, A; see also Athens News Agency, Justice minister will not sign order to confiscate German properties in Athens, 15 September 2001.

the municipal courts of either of the belligerent parties and concluded that considerations of sovereign immunity precluded proceedings against the US either before Japanese or US courts.[163]

196. In the *Siberian Detainees case* in 1989, Japan's Tokyo District Court dismissed claims of former soldiers and civilian employees who had been detained and put into involuntary labour in Siberia for a long time after the end of Second World War. The claimants were seeking compensation for their labour from Japan as "power on which prisoners of war depend" on the basis of the Geneva Conventions and customary international law, but the Court dismissed the case for a lack of standing.[164] The judgement was upheld on appeal.[165]

197. In the *Apology for the Kamishisuka Slaughter of Koreans case* before Japan's Tokyo District Court in 1996, three Korean plaintiffs claimed compensation for the arrest and execution of their father and brother by the Japanese military police on charges of spying in August 1945. They argued that, as the employer of the military police, Japan was under a duty to provide compensation. The claim was based on the Japanese Civil Code and international law. The Court found that:

> Regarding the existence of international customary law as alleged by the plaintiffs, neither the general practice nor the conviction (*opinio juris*) that the state has a duty to pay damages to each individual when that state infringes its obligations under international human rights law or international humanitarian law can be said to exist. As international customary law as alleged by the plaintiffs cannot be determined, therefore, the plaintiffs' claim based on international law is also without grounds.[166]

The judgement was upheld on appeal in 1996, when the Tokyo High Court approved the statement of the lower court but limited its finding of the absence of a rule of customary law entitling individuals to compensation in the law as it was at the time of the incident. The Court emphasised that:

> When the incident occurred, there was no evidence of any general practice, nor the existence of *opinio juris* that when a State acts in violation of the obligation of international human rights law or international humanitarian law, that State has the responsibility of compensating for damages any individual who was a victim.
>
> Therefore, the international customary law against which the appellants claim did not exist at the time of the incident, and there are no grounds for the allegation of the appellants based upon international law.[167]

[163] Japan, Tokyo District Court, *Shimoda case*, Judgement, 7 December 1963.
[164] Japan, Tokyo District Court, *Siberian Detainees case*, Judgement in Trial of First Instance, 4 April 1989.
[165] Japan, Tokyo High Court, *Siberian Detainees case*, Judgement in Trial of Second Instance, 5 March 1993; Supreme Court, *Siberian Detainees case*, Judgement in Trial of Third Instance, 13 March 1997.
[166] Japan, Tokyo District Court, *Apology for the Kamishisuka Slaughter of Koreans case*, Judgement in Trial of First Instance, 27 July 1995.
[167] Japan, Tokyo High Court, *Apology for the Kamishisuka Slaughter of Koreans case*, Judgement on Appeal, 7 August 1996.

198. In 1998, Japan's Tokyo District Court considered three further cases in which groups of individuals sought compensation from the government of Japan for violations of IHL: the *Ex-Allied Nationals Claims case*, the *Dutch Nationals Claims case* and the *Filippino "Comfort Women" Claims case*. The first two cases dealt with claims of former POWs and civilian internees, the third with claims of Filippino women who were allegedly assaulted, confined and raped as "comfort women" during the Japanese occupation of the Philippines during Second World War. The cases were based principally on Article 3 of the 1907 Hague Convention (IV) and customary international law. The Court dismissed all three cases for lack of standing by the individuals. The Court reviewed the precise wording of Article 3 of the 1907 Hague Convention (IV) and concluded that it did not specify the methods for enforcing liability for violations nor provided that individuals had a right to claim compensation against a State in national courts. Having reached this conclusion on the basis of the language of Article 3 of the 1907 Hague Convention (IV), the Court pointed out that international law only exceptionally recognised the right of individuals to enforce their rights under international law directly and that usually this had to be done by their State of nationality by means of diplomatic protection. The Court confirmed this conclusion by a review of the drafting history of Article 3 of the 1907 Hague Convention (IV) and of its application by other States, and concluded that Article 3 could not be interpreted so as to provide a right to individuals who had suffered damages because of violations of the laws of war to bring direct claims for compensation against the violating State in domestic courts.[168] In the *Filippino "Comfort Women" case*, the Court stated that:

> To summarize, according to the ordinary meaning to be given to the terms in their context, Article 3 of the Hague Convention cannot be understood as a clause that entitles individual victims to bring a claim for compensation directly against a wrongdoing State. Accordingly, it is impossible to recognize that the article is a codification of a rule of customary international law.

Having considered the reconfirmation of the principle of Article 3 of the 1907 Hague Convention (IV) since Second World War, the Court further stated that:

> Consequently, throughout its close examination of texts and the drafting process of Article 3 of the Hague Convention, the Court has been unable to recognize the alleged rule of customary international law that provides individual residents in an occupied territory the right to claim compensation directly against the occupying State for damages resulting from a violation of the Hague Regulations committed by members of the occupying forces.

[168] Japan, Tokyo District Court, *Ex-Allied Nationals Claims case*, Judgement, 26 November 1998; *Dutch Nationals Claims case*, Judgement, 30 November 1998; *Filippino "Comfort Women" Claims case*, Judgement, 9 October 1998.

In addition, throughout its careful survey of all records of the case, the Court was unable to find any rule of customary international law apart from Article 3 of the Hague Convention that provides the principle mentioned above.[169]

199. In the *Zhang Baoheng and Others case* in 2002, Japan's Fukuoka District Court awarded US$ 1.29 million to 15 Chinese men who had been forced to work in Japan during Second World War and who had filed a lawsuit against the Japanese government and a mining company for compensation and a public apology. The Court ruled that the company should be held liable, but not the Japanese government, finding that the company and the government "jointly committed an illegal act" but that the Constitution barred the Court from ordering the government to pay compensation.[170]

200. In the *Ko Otsu Hei Incidents case* in 1998, Japan's Yamaguchi Lower Court ordered the Japanese government to pay 300,000 yen each to three South Korean "comfort women" for their enforced prostitution during Second World War. It considered that the acts in question constituted severe violations of human rights and human dignity on the basis of the sex and race of the plaintiffs. As the Japanese government had been aware of the violations but had not adopted legislation to compensate the plaintiffs, it was at fault and in violation of the Constitution. The Court rejected the claim for an official apology from the Japanese government before the Japanese parliament and the UN General Assembly on the ground that it did not have jurisdiction to make such orders. Regarding the claims of Korean women who had worked as slave labourers in Japanese factories during the war, the Court found that, unlike the situation of the "comfort women", the suffering of the forced labourers was not so great when compared to the hardships suffered by members of the civilian population generally during the war as to have required the Japanese government to adopt legislation to compensate them. The Court added that the labourers' claim was within the scope of war reparation, responsibility for which was vested in the executive and the legislature and not the courts.[171] However, in March 2001, the Hiroshima High Court reversed the 1998 judgement and dismissed the claims for the reasons that the Japanese Constitution did not oblige the State to apologize or to legislate laws concerning the compensation as such. Referring to the State's obligation to compensate for its omission, which had been admitted at the trial of first instance, the Court stated that a decision on the modalities of post-war compensation was a policy decision within the discretionary power of the legislature. However, it stated that "considering the serious damage the applicants have suffered, we understand their dissatisfaction caused by the State's omission of legislation".[172]

[169] Japan, Tokyo District Court, *Filippino "Comfort Women" Claims case*, Judgement, 9 October 1998.
[170] Japan, Fukuoka District Court, *Zhang Baoheng and Others case*, Judgement, 26 April 2002.
[171] Japan, Yamaguchi Lower Court, *Ko Otsu Hei Incidents case*, Judgement, 27 April 1998.
[172] Japan, Hiroshima High Court, *Ko Otsu Hei Incidents case*, Judgement, 29 March 2001.

201. In the *Khamzaev case* in 2001, a Russian District Court rejected the claim of a private person against the Russian government for material and moral compensation for the damages sustained in the aerial bombardment of Urus-Martan in October 1999 by Russian aviation. During the trial, the government denied that bombings had taken place in the relevant part of the town. However, the representative of the Ministry of Finance of the Russian Federation declared that:

> We think that the damage was caused by the Federal armed forces. The house was destroyed. But, if the generals assert that they had not given the order to attack residential areas of Urus-Martan, then the pilot(s) exceeded the limits of the order. Hence, there are no grounds for compensation for damages from the State treasury.[173]

202. In its judgement in the *Spring case* in 2000 dealing with the claim of a Jewish Auschwitz survivor against the Swiss Confederation for 100,000 Swiss francs in compensation for having been handed over, in November 1943, to German troops by Swiss border guards, Switzerland's Federal Court referred to a possible right to compensation on the ground of Switzerland's Law on (State) Responsibility as amended. It stated, however, that, as a condition for the applicability of this law, the right to compensation would not have to be barred by statutes of limitation or by laches. The Federal Court, stating that the claimant based his right to compensation, *inter alia*, on the alleged illegal handing over to the German authorities which he had qualified as complicity in genocide, referred to Article 75(1) *bis* of the Swiss Penal Code and Article 56 *bis* of the Swiss Military Criminal Code. It stated that even under these provisions, which excluded the applicability of statutes of limitation to, *inter alia*, genocide and grave breaches of the Geneva Conventions or other international agreements on the protection of victims of war if the offence was particularly serious given the circumstances, the alleged criminal acts were barred. The Federal Court also referred to the principle according to which statutes of limitation under penal law could also be applicable to the right under civil law. It further stated that the claim was also barred by statutes of limitation under (the applicable national) public law. Therefore, in the merits, the Federal Court dismissed the claim. Nevertheless, it awarded the claimant 100,000 Swiss francs in compensation for the procedural costs.[174]

203. In the *Goldstar case* in 1992, a US Court of Appeals rejected a claim brought against the US government by Panamanian nationals whose business establishments had been looted during the US intervention in Panama. The plaintiffs argued, *inter alia*, that Article 3 of 1907 Hague Convention (IV) provided them with a remedy which could be enforced before the US courts and that the US had waived its sovereign immunity under this self-executing

[173] Russia, Basmanny District Court, *Khamzaev case*, Judgement, 11 May 2001.
[174] Switzerland, Federal Court, *Spring case*, Judgement, 21 January 2000.

provision. The Court rejected this argument, holding that the Hague Convention was not self-executing and stating that:

> International treaties are not presumed to be self-executing . . . Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action . . . The Hague Convention does not explicitly provide for a privately enforceable cause of action. Moreover, we find that a reasonable reading as a whole does not lead to the conclusion that the signatories intended to provide such a right.[175]

204. In the *Princz case* in 1992 in which the plaintiff had brought an action for damages against Germany based on his internment by the Nazi regime during Second World War, a US District Court affirmed its subject matter jurisdiction and rejected the claim of sovereign immunity by Germany. It held that Germany was stopped from relying on State immunity and that:

> Under the circumstances of this case, a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law [i.e. immunity under the Foreign Sovereign Immunities Act of 1976] to block the citizen in his effort to vindicate his rights. In such a case, Plaintiff has a right to have his claim heard by a U.S. court.[176]

However, in 1994, the decision of the District Court was overruled by the Court of Appeals which held that "none of the exceptions to sovereign immunity provided in the [Foreign States Immunity Act of 1976] applies to the facts alleged by [the plaintiff]". It therefore dismissed the claim for lack of jurisdiction.[177] In his dissenting opinion, one of the judges stated that he believed that "Germany's treatment of [the plaintiff] violated *jus cogens* norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit".[178]

205. In the *Mochizuki case* in 1998, a class action brought by Latin American nationals of Japanese ancestry who had been arrested in various Latin American countries during Second World War and who had been brought to the US and interned, and who were not entitled to benefit from the terms of the 1988 Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended) because they were not US nationals, the US Court of Federal Claims preliminarily approved the settlement agreement entered by the parties shortly before which grants each member of the group of plaintiffs US$ 5,000 in

[175] US, Court of Appeals (Fourth Circuit), *Goldstar case*, Judgement, 16 June 1992.
[176] US, District Court for the District of Columbia, *Princz case*, Judgement, 23 December 1992.
[177] US, Court of Appeals for the District of Columbia, *Princz case*, Judgement, 1 July 1994. This conclusion was based on the retrospective application of the Foreign Sovereign Immunities Act. The Court also concluded that if the Act were considered not to apply retrospectively it would lack jurisdiction in any event because the type of claim in question was not within the post-Act jurisdiction of District Courts.
[178] US, Court of Appeals for the District of Columbia, *Princz case*, Dissenting opinion of Judge Wald, 1 July 1994.

compensation to be paid by the US.[179] In its final order of 1999, the same Court stated that "the Settlement Agreement executed by the parties on June 10, 1998, is adjudged to be fair, reasonable, and adequate, and its terms are hereby approved".[180]

206. In July 1999, Barclays Bank, having been sued before a US District Court along with various other banks with branches, operations or predecessors in France during Second World War by families of Jewish customers in France who had lost their assets during the German occupation, agreed to the so-called Barclays French Bank Settlement which provided for the establishment of a US$ 3,612,500 fund to compensate the victims.[181] The US District Court approved the Settlement Agreement.[182]

207. In 2000, J. P. Morgan agreed to settle compensation claims by the so-called J. P. Morgan Settlement Agreement which provided for the establishment of a settlement fund of US$ 2,750,000 to compensate Jewish victims of the Holocaust who had seen their bank accounts seized during Second World War in France.[183] The Settlement Agreement was approved by the US District Court.[184]

208. In the *Holocaust Victims Assets case* in 2000, a US District Court approved a class-action Settlement Agreement between Holocaust victims and Swiss banks agreed in August 1998, finding it fair, reasonable and adequate. The Agreement set up a US $1.25 billion fund to be created in four annual instalments over three years. In addition, it released, with few exceptions, "the Swiss Confederation, the Swiss National Bank, all other Swiss banks, and other members of Swiss industry". In its final order and judgement of 2000, the District Court approved the Settlement Agreement.[185]

209. In the *Comfort Women case* in 2001 dealing with the claim of 15 Asian women seeking compensation from Japan for having been used, during Second World War, by Japanese military as so-called "comfort women", a US District Court dismissed the complaint for lack of subject matter jurisdiction and, additionally, nonjusticiability on the ground of the political question doctrine.

[179] US, Court of Federal Claims, *Mochizuki case*, Settlement Agreement, 10 June 1998; Order Granting Preliminary Approval of Settlement Agreement, 11 June 1998, § 3.

[180] US, Court of Federal Claims, *Mochizuki case*, Opinion and Order, 25 January 1999, § 2.

[181] US, District Court of the Eastern District of New York, *Barclays French Bank Settlement case*, Settlement Agreement, 8 July 1999.

[182] US, District Court of the Eastern District of New York, *Barclays French Bank Settlement case*, Preliminary Order, 10 April 2000, and Supplemental Order, 4 June 2001; Notice of pendency of class action, proposed settlement of class action and settlement hearing, 4 June 2001.

[183] US, District Court of the Eastern District of New York, *J. P. Morgan French Bank Settlement case*, Settlement Agreement, 29 September 2000.

[184] US, District Court of the Eastern District of New York, *J. P. Morgan French Bank Settlement case*, Preliminary Order, 10 April 2000 and Supplemental Order, 4 June 2001; Notice of pendency of class action, proposed settlement of class action and settlement hearing, 4 June 2001.

[185] US, District Court for the Eastern District of New York, *Holocaust Victims Assets case*, Memorandum and Order, 26 July 2000; Final Order and Judgement approving the Settlement Agreement, 9 August 2000.

It stated, however, that "for [these] reasons, this court is unable to provide plaintiffs the redress they seek and surely deserve".[186]

Other National Practice

210. In 1988, the Canadian government concluded an agreement with the National Association of Japanese Canadians, the so-called Japanese-Canadian Redress Agreement, under which the government officially acknowledged that the forced removal and internment of Canadian nationals of Japanese descent during Second World War was unjust and violated human rights. The Agreement also provided that:

> As symbolic redress for those injustices, the Government offers:
> a) [CAN]$21,000 individual redress, subject to application by eligible persons of Japanese ancestry who, during this period, were subjected to internment, relocation, deportation, loss of property or otherwise deprived of the full enjoyment of fundamental rights and freedoms based solely on the fact that they were of Japanese ancestry; each payment would be made in a tax-free lump sum, as expeditiously as possible;
> b) [CAN]$12 million to the Japanese-Canadian community, through the National Association of Japanese Canadians, to undertake educational, social and cultural activities or programmes that contribute to the well-being of the community or that promote human rights;
> c) [CAN]$12 million, on behalf of Japanese Canadians and in commemoration of those who suffered these injustices, and matched by a further $12 million from the Government of Canada, for the creation of a Canadian Race Relations Foundation that will foster racial harmony and cross-cultural understanding and help to eliminate racism.
> . . .
> f) to provide, through contractual arrangements, up to [CAN]$3 million to the National Association of Japanese Canadians for their assistance, including community liaison, in administration of redress over the period of implementation.[187]

211. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Canada deduced the illegality of Iraq's conduct of war from the fact that "a mechanism had been put in place [by the relevant UN Security Council resolutions] to obtain compensation for the damage done and the clean-up involved".[188]

212. In 1991, in its official report on violation of human rights during the military regime, Chile's National Commission for Truth and Reconciliation recommended that reparations be paid by the State in respect of disappearances,

[186] US, District Court of Columbia, *Comfort Women case*, Memorandum Opinion and Judgement, 4 October 2001.

[187] Canada, Prime Minister, *Agreement between the Government of Canada and the National Association of Japanese Canadians (Japanese-Canadian Redress Agreement)*, 22 September 1988.

[188] Canada, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 11.

and concluded that Chile should grant the families of disappeared persons a pension for life as material recompense.[189]

213. In its views and comments on the 1997 Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law – as they were then called – Chile stated that "it seems appropriate to include in the set of basic principles and guidelines a specific provision establishing the State's immediate, direct liability for compensation, without prejudice to its right to attempt to recover from the offenders the amount paid".[190]

214. In 1955, the Chinese Minister of Foreign Affairs stated that:

> During the war in which Japanese militarists invaded China, millions of Chinese people were killed, Chinese public and private property worth billions of dollars was damaged, thousands of Chinese people were forcibly moved to Japan and were enslaved and killed. The Japanese Government should understand that the Chinese people have the right to ask the Japanese Government to compensate for all the damages suffered by the Chinese people.[191]

215. In 1979, a special committee set up by the government of El Salvador to investigate the whereabouts of missing persons recommended that action be taken to compensate the families of missing political prisoners whose deaths could be either confirmed or presumed. The Ministry of the Presidency consequently announced that the families would be compensated.[192]

216. In 1999, the French government created by a decree a "Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation" (also known as "Commission Drai").[193] Furthermore, in 2000, the French government established a special compensation programme for orphans whose parents were victims of anti-Semitic persecution.[194]

[189] Chile, National Commission for Truth and Reconciliation, Official Report on Violations of Human Rights During the Military Regime, *International Commission of Jurists Review*, No. 46/1991, p. 6.

[190] Chile, Views and Comments on the note and revised Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, 7 October 1997, UN Doc. E/CN.4/1998/34, 22 December 1997, § 21.

[191] China, Minister of Foreign Affairs, Statement on the issue of so-called withdrawal of Japanese Nationals in China put forward by the Japanese Government, 16 August 1955, *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 3, pp. 338–339.

[192] IACiHR, *Annual Report 1979–1980*, Doc. OEA/Ser.L/V/II.50 Doc. 13 rev.1, 2 October 1980, p. 138.

[193] France, First Minister and other ministries, Decree No. 99-778 Creating a Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in force during the Occupation, 10 September 1999, *Journal Officiel de la République française*, No. 211, 11 September 1999, p. 13633.

[194] France, First Minister and other ministries, Decree No. 2000-657 Establishing a Special Compensation Program for Orphans whose Parents were Victims of Anti-Semitic Persecution, 13 July 2000, *Journal Officiel de la République française*, No. 162, 14 July 2000, p. 10838.

217. In 1951, the German Chancellor made a declaration before the German Bundestag (Lower House of Parliament), which was then endorsed by this body. The declaration stated that:

However, unspeakable crimes have been committed in the name of the German people, crimes that impose a duty to make moral and material amends, both as regards the individual damage that Jews have suffered and as regards Jewish property for which individual claimants no longer exist . . . The Federal Government is prepared to work with representatives of Jews and the State of Israel, which has received so many homeless Jewish refugees, to find a solution to the problem of making amends in a material sense.[195]

218. In 1995, the German government, in reply to a question from members of the Lower House of Parliament with regard to payments in reparation for Greek victims of the German National Socialist regime, stated that:

With regard to a concluding settlement of the claims of Greece resulting from National Socialist measures of persecution against Greek nationals who have suffered damages to their freedom and health, the Federal Republic of Germany has paid, on the basis of the treaty of 18 March 1960 "concerning obligations in favour of Greek nationals who were concerned by national socialist measures of persecution", DM 115 million.[196]

219. In 1995, the German government, in reply to a question from members of the Lower House of Parliament regarding the amount of payments made by the FRG in compensation to former East and West European inmates of concentration camps, stated that "including . . . payments in the field of reparations through the social insurance, the total amount of payments up to now are significantly more than DM100 billion".[197]

220. In 1996, in a letter to the UN Secretary-General, Iraq reported that "a number of United States warplanes dropped 10 heat flares in the Saddam Dam area of Ninawa Governorate in northern Iraq" and affirmed "the legally established right of the Republic of Iraq to seek compensation for the damage caused by these unwarranted actions by the United States, in accordance with the principle of international responsibility".[198]

221. In 1998, during a debate in the Fifth Committee of the UN General Assembly in which several States had referred to a resolution of the General Assembly

[195] Germany, Lower House of Parliament, Declaration by the Federal Chancellor entitled "Germany is obliged to make moral and material amends", *BT-Drucksache* 6697, 27 September 1951.

[196] Germany, Lower House of Parliament, Reply by the Government to a question on payments in compensation for victims of the National Socialist regime from Greece, *BT-Drucksache* 13/2878, 7 November 1995, p. 2.

[197] Germany, Lower House of Parliament, Response by the federal government to a question from members of parliament on payments made by the Federal Republic of Germany in compensation to the US citizen and survivor of the concentration camp Mr Hugo Princz, *BT-Drucksache* 13/3190, 4 December 1995. p. 3.

[198] Iraq, Letter dated 14 August 1996 to the UN Secretary-General, UN Doc. S/1996/657, 14 August 1996.

and stated that Israel was obliged to pay the costs resulting from its attack on the UNIFIL compound at Qana, Israel replied that "defensive military operations against terrorists who had shamelessly used a UNIFIL outpost as cover for their provocative attacks had been, and continued to be, justified and necessary".[199]

222. In an exchange of letters in 1951 between the Minister of Foreign Affairs of the Netherlands, Dirk U. Stikker, and the Prime Minister of Japan, Shigeru Yoshida, with respect to Japan's occupation of the Dutch East Indies and the 1951 Peace Treaty for Japan it is stated that:

> The Government of Japan does not consider that the Government of the Netherlands by signing the [1951 Peace Treaty for Japan] has itself expropriated the private claims of its nationals so that, as a consequence thereof, after the Treaty comes into force these claims would be non-existent.[200]

223. In 1998, the South Korean government established a trust fund to provide compensation to 155 women used as sex slaves by the former Japanese Imperial Army. The South Korean government indicated that it planned to collect the value of the fund (5 million yen) as compensation from the Japanese government.[201]

224. In a memorandum issued in 1994 on "practical means to fully support international humanitarian law and apply its rules", the Kuwaiti Ministry of Justice stated that a belligerent was "responsible for the acts committed by its armed forces' personnel, and [obliged] to make up for these damages, and pay compensation for wrongful acts".[202]

225. According to the Report on the Practice of Kuwait, Kuwait has demanded compensation for the damage to its environment during the Gulf War. The report further states that it is Kuwait's *opinio juris* that States which cause damage to the environment are under a duty to remedy such damage.[203]

226. In 1998, during a debate in the Fifth Committee of the UN General Assembly, Lebanon, speaking on behalf of the Group of Arab States, stated that:

> [The Group of Arab States] wished to convey their regret and displeasure at the fact that Israel had failed to meet its obligation, under paragraph 8 of General Assembly resolution 51/233, to pay the sum of US$ 1,773,618 to cover the costs resulting from its attack on the UNIFIL compound at Qana in 1996. The international community,

[199] Israel, Statement before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/52/SR.62, 18 May 1998, § 67.

[200] Japan and the Netherlands, Exchange of letters between the Minister of Foreign Affairs of the Netherlands, Dirk U. Stikker, and the Prime Minister of Japan, Shigeru Yoshida, 6–7 September 1951.

[201] "Seoul to compensate 'comfort women', get refund from Tokyo", BBC News, 11 March 1998.

[202] Kuwait, Ministry of Justice, Memorandum concerning the discussion of practical means to fully support international humanitarian law and apply its rules, 5 June 1994.

[203] Report on the Practice of Kuwait, 1997, Chapter 4.4.

as represented in the General Assembly, should compel Israel to pay the costs in question.[204]

227. At the CDDH, Mexico, with respect to Article 91 AP I, stated that "the article did not rule out the possibility of a State incurring liability, and consequently being required to pay compensation, if it had not taken steps to prevent its nationals from committing the offences covered by the Geneva Conventions, Protocol I and its domestic legislation".[205]

228. When in 1996 the question of whether victims of violations of IHL could seek compensation from Japan was raised in the Dutch parliament, the government of the Netherlands stated that it could not claim financial compensation from Japan for damage incurred during the occupation of the former Dutch East Indies because of the 1951 Peace Treaty for Japan and the 1956 Yoshida-Stikker Protocol. The government added that its position would be the same even in the event of an individual invoking the international law rules regulating compensation for damage caused by war.[206]

229. In 1998, the Norwegian Ministry of Justice drafted a White Paper for parliament with the conclusion that in addition to an official apology to Norwegian Jewry, the government should pay out 450 million Norwegian Kroner in settlement of anti-Jewish measures such as confiscation of Jewish property taken by the Nazi occupation authorities and the Quisling regime during Second World War. This amount reflected the share of the total loss that was confiscated by the Norwegian treasury during Second World War. On 11 March 1999, the White Paper was unanimously adopted by all political parties in parliament. The compensation was divided into two main categories: individual compensation, the fixed sum of 200,000 Norwegian Kroner (US$28,000) to be given to those persons in Norway who suffered from anti-Jewish measures during the war; and collective compensation of 250 million Norwegian Kroner (US$35 million) to be divided among Jewish communities in Norway. Under the White Paper, contributions were also to be made to establish a research centre for Holocaust studies and minority research in Norway.[207]

230. In 1970, during a debate in the Special Political Committee of the UN General Assembly on measures carried out by Israel in the occupied territories, Poland stated that:

[204] Lebanon, Statement on behalf of the Group of Arab States before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/52/SR.62, 18 May 1998, § 63. This statement was endorsed by Saudi Arabia (§ 64), Indonesia (§ 66), and Egypt (§ 72).

[205] Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344, § 23.

[206] Netherlands, Lower House of Parliament, Reply by the Minister of Public Health to a question in parliament, 1996–1997 Session, Appendix, Doc. 1031, pp. 2107–2108.

[207] Norway, Ministry of Justice and the Police, White Paper No. 82 to the Storting, "Historical and moral settlement for the treatment in Norway of the economic liquidation of the Jewish minority during World War II", 26 June 1998, approved by The King in Council on 26 June 1998, *Stortingsproposisjon* No. 82 (1997–1998).

The destruction of houses and the confiscation of property, which were designed to demoralize the inhabitants of certain areas and to force them to abandon their homes, were in violation of the basic principles of international law and contrary to the provisions of article 46 of the [1907 HR] and article 53 of the fourth Geneva Convention. Since such acts were illegal, the Government of Israel was liable for full compensation for destroyed property.[208]

231. The Report on the Practice of Russia notes that a number of victims of the conflict in Chechnya have filed claims and "are entitled to get a reimbursement for their homes demolished by federal troops, *i.e.*, for the lost property".[209]

232. In 1996, during the preparatory work in the Rwandan parliament on a law for the punishment of acts of genocide and crimes against humanity in 1996, the issue of the responsibility of the State and the duty to compensate victims was raised. The government spokesman declared that the Rwandan State recognised its responsibility and that a compensation scheme had been adopted.[210]

233. In its final report in 1997, the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, established by the Sri Lankan government, recommended that:

(i) Expeditious payment of fair and adequate compensation be made to dependants of disappeared persons within a time-frame in all the districts. Such payment should cover dependants of employees of the public sector, corporations and other state-owned institutions. The idea of introducing a new tax similar to the Defence Levy may be considered in order to generate funds for this purpose.

(ii) A scheme to provide monetary assistance to affected families who had suffered loss and damage to property be initiated. A forum be created to receive complaints of successors of disappeared persons.

(iii) Legislative provision be made exempting whatever amount paid as compensation for being made the subject matter of a civil claim and seizure.[211]

234. In its final report in 1997, the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces, established by the Sri Lankan government, noted that:

The Commission has worked out a Compensation Scheme in accordance with the circular issued by the Ministry of Public Administration No. 21/88 of 13th July, 1988 and this is only a token of the concern of the Government for deprivation

[208] Poland, Statement before the Special Political Committee of the UN General Assembly, UN Doc. A/SPC/SR.748, 10 December 1970, § 9.

[209] Report on the Practice of Russia, 1997, Chapter 6.2.

[210] Rwanda, Travaux préparatoires of the Parliamentary Committees on the organic law of 30 August 1996, Report of the meeting of 9 July 1996 (original in Kinyarwanda), p. 54, Report on the Practice of Rwanda, 1997, Chapter 6.2.

[211] Sri Lanka, Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Final report, Sessional Paper No. V – 1997, September 1997, Chapter 14, Section I(1).

suffered by the affected families. Money in any quantity will not compensate the absence of the bread-winner, the love of the father, the duty of the son for the family. But money helps in some way to cushion the blow.[212]

235. In 1998, during a debate in the Fifth Committee of the UN General Assembly, Syria stated that:

Israel's financial obligations under General Assembly resolution 51/233 represented only a minute part of the consequences of the Israeli attack on the UNIFIL compound at Qana, and were nothing compared with the lives of the victims, namely the United Nations soldiers and the Lebanese civilians seeking protection at the compound. In accordance with the principles of international law, Israel . . . must be forced to comply with resolution 51/233 so as to avoid establishing a precedent.[213]

236. The Report on the Practice of Syria asserts that Syria considers Article 91 AP I to be part of customary international law.[214]

237. In 1991, during a debate in the House of Commons on the subject of compensation for Allied POWs in the hands of Japan during Second World War, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, referring to Articles 14 and 16 of the 1951 Peace Treaty for Japan, stated that:

The [1951 Peace Treaty for Japan] contained a specific provision for compensation for prisoners of war. We had insisted on that provision, which had not been included in the original treaty, because we thought it important that the treaty should recognise the cruel and barbaric treatment to which allied service men in the far east had been subjected . . . No one could dispute that the issue of compensation was crucial . . . From the disposal of Japanese property within its jurisdiction, the United Kingdom received just over £3 million. The United Kingdom's share of the £4.5 million that the Japanese Government placed at the disposal of the International Red Cross in accordance with article 16 of the treaty was just over £1.6 million.

It was agreed in a minute between the Japanese and the allied powers that the payment of the £4.5 million would be recognised as a full discharge by the Japanese Government of their obligations under article 16 of the peace treaty . . . I sympathise with my right hon. Friend's contention that the settlement was unsatisfactory but . . . the provisions of the treaty remove any possibility of the British Government claiming further compensation or reparations from the Japanese Government.[215]

238. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, the US maintained that:

[212] Sri Lanka, Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces, Final report, Sessional Paper No. VII – 1997, September 1997, Chapter 10, Section G.

[213] Syria, Statement before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/52/SR.62, 18 May 1998, § 65.

[214] Report on the Practice of Syria, 1997, Chapter 6.2.

[215] UK, House of Commons, Statement by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, 6 June 1991, *Hansard*, Vol. 192, cols. 479–82.

Under Security Council resolution 687 (1991), Iraq was financially liable for the environmental damage it had caused. Thus, existing international law not only prohibited the type of acts committed by Iraq, but also provided important remedies to address and deter such acts, in particular with respect to . . . official financial liability.[216]

239. In 1996, the US, with regard to funding provided by the US Agency for International Development (USAID) for the construction of a new hospital and satisfactory compensation in favour of petitioners before the IACiHR who had allegedly suffered an US military aircraft attack on an asylum in Grenada, formally noted:

its long-standing position that its actions were entirely in conformance with the law of armed conflict, and that therefore the US had no legal liability for any damages claimed. For these reasons, the US categorically rejects as inaccurate and misleading the petitioners' statement as an alleged settlement of this case and compensation paid in this matter.[217]

240. In a concurrent resolution adopted in 2000 concerning the war crimes committed by the Japanese military during Second World War, the US Congress expressed its sense that:

the Government of Japan should –

. . .

(2) immediately pay reparations to the victims of those crimes, including United States military and civilian prisoners of war, survivors of the "Rape of Nanjing" from December, 1937, until February, 1938, and the women who were forced into sexual slavery and known by the Japanese military as "comfort women".[218]

241. According to media reports, in October 1999, the President of Zimbabwe apologised for the atrocities committed by the Five Brigade army unit which killed an estimated 25,000 people in an opposition stronghold during the civil war in the early 1980s and announced that the government was ready to compensate the families of the victims.[219]

III. Practice of International Organisations and Conferences

United Nations

242. In a resolution adopted in 1976 on South Africa's military activities against Angola, the UN Security Council called upon the government of South Africa

[216] US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 39.

[217] US, Note for the record of the IACiHR concerning *Case 9213* (US), referred to in IACiHR, Report No. 3/96, Doc. OEA/Ser.L/V/II.91 Doc. 7, 1 March 1996, p. 201.

[218] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

[219] "Zimbabwe – Mugabe offers compensation for 25,000 civil war killings", *The Independent*, 19 October 1999.

"to meet the just claims of the People's Republic of Angola for a full compensation for the damage and destruction inflicted on its State".[220]

243. In a resolution adopted in 1979 following an incursion into Zambia of troops from southern Rhodesia, the UN Security Council called for "the payment of full and adequate compensation to the Republic of Zambia by the responsible authorities for the damage to life and property resulting from the acts of aggression".[221]

244. In a resolution adopted in 1980, the UN Security Council, after recalling the applicability of GC IV "to the Arab territories occupied by Israel since 1967, including Jerusalem" and, in particular, Article 27 thereof, condemned "the assassination attempts on the lives of the mayors of Nablus, Ramallah and Al Bireh" and called upon Israel "to provide the victims with adequate compensation for the damages suffered as a result of these crimes".[222]

245. In a resolution adopted in 1982 on South Africa's military actions against Lesotho, the UN Security Council demanded "the payment by South Africa of full and adequate compensation to the Kingdom of Lesotho for the damage to life and property resulting from [its] aggressive act".[223]

246. In a resolution adopted in 1985 on South Africa's military activities against Angola, the UN Security Council stated that Angola should be entirely and adequately compensated for the loss of human life and the material damages resulting from the acts of aggression of South Africa. It decided to appoint a Commission of Investigation comprised of three members of the Security Council to evaluate the damage resulting from the invasion of Angola by South African forces.[224]

247. In Resolution 687 adopted in 1991 in the context of the Iraqi invasion and occupation of Kuwait, the UN Security Council decided:

> to create a fund to pay compensation for claims [resulting from its liability "under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait"] and to establish a commission that will administer the fund.[225]

248. By Resolution 692 adopted in 1991, the UN Security Council, "acting under Chapter VII of the Charter of the United Nations", decided "to establish the Fund and Commission referred to in paragraph 18 of resolution 687 (1991) in accordance with Part I of the Secretary-General's report", i.e. the United

[220] UN Security Council, Res. 387, 31 March 1976, § 4; see also Res. 475, 27 June 1980, § 6, Res. 546, 6 January 1984, § 7 and Res. 567, 20 June 1985, § 4.
[221] UN Security Council, Res. 455, 23 November 1979, § 5.
[222] UN Security Council, Res. 471, 5 June 1980, §§ 1 and 3.
[223] UN Security Council, Res. 527, 15 December 1982, § 2; see also Res. 572, 30 September 1985, § 4 and Res. 580, 30 December 1985, § 2.
[224] UN Security Council, Res. 571, 20 September 1985, §§ 6 and 7.
[225] UN Security Council, Res. 687, 3 April 1991, §§ 16 and 18.

Nations Compensation Fund and the United Nations Compensation Commission (UNCC).[226] Although the UNCC deals principally with losses arising from Iraq's unlawful use of force, it is also responsible for awarding compensation for violations of IHL suffered by individuals.[227]

249. In Resolution 827 of May 1993 establishing the ICTY, the UN Security Council decided that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law".[228]

250. In a resolution adopted in 1996, the UN General Assembly condemned "the Israeli military attacks against the civilian population in Lebanon, especially against the United Nations base at Qana, which violate the rules of international humanitarian law pertaining to the protection of civilians" and stated that "Lebanon is entitled to appropriate redress for the destruction it has suffered and that Israel is responsible for such compensation".[229]

251. In a resolution adopted in 1997 concerning, *inter alia*, the attack by Israel against the UNIFIL compound in Qana, the UN General Assembly decided that "the total amount mentioned . . . above, namely 1,773,618 dollars [i.e. the amount to cover the costs resulting from the incident at the headquarters of the Force at Qana on 18 April 1996], shall be borne by Israel".[230]

252. In 2001, the UN General Assembly adopted a resolution entitled "Responsibility of States for internationally wrongful acts", to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 36 entitled "Compensation", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[231]

253. In a resolution on Sudan adopted in 1995, the UN Commission on Human Rights called:

> once more upon the Government of the Sudan to ensure a full and thorough investigation by the independent judicial inquiry commission of the killings of Sudanese employees of foreign relief organizations, to bring to justice those responsible for the killings and to provide just compensation to the families of the victims.[232]

[226] UN Security Council, Res. 692, 20 May 1991, preamble and § 3.
[227] See, e.g., UNCC, Governing Council, Decision 3: Personal injury and mental pain and anguish, 18 October 1991, UN Doc. S/AC.26/1991/3, 23 October 1991; Decision 11: Eligibility for compensation of members of the Allied Coalition Armed Forces, 26 June 1992, UN Doc. S/AC.26/1992/11, 26 June 1992.
[228] UN Security Council, Res. 827, 25 May 1993, § 7.
[229] UN General Assembly, Res. 50/22 C, 25 April 1996, §§ 3 and 7.
[230] UN General Assembly, Res. 51/233, 13 June 1997, §§ 7 and 8.
[231] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[232] UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 17.

254. In a resolution adopted in 1993 on the situation in Peru, the UN Sub-Commission on Human Rights, after condemning the violations of human rights by the Sendero Luminoso (Shining Path) and the MRTA, and regretting the violations of human rights "by some members of the forces of law and order", urged the Peruvian authorities "to compensate the victims of such [human rights] violations".[233]

255. In a resolution adopted in 1995, the UN Sub-Commission on Human Rights called "for the individuals implicated in the war crimes, crimes against humanity and genocide in Rwanda who have already been identified to be punished in order to guarantee the victims or their heirs fair compensation in accordance with the principles of international law".[234]

256. In a resolution adopted in 1998 on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the UN Sub-Commission on Human Rights reiterated that "States must respect their international obligations to . . . compensate victims of human rights and humanitarian law violations".[235]

257. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights stated that it was:

> aware that the provision of the Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land which states that States "shall be responsible for all acts committed by persons forming part of [their] armed forces" and "shall, if the case demands, be liable to pay compensation" for violations of the rules is part of customary international law.[236]

The Sub-Commission reiterated that "States must respect their international obligations to . . . compensate all victims of human rights and humanitarian law violations" and called upon States "to provide effective . . . compensation for unremedied violations in order to end the cycle of impunity with regard to sexual violence committed during armed conflicts".[237]

258. In 1998, in his report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the UN Secretary-General stated that:

> Adherence to international humanitarian and human rights norms by all parties to a conflict must be insisted upon, and I intend to make this a priority in the work of the United Nations. In order to make warring parties more accountable for their actions, I recommend that combatants be held financially liable to their victims under international law where civilians are made the deliberate target of aggression. I further recommend that international legal machinery be developed

[233] UN Sub-Commission on Human Rights, Res. 1993/23, 23 August 1993, §§ 2, 3 and 8.
[234] UN Sub-Commission on Human Rights, Res. 1995/5, 18 August 1995, § 9.
[235] UN Sub-Commission on Human Rights, Res. 1998/18, 21 August 1998, § 9.
[236] UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 4.
[237] UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, §§ 9 and 12.

to facilitate efforts to find, attach and seize the assets of transgressing parties and their leaders.[238]

259. In 1996, in a report on a mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences recommended that:

137. The Government of Japan should:

...

(b) Pay compensation to individual victims of Japanese military sexual slavery according to principles outlined by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. A special administrative tribunal for this purpose should be set up with a limited time-frame since many of the victims are of a very advanced age.

...

139. The Governments of the Democratic People's Republic of Korea and the Republic of Korea may consider requesting the International Court of Justice to help resolve the legal issues concerning Japanese responsibility and payment of compensation for the "comfort women".[239]

260. In 1998, in a report on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Commission on Human Rights recommended that:

108. ... Peace treaties must not seek to extinguish the rights of victims of human rights violations with respect to claims of compensation and other forms of legal redress unless appropriate administrative schemes for compensation and prosecution are incorporated into the substantive peace agreement ...
109. ... By incorporating an understanding of gender into the legal framework for responding to systematic rape and sexual slavery, the full range of the obligations and legal accountability of all parties to a conflict may be carefully articulated and concrete steps may be outlined to ensure adequate prevention, investigation and criminal and civil redress, including compensation of victims.
...
112. When the necessary elements exist to establish that sexual violence constitutes an international crime such as slavery, crimes against humanity, genocide, torture or war crimes, it must be charged, prosecuted and redressed as such. Concrete steps must be taken immediately, including in those countries currently experiencing

[238] UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, UN Doc. A/52/871-S/1998/318, 13 April 1998, § 50; see also Report on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/957, 8 September 1999, § 38.

[239] UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, §§ 137(b) and 139.

internal armed conflict or violence, to ensure that . . . (c) victims of such abuses receive full redress under both criminal and civil laws, including compensation where appropriate.[240]

261. The conclusions of UNEP's Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities presented in a report in 1996 stressed, *inter alia*, that:

(19) thresholds of damage established under instruments relating to the laws of war should not be a defence against claims arising in relation to the illegal use of force . . .
(21) where compensation is due for damage caused by a wrongful act, the basis for that compensation under international law is reflected in the approach of the Permanent Court of International Justice in the Chorzów Factory (Indemnity) case . . .
(22) that approach relates to the standard of compensation but does not provide guidance as to how to value the damage which has occurred . . .
(26) the environmental as well as the economic costs of clean-up measures should be considered, in accordance with the basic requirement of mitigation or avoidance of damage . . .
(27) the basic aim of restoration should be to reinstate the ecologically significant functions of injured resources and the associated public uses and amenities supported by such functions.[241]

262. In its report in 1993, the UN Commission on the Truth for El Salvador stated with respect to an incident which had occurred at El Junquillo that:

On 12 March 1981, soldiers and members of the Cacaopera military defence unit attacked the population, consisting solely of women, young children and old people. They killed the inhabitants and raped a number of women and little girls under the age of 12. They set fire to houses, cornfields and barns.

The Commission finds that: . . . the Government and the judiciary of El Salvador failed to conduct investigations into the incident. The State thus failed in its duty under international human rights law to . . . compensate the victims or their families.[242]

263. In its commentary on Article 36 of the 2001 ILC Draft Articles on State Responsibility, the ILC stated that:

Restitution, despite its primacy as a legal principle, is frequently unavailable or inadequate . . . The role of compensation is to fill gaps so as to ensure full reparation for damage suffered. . . . As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally

[240] UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 108–109 and 112.
[241] UNEP, Conclusions by the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, UN Doc. UNEP/Env.Law/3/Inf.1, 15 October 1996, *Liability and Compensation for Environmental Damage*, Nairobi, 1998, §§ 87(19), (21), (22), (26) and (27).
[242] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 67.

wrongful act . . . Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach . . . Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well-established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as moral damage in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the "*Lusitania*" case.[243]

Other International Organisations

264. In a resolution adopted in 1983 on missing persons in Argentina, the European Parliament insisted that "the good future relations of the Community with Argentina require that effective steps be taken by the Argentinean authorities to establish the fate of citizens of Member States who have disappeared and to provide financial compensation for them or their dependants".[244]

International Conferences

265. The 24th International Conference of the Red Cross in 1981 adopted a resolution on assistance to victims of torture in which it welcomed the efforts within the UN to "establish a Voluntary Fund for victims of torture . . . to extend humanitarian, legal and financial aid to individuals whose fundamental rights have been severely violated as a result of torture and to relatives of such victims" and urged governments to "consider responding favourably to requests for contributions to such a fund".[245]

266. The 25th International Conference of the Red Cross in 1986 adopted a resolution on assistance to victims of torture in which it urged "National Societies to take the initiative to give, either independently or in co-operation with their governments, humanitarian, legal, medical, psychological and social assistance to victims of torture in exile and, whenever possible, in their own countries".[246]

[243] ILC, Commentary on Article 36 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 244–252.

[244] European Parliament, Resolution on the situation in Argentina, 13 October 1983, § 3.

[245] 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XV, §§ 1 and 2.

[246] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XI.

267. The 25th International Conference of the Red Cross in 1986 adopted a resolution on assistance to victims of torture in which it appealed to "governments in a position to do so to respond favourably to requests for further contributions to the United Nations' Voluntary Fund for victims of torture".[247]

268. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on "all States to review procedures on compensation for damages caused to victims of violations of international humanitarian law and the payment of indemnities so as to allow the victims to derive real benefit from the assistance to which they are entitled".[248]

269. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 reaffirmed that "States which violate international humanitarian law shall, if the case demands, be liable to pay compensation."[249]

270. The Hague Agenda for Peace and Justice for the Twenty-first Century, adopted by the Hague Appeal for Peace Conference in May 1999, addressed the issue of reparation to victims of armed conflict and concluded that:

> The Hague Appeal will demand that victims of armed conflict and human rights violations be made whole through the establishment of national, regional and international victim compensation funds and other reparation measures, which address the need of victims in a timely way.[250]

271. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants committed themselves to see that "any party to an armed conflict which violates International Humanitarian Law shall, if the case demands, be liable to pay compensation".[251]

IV. Practice of International Judicial and Quasi-judicial Bodies

272. Decision 1 of the UNCC Governing Council in August 1991 stressed Iraq's responsibility for five particular causes of loss:

> (a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991, (b) departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period, (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that

[247] 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XII, § 1.
[248] 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(n).
[249] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(7), *ILM*, Vol. 33, 1994, pp. 300–301.
[250] Hague Appeal for Peace Conference, The Hague Agenda for Peace and Justice for the Twenty-first Century, 12–15 May 1999, UN Doc. A/54/98, Point 17, p. 10.
[251] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niger, 18–20 February 2002, Final Declaration, § 11.

period in connection with the invasion or occupation, (d) the breakdown of civil order in Kuwait or Iraq during that period, and (e) hostage-taking or other illegal detention.[252]

In a number of other decisions, the UNCC Governing Council admitted the following types of claims for compensation: (a) serious personal injury and mental pain and anguish; (b) business claims; (c) embargo losses; (d) contract losses; (e) losses involving tangible property; (f) losses relating to income-producing properties; and (g) claims by members of coalition forces.[253]

273. In Decision 7 of November 1991 and revised in March 1992, the UNCC Governing Council held that payments were in principle available

with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of: (a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991; ... (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation.[254]

With regard to environmental claims, the UNCC Governing Council decided that:

These payments are available with respect to direct environmental damage and the depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait: This will include losses or expenses resulting from: (a) abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters; (b) reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment; (c) reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment; (d) reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks

[252] UNCC, Governing Council, Decision 1: Criteria for expedited processing of urgent claims, UN Doc. S/AC.26/1991/1, 2 August 1991, § 18.

[253] UNCC, Governing Council, Decision 3: Personal injury and mental pain and anguish, 18 October 1991, UN Doc. S/AC.26/1991/3, 23 October 1991; Decision 4: Business losses of individuals eligible for consideration under the expedited procedures, 18 October 1991, UN Doc. S/AC.26/1991/4, 23 October 1991; Decision 7: Criteria for additional categories of claims, 18 November 1991 as revised on 16 March 1992, UN Doc. S/AC.26/1991/7/Rev.1, 17 March 1992; Decision 9: Propositions and conclusions on compensation for business losses: types of damages and their valuation, 6 March 1992, UN Doc. S/AC.26/1992/9, 6 March 1992; Decision 11: Eligibility for compensation of members of the Allied Coalition Armed Forces, 26 June 1992, UN Doc. S/AC.26/1992/11, 26 June 1992; Decision 15: Compensation for business losses resulting from Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause, 18 December 1992, UN Doc. S/AC.26/1992/15_*, 4 January 1993; J. R. Crook, "The United Nations Compensation Commission – A New Structure to Enforce State Responsibility", *AJIL*, Vol. 87, 1993, pp. 153–156.

[254] UNCC, Governing Council, Decision 7: Criteria for additional categories of claims, 18 November 1991, as revised on 16 March 1992, UN Doc. S/AC.26/1991/7/Rev.1, 17 March 1992, § 34.

as a result of environmental damage; and (e) depletion of or damage to natural resources.[255]

274. In Decision 11 of June 1992, the UNCC Governing Council provided that:

Members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq, except if the following three conditions are met:

a. The compensation is awarded in accordance with the general criteria already adopted; and
b. They were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and
c. The loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949).[256]

275. In 1994, the Panel of Commissioners appointed by the UNCC recommended in relation to claims from individuals who suffered serious personal injury or whose spouse, child or parent died as a direct result of Iraq's invasion of Kuwait that:

c) Claims submitted for detained persons
. . . Compensation, if any, would be awarded for claims for serious personal injury submitted by the detainee personally after his/her release, or for claims for death submitted by the family after it has been determined by the detainee's Government that the detainee is deceased.
d) Missing persons
compensation be awarded where from the documentation submitted it could be presumed that the "missing" person is deceased. In instances where it could not conclude that the "missing" person is deceased, the Panel holds that compensation cannot be recommended at this stage and that a new claim can be submitted if the family ever receives confirmation of the death.[257]

276. The 1994 report and recommendations made by the Panel of Commissioners concerning Part One of the Second Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims) of the UNCC state that:

Among the claims for "serious personal injury" or "death" were those involving members of the Allied Coalition Armed Forces which in principle are not recommended for compensation by the Panel pursuant to Decision 11 of the Governing

[255] UNCC, Governing Council, Decision 7: Criteria for additional categories of claims, UN Doc. S/AC.26/1991/7/Rev.1, 18 November 1991, as revised on 16 March 1992, 17 March 1992, § 35.

[256] UNCC, Governing Council, Decision 11: Eligibility for compensation of members of the Allied Coalition Armed Forces, 26 June 1992, UN Doc. S/AC.26/1992/11, 26 June 1992. (At its twentieth Session, in October 1998, the Governing Council extended the application of its Decision 11 to members of forces that were not part of the Allied Coalition Forces, UN Doc. S/AC.26/SR.81, 12 October 1998.)

[257] UNCC, Governing Council, Recommendations made by the Panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), 14 April 1994, UN Doc. S/AC.26/1994/1, 26 May 1994, § II(A)(2)(c) and (d).

Council. However, the Panel had before it claims by members of the Allied Coalition Armed Forces that fall within the exceptional conditions stated in the same decision. These members of the Allied Forces were taken prisoners of war during coalition military operations against Iraq and their claims contain extensive medical documentation explaining the torture and injuries that were inflicted upon them by Iraqi authorities during their captivity. Many of the personal statements attached to the claim forms explain that beatings were administered to members of the Allied Forces so as to coerce them into releasing information. The Panel accordingly recommends that these claims be awarded compensation.[258]

277. On 30 July 1993, Kuwait Oil Company filed with the UNCC the "Well Blowout Control Claim" (also known as "WBC Claim")

in the amount of US$951,630,871 for costs it allegedly incurred in (a) the planning for the work anticipated on the return of the oil fields of Kuwait . . . (b) the work performed to extinguish the well-head fires that were burning upon the withdrawal of Iraqi forces from Kuwait; (c) the initial sealing of the wells to stop the flow of oil and gas; and (d) the making safe of the wellheads so that work on the reinstatement of production could be started.[259]

278. On 22 March 1995, the UNCC Governing Council appointed a Panel of Commissioners.[260] During the proceedings, regarding the categorisation of the claim (category "E" or category "F" claim), the Panel referred to Decision 7 of the Governing Council. It also noted that, in its view, "the categorization of a claim as an 'E' or 'F' claim does not necessarily entail substantive consequences in terms of the law applicable to such claim" and that UN Security Council Resolution 687 provided "for the compensability of, inter alia, 'environmental damage and the depletion of natural resources', without making any qualifications as to the legal subject or entity eligible to make such claims".[261] On the question of a direct link between actions taken by Iraq and damage incurred by Kuwait, the Panel of Commissioners found that "although part of the damage for which compensation is being sought in the WBC Claim may be a result of the Allied bombing, the bulk of the oil-well fires was directly caused by the explosives placed on the wellheads and detonated by Iraqi armed forces". Referring to Decision 7 of the Governing Council, it added that "Iraq is liable for any direct loss, damage or injury whether caused by its own or by the coalition armed forces. Iraq's contention that the Allied air raids broke the

[258] UNCC, Report and Recommendations made by the Panel of Commissioners concerning Part One of the Second Instalment of Claims for Serious Personal Injury of Death (Category "B" Claims), UN Doc. S/AC.26/1994/4, 15 December 1994, § 14.

[259] UNCC, Governing Council, UN Doc. S/AC.26/1996/5/Annex, Report and Recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), 18 December 1996, § 1.

[260] UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, § 9.

[261] UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, §§ 49 and 51.

chain of causation therefore cannot be upheld."[262] The Panel included in its recommendations that:

(a) the Claimant KUWAIT OIL COMPANY (the "Claimant") is to be paid the amount of US$ 610,048,547 as compensation for the costs incurred in the execution of the Well Blowout Control Exercise as a direct result of Iraq's invasion and occupation of Kuwait; . . . (c) the claim for the costs incurred in connection with the work performed by the Claimant's own firefighting team . . . is rejected; (d) the claim for the indirect costs incurred in fighting oil-well fires . . . is rejected.[263]

279. In December 1996, the UNCC Governing Council approved the recommendations of the Panel of Commissioners in the "WBC Claim" and decided "to approve the amount of the recommended award of US$610,048,547 . . . to Kuwait Oil Company on behalf of Kuwait's public oil sector as a whole".[264]

280. In its judgement in *Akdivar and Others v. Turkey* in 1998, the ECtHR stated that:

45. The applicants further submitted that the Court should confirm . . . that the government should (1) bear the costs of necessary repairs in [their village] to enable the applicants to continue their way of life there; and (2) remove any obstacle preventing the applicants from returning to their village.

    In their view, such confirmation was necessary to prevent future and continuing violations of the Convention, in particular the *de facto* expropriation of their property.

46. The government maintained that the restoration of rights is not feasible due to the emergency conditions prevailing in the region. However, resettlement will take place when the local inhabitants feel themselves to be safe from terrorist atrocities.

47. The Court recalls that a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they will comply with a judgement in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.

The Court awarded damages for pecuniary and non-pecuniary losses but dismissed the remainder of the claim for just satisfaction.[265]

281. In 2003, in two partial awards dealing with claims brought by Eritrea and Ethiopia on behalf of their nationals respectively, the Eritrea-Ethiopia Claims

[262] UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, §§ 85 and 86.

[263] UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, § 233.

[264] UNCC, Governing Council, Decision 40: Well Blowout Control Claim, 17 December 1996, UN Doc. S/AC.26/Dec.40, 18 December 1996, §§ 1 and 2.

[265] ECtHR, *Akdivar and Others v. Turkey*, Judgement, 1 April 1998, §§ 45–47.

Commission awarded compensation related to the treatment of former prisoners of war by the two governments.[266]

282. In 1983, in a report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, the IACiHR recommended that a conference should be held by representatives of the government of Nicaragua and persons representing the people of the Miskitos. For the agenda of the conference, the IACiHR suggested, *inter alia*, the "establishment of procedures and mechanisms to compensate the Miskito for the loss of their homes, crops, livestock or other belongings when they were evacuated from their villages".[267]

283. In 1983, a petition filed before the IACiHR alleged that an asylum in Grenada had been bombed by US military aircraft. Before a settlement could be reached with the US on the matter, the Commission declared the petition admissible, *inter alia*, given the "unwillingness of the US Government to compensate these victims subsequent to the expiration of the *ad hoc* compensation program".[268]

284. In a case concerning Colombia in 1992, the IACiHR concluded that the Colombian government had failed to comply with its obligation under the 1969 ACHR (right to life, right to humane treatment, right to personal liberty and judicial protection) and concluded that "Colombia must pay the victim's next-of-kin compensatory damages".[269]

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

285. The ICRC Commentary on the Fourth Geneva Convention states with respect to Article 148 GC IV that:

> As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breach was working. Only a State can make such claims on another State, and they form part, in general, of what is called "war reparations". It would seem unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability.[270]

286. The ICRC Commentary on the Additional Protocols states that:

> Article 91 literally reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, and does not abrogate it in any way, which means that it continues to be customary law for all nations.

[266] Eritrea-Ethiopia Claims Commission, *Prisoners of War, Eritrea's Claim*, Partial Award, 1 July 2003; *Prisoners of War, Ethiopia's Claim*, Partial Award, 1 July 2003.
[267] IACiHR, Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, Doc. OEA/Ser.L/V/II.62 Doc. 10 rev. 3, 29 November 1983, Part Three, § B(3)(i).
[268] IACiHR, *Case 9213 (US)*, Report on the admissibility of the petition, 22 September 1987.
[269] IACiHR, *Case 10.581 (Colombia)*, Report, 25 September 1992, Conclusions, § 2.
[270] Jean S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, Geneva, 1958, p. 603.

...
In fact [the principle contained in Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV] is the same principle as that contained in the present Article 91 and in Article 3 of Hague Convention IV of 1907. The purpose of this provision is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor.[271]

287. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that during expert meetings on the issue, a list of the most important matters to be discussed had been drawn up.[272] Under one of these specific issues ("When should damage to the environment be qualified as a 'grave breach'? State Responsibility and compensation"), it was stated that:

Any violation of either treaty-based or customary rules attributable to a State would create an obligation on the part of the offending State towards the State or States whose environment suffered damage.

According to article 3 of the Hague Convention IV of 1907 and to article 91 of Protocol I of 1977, a State violating an international obligation must be liable to pay compensation.[273]

288. In 1993, in a report on the protection of war victims, the ICRC, referring to Article 91 AP I, stated that "this article confirms a rule which is today accepted as being part of customary law and was already stated, in almost identical terms, in Article 3 of the Hague Convention No. IV of 1907". Referring to Articles 51 GC I, 52 GC II, 131 GC IV and 148 GC IV, the ICRC moreover stated that "this provision ... also implies that, irrespective of the outcome of an armed conflict, no decision or agreement can dispense a State from the responsibility to make reparation for damages caused to the victims of breaches of international humanitarian law or to pay compensation for those damages".[274] It recommend that:

The International Conference for the Protection of War Victims should make it clear that it wishes procedures to be set up to provide reparation for damage inflicted on the victims of violations of international humanitarian law and award compensation to them, so as to enable them to receive the benefits to which they are entitled.[275]

[271] Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3645 and 3649.

[272] ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, §§ 65–72.

[273] ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, §§ 86 and 87.

[274] ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.

[275] ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.

VI. Other Practice

289. In 1936, during the Spanish Civil War, in a note to the Portuguese Minister of Foreign Negotiations, the President of the Spanish Junta de Defensa Nacional, while denouncing and condemning certain acts of assassination, mistreatment and damage allegedly committed against his side and non-belligerent third parties by members of the adverse party (the "Red Forces Armed by the Government of Madrid"), expressed his intention to pay compensation to the victims of the alleged offences and to repair the damage caused.[276]

290. In a resolution on the application of the rules of IHL in hostilities in which UN forces are engaged, adopted at its Zagreb Session in 1971, the Institute of International Law stated that:

> Without prejudice to the individual or collective responsibility which derives from the very fact that the party opposing the United Nations Forces has committed aggression, that party shall make reparation for injuries caused in violation of the humanitarian rules of armed conflict. The United Nations is entitled to demand compliance with these rules for the benefit of its Forces and to claim damages for injuries suffered by its Forces in violation of these rules.[277]

291. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury".[278]

292. The Restatement (Third) further provides that:

> A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense
> (a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims;
> (b) in a court or other tribunal of that state pursuant to its law; or
> (c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.[279]

[276] Spain, Note from the President of the Spanish Junta de Defensa Nacional to the Portuguese Minister of Foreign Negotiations, concerning a supposed incursion into Portuguese territory of "Red forces armed by the Government of Madrid" resulting in the death of a commander of the "National" army, mistreatment of Spanish and Portuguese subjects, and damage to Portuguese property, Burgos, 17 September 1936, reprinted in *Ministério dos Negócios Estrangeiros, Dez anos de política externa (1936–1947), A Nação portuguesa e a segunda Guerra Mundial*, 1964, pp. 285–287.

[277] Institute of International Law, Zagreb Session, Resolution on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, 3 September 1971, § 7.

[278] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 901.

[279] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 906.

293. In a joint statement in 1987, several factions involved in the conflict in Afghanistan declared that the USSR could not securely leave Afghanistan without paying war compensation.[280]

294. In 1992, in the context of the conflict in Georgia, Abkhazia denounced acts of pillage committed by Georgian troops and considered the leadership of the Republic of Georgia responsible for them. It further considered that Georgia was obliged to compensate the damage caused to the Republic of Abkhazia and to each victim in particular.[281]

295. The SPLM Human Rights Charter provides that "the victims of human rights abuses shall receive compensation. In the case of victims who have been killed, the compensation should go to their kin in accordance with the customary law of the victim."[282]

296. In an expert opinion on Article 3 of the 1907 Hague Convention (IV) prepared in the context of cases seeking compensation for individual victims before Japanese courts, Kalshoven asserted that the adoption of Article 91 AP I which, in his words, "contains a slightly modernised version of Article 3 [1907 Hague Convention IV]" at the CDDH without much discussion and without any dissent "reflected and indeed reaffirmed the general acceptance of the contents of the Article as established customary law".[283] In the same opinion, he added that:

> Although the first sentence of Article 3 does not state in so many words that individual persons, including persons resident in occupied territory, have a right to claim the compensation due under the Article, the drafting history of the Article leaves no room for doubt that this was precisely its purpose.[284]

297. An expert opinion prepared by Christopher Greenwood took into account military manuals (from the UK and Germany), which stated that the laws of war were binding not only upon governments but also upon every individual, and the position of the IMT, which insisted on punishing individuals responsible for violations of the laws of war, to state that:

> The international law of war thus clearly imposes *duties* upon individuals and subjects those who violate their obligations to criminal penalties. There is, therefore, no reason why the *rights* created by the international law of war should be confined

[280] *Afghan News*, 15 August 1987, Vol. III, Nos. 15 and 16, pp. 8 and 9.

[281] Supreme Council of Abkhazia, Statement of the Press-Service of the Supreme Soviet of Abkhazia, No. 10-86, August 1992.

[282] SPLM, Human Rights Charter, May 1996, Article 10.

[283] Frits Kalshoven, Expert opinion, Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, p. 37.

[284] Frits Kalshoven, Expert opinion, Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, p. 38.

to states. To confine them in that way would create a wholly illogical asymmetry in the law for which there would be no justification.[285] [emphasis in original]

Referring to the debates on what became Article 3 of the 1907 Hague Convention (IV), which led to the conclusion that the "liability on the part of the State is additional to the criminal liability of the individual wrongdoer" and to Security Council Resolution 687 (1991) creating a Compensation Commission to hear claims for compensation in Kuwait after the Gulf War, Greenwood added:

It is my opinion, therefore, that Article 3 of the Hague Convention, the Hague Regulations and customary international law of war confer rights upon individuals, including rights to compensation, in the event of a violation, which the individual can assert against the State of the wrongdoer. The right exists under international law. While it is obviously a matter of Japanese law . . . whether the Japanese courts have jurisdiction to give effect to that right, for them to do so would clearly be in accordance with international law and would enable the Japanese State to comply with its obligations under international law.[286]

298. In the late 1990s, five European Insurance companies (Generali, Allianz, Axa, Winterthur Leben and Zurich) sued by Holocaust survivors in the US formed and funded, in co-operation with the United States National Association of Insurance Commissioners, representatives of Jewish organizations and the State of Israel, the International Commission on Holocaust Era Insurance Claims (ICHEIC) in order to settle the claims of Holocaust survivors and/or their heirs for non-payment of pre-Second-World War policies.[287] In this context, the Italian insurer Assicurazioni Generali, for example, agreed to pay US$100 million.[288]

299. In 1999, the French Banking Association (AFB), long accused of benefiting from unclaimed accounts confiscated or frozen by French banks during Second World War, announced compensation measures for survivors of the Holocaust and their heirs. Some 76,000 French Jews were sent to Nazi death camps in Second World War, and the banks are accused of making no effort to return the funds from their accounts since then.[289]

[285] Christopher Greenwood, Expert opinion, Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No. IV 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, pp. 66–67, §§ 21, 22 and 23.

[286] Christopher Greenwood, Expert opinion, Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No. IV 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, pp. 67 and 69, §§ 24 and 30.

[287] See, e.g., Michael J. Bazyler, "The Holocaust Restitution Movement in Comparative Perspective", Paper presented at the Association of Genocide Scholars, 4th Biennial Conference, Minneapolis, June 2001.

[288] "Payment for Past: Survivors May Finally Collect Claims", *The Christian Science Monitor*, 21 August 1998.

[289] "News in Brief", *The Christian Science Monitor*, 25 March 1999.

300. The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery stated in its first findings that:

In examining the government of Japan's obligation to provide reparations, we refer to the longstanding principle of international law that the state must provide a remedy for its international wrongs. The state's responsibility is to provide compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Reparation includes any or all forms that are applicable to the situation and cover all injuries suffered by the victim . . .

Under international law, compensation must come from the government and must be adequate to the material harm, lost opportunities and emotional suffering of the victims, their families and close associates.[290]

The Women's International War Crimes Tribunal therefore recommended that:

The government of Japan . . . enact legislation and take all necessary and appropriate measures to compensate the victims and survivors and those entitled to recover as a result of the violations declared herein through the government and in amounts adequate to redress the harm and deter its future occurrence.[291]

Forms of reparation other than compensation

Note: *For practice concerning investigation of enforced disappearance, see Chapter 32, section K.*

I. Treaties and Other Instruments

Treaties

301. The 1946 Paris Agreement on Reparation from Germany was concluded:

in order to obtain an equitable distribution among [the signatory governments] of the total assets which . . . are or may be declared to be available as reparation from Germany . . . in order to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold.

302. The single Article of Part III of the 1946 Paris Agreement on Reparation from Germany, entitled "Restitution of monetary gold", provides that:

A. All the monetary gold found in Germany by the Allied Forces . . . shall be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany.

[290] Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Summary of Findings, 12 December 2000, § 32 and 35.

[291] Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Summary of Findings, 12 December 2000, Preliminary Recommendations.

B. Without prejudice to claims by way of reparation for unrestored gold, the portion of monetary gold thus accruing to each country participating in the pool shall be accepted by that country in full satisfaction of all claims against Germany for restitution of monetary gold.
C. A proportional share of the gold shall be allocated to each country concerned which adheres to this arrangement for the restitution of monetary gold and which can establish that a definite amount of monetary gold belonging to it was looted by Germany or, at any time after 12 March 1938, was wrongfully removed into German territory.

303. Article 41 of the 1950 ECHR provides that:

If the [ECtHR] finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the [ECtHR] shall, if necessary, afford just satisfaction to the injured party.

304. Article 2 of Chapter Three ("Internal Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

The Federal Republic [of Germany] hereby acknowledges the need for, and assumes the obligation to implement fully and by every means in its power, the legislation . . . and the programmes for restitution and re-allocation thereunder provided. The Federal Republic shall entrust a Federal Agency with ensuring the fulfilment of the obligation undertaken under this Article, paying due regard to the provisions of the [German] Basic Law.

305. Article 4 of Chapter Three ("Internal Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

1. The Federal Republic [of Germany] hereby undertakes
   (a) . . . to ensure the payment to restitutees of all judgments or awards which have been or hereafter shall be given or made against the former German Reich . . .
   (b) to assume forthwith, by appropriate arrangements with the City of Berlin, liability for the payment . . . of all judgments and awards against the former German Reich under the internal restitution legislation in the Western Sector of Berlin.
   . . .
3. The obligation of the Federal Republic to the Three Powers with respect to money judgments and awards under paragraph 1 of this Article shall be satisfied when such judgments and awards shall have been paid or shall, if the Federal Republic so requests, be considered to have been satisfied when the Federal Republic shall have paid a total of DM 1,500,000,000 thereon.

306. By Article 6 of Chapter Three ("Internal Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation, a "Supreme Restitution Court" was established.

307. Article 1, first paragraph, of Chapter Five ("External Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

Upon the entry into force of the present Convention, the Federal Republic [of Germany] shall establish, staff and equip an administrative agency which shall . . . search for, recover, and restitute jewellery, silverware and antique furniture . . . and cultural property, if such articles or cultural property were, during the occupation of any territory, removed therefrom by the forces or authorities of Germany or its Allies or their individual members (whether or not pursuant to orders) after acquisition by duress (with or without violence), by larceny, by requisitioning or by other forms of dispossession by force.

308. Paragraph 1 of Article 3 of Chapter Five ("External Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

Notwithstanding provisions of German law to the contrary, any person who, or whose predecessor in title, during the occupation of a territory, has been dispossessed of his property by larceny or by duress (with or without violence) by the forces or authorities of Germany or its Allies, or their individual members (whether or not pursuant to orders), shall have a claim against the present possessor of such property for its restitution.

309. Paragraph 1 of Article 3 of Chapter Six ("Reparation") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that "the Federal Republic [of Germany] shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of . . . restitution".

310. Paragraphs 1, 3 and 4 of the 1954 Hague Protocol provide that:

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the [1954 Hague Convention].
. . .
3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.
4. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

311. Article 26 of the 1955 Austrian State Treaty, which in its preamble considers that "on 13 March 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich", states that:

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13 March 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories . . .
2. Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organizations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organizations and communities such organizations or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organizations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims of persecution by the Axis Powers.

Part IV ("Claims arising out of the War", Articles 21–24) and Part V ("Property, Rights and Interests", Articles 25–28) provide for more detailed and comprehensive settlement of all property claims on a State-to-State level.

312. Article 63(1) of the 1969 ACHR provides that:

> If the [IACtHR] finds that there has been a violation of a right or freedom protected by this Convention, the Court shall . . . also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

313. Article 75(1) of the 1998 ICC Statute provides that "the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution . . . and rehabilitation".

314. Article 27(1) of the 2003 Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights which was signed in 1998 provides that "if the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

Other Instruments

315. Protocol No. 1 of the 1952 Luxembourg Agreement between Germany and the CJMC, concluded at a meeting between the representatives of the FRG and the CJMC at which "the extension of the legislation existing in the Federal Republic of Germany for the redress of National-Socialist wrongs" was discussed and at which the representatives of both parties "agreed on a number of principles for the improvement of the existing legislation as well as on other measures", states that:

II. Restitution

1. The legislation now in force in the territory of the Federal Republic of Germany concerning restitution of identifiable property to victims of National-Socialist persecution shall remain in force without any restrictions . . .
2. The Federal Government will see to it that the Federal Republic of Germany accepts liability also for confiscation of household effects in transit which were seized by the German Reich in European ports outside of the Federal Republic, in so far as the household effects belonged to persecutees who emigrated from the territory of the Federal Republic.
3. The Government of the Federal Republic of Germany will see to it that payments shall be ensured to restitutees – private persons and successor organizations appointed pursuant to law – of all judgments or awards which have been or hereafter shall be given or made against the former German Reich under restitution legislation. The same shall apply to amicable settlements . . .

   In accordance with Article 4, paragraph 3 of Chapter Three of the Convention on the Settlement of Matters arising out of the War and the Occupation, the obligation of the Federal Republic of Germany shall be considered to have been satisfied when the judgments and awards shall have been paid or when the Federal Republic of Germany shall have paid a total of DM 1,500 million. Payments on the basis of amicable settlements shall be included in this sum.

316. Article 1(1) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that "all refugees and displaced persons . . . shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them".

317. By Article VII of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina was established. According to Article XI, the mandate of the Commission was to:

> receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

318. Article 2(3) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the right of the victims and their families to seek justice for violations of human rights includes "adequate compensation or indemnification, restitution and rehabilitation".

319. In 1999, Section 2 of UNMIK Regulation No. 1999/23 established the Housing and Property Claims Commission in Kosovo. According to Section 2 of UNMIK Regulation No. 2000/60, the Commission is given the power to decide on claims for restitution, repossession and return to the property brought by certain categories of persons, among which persons who lost their property right as a result of discrimination and refugees or displaced persons.

320. Article 21 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, . . . rehabilitation, and satisfaction and guarantees of non-repetition.

321. Article 22 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

322. Article 25 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

(a) Cessation of continuing violations;
(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;
(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
(f) Judicial or administrative sanctions against persons responsible for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;
(i) Preventing the recurrence of violations.

323. Article 34 of the 2001 ILC Draft Articles on State Responsibility, dealing with "Forms of reparation", provides that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter".

324. Article 35 of the 2001 ILC Draft Articles on State Responsibility, entitled "Restitution", provides that:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
a) Is not materially impossible;
b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

325. Article 37 of the 2001 ILC Draft Articles on State Responsibility, entitled "Satisfaction", provides that:

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

II. National Practice

Military Manuals

326. Hungary's Military Manual, in a section entitled "Measures required after a conflict", requires the restoration of "normal conditions" and provides for the "return [of] ... objects" and the "return [of] cultural objects".[292] In a section entitled "After combat", the manual repeats the instruction to "restore normal conditions" and provides for the "return of civilian ... objects" and the "restitution of requisitioned objects".[293]

327. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that in the case of damage to private property in the course of legitimate security or police operations, "measures shall be undertaken whenever practicable ... to repair the damage caused".[294]

328. The US Field Manual, under the heading "Remedies of Injured Belligerent", provides that:

In the event of [a] violation of the law of war, the injured party may legally resort to remedial action of the following types:
a) Publication of the facts, with a view to influencing public opinion against the offending belligerent.
b) Protest ... and/or punishment of the individual offenders. Such communications may be sent through the protecting power, a humanitarian organization performing the duties of a protecting power, or a neutral state, or by parlementaire direct to the commander of the offending forces ...

[292] Hungary, *Military Manual* (1992), p. 38. [293] Hungary, *Military Manual* (1992), p. 80.
[294] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a.4).

c) Solicitation of the good offices, mediation, or intervention of neutral States for the purpose of making the enemy observe the law of war.
d) Punishment of captured offenders as war criminals.[295]

National Legislation

329. In 2001, Austria adopted the General Settlement Fund Law (which was later amended) which provides that "an Arbitration Panel for the examination of applications for *in rem* restitution of publicly-owned property shall be established with the fund".[296] The Law further provides that:

(1) Persons and associations who/which were persecuted by the National Socialist regime on political grounds, on grounds of origin, religion, sexual orientation, or of physical or mental handicap, or of accusations of so-called asociality, or who left the country to escape such persecution, and who suffered losses or damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era shall be eligible to file an application.
(2) In addition . . . heirs of eligible claimants as defined in Paragraph 1 shall also be eligible to file an application. In case of a defunct association, an association which the Arbitration Panel regards as the legal successor shall be entitled to file an application as well.[297]

As to restitutable publicly-owned property, the Law provides that:

(1) For the purposes of *in rem* restitution, the notion of "publicly-owned property" shall cover . . . real estate (land) and buildings (superstructures) . . .
(2) For the purposes of *in rem* restitution to Jewish communal organizations, the notion "publicly-owned property" shall furthermore cover tangible movable property, particularly cultural and religious items.[298]

330. Since the end of the Second World War, Germany has adopted several laws related to reparation and restitution for victims of the war and the holocaust, for example the Federal Restitution Law as amended.[299]

331. In 1988, the US passed the Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended), the purpose of which was, *inter alia*, to:

(1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
(2) apologize on behalf of the people of the United States [for these acts];
(3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;

[295] US, *Field Manual* (1956), § 495.
[296] Austria, *General Settlement Fund Law as amended* (2001), Article 1(23)(1).
[297] Austria, *General Settlement Fund Law as amended* (2001), Article 1(27).
[298] Austria, *General Settlement Fund Law as amended* (2001), Article 1(28).
[299] Germany, *Federal Restitution Law as amended* (1957).

(4) make restitution to those individuals of Japanese ancestry who were interned;
(5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimark Island, in settlement of United States obligations in equity and at law, for –
  (A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II;
  (B) personal property taken or destroyed by the United States forces during World War II;
  (C) community property, including community church property, taken or destroyed by United States forces during World War II; and
  (D) traditional village islands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use;
(6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and
(7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.[300]

Title I of the Law, entitled "United States Citizens of Japanese Ancestry and Resident Japanese Aliens", provides that:

Each department and agency of the United States Government shall review with liberality, giving full consideration to the findings of the Commission and the statement of the Congress set forth in section 2(a) [section 1989a(a) of this Appendix], any application by an eligible individual for the restitution of any position, status, or entitlement lost in whole or in part because of any discriminatory act of the United States Government against such individual which was based upon the individual's Japanese ancestry and which occurred during the evacuation, relocation, and internment period.[301]

National Case-law

332. In its judgement in the *J. T. case* in 1949 in which an individual had sued the State for repayment of money taken by the police during the arrest of the claimant during the occupation of the Netherlands by the German army, the District Court of The Hague held that the State of the Netherlands must repay the money to the plaintiff. The Court held that it was true that the State was not liable for all acts committed by the resistance movement (Binnenlandse Strijdkrachten) which had been organized with the consent of the government in exile during Second World War, but since it was definitely established that the money had come into the hands of the police, restitution had to be made.[302]

[300] US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Purposes, Section 1989.
[301] US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title I, Section 1989b-2.
[302] Netherlands, District Court of The Hague, *J. T. case*, Judgement, 13 April 1949.

Other National Practice

333. In 1988, the Canadian government concluded an agreement with the National Association of Japanese Canadians, the so-called Japanese-Canadian Redress Agreement, the terms of which provided that:

> Despite perceived military necessities at the time, the forced removal and internment of Japanese Canadians during World War II and their deportation and expulsion following the war, was unjust. In retrospect, government policies of disenfranchisement, detention, confiscation and sale of private and community property, expulsion, deportation and restriction of movement, which continued after the war, were influenced by discriminatory attitudes. Japanese Canadians who were interned had their property liquidated and the proceeds of sale were used to pay for their own internment.
>
> . . .
>
> Therefore, the Government of Canada, on behalf of all Canadians, does hereby:
>
> 1) acknowledge that the treatment of Japanese Canadians during and after World War II was unjust and violated principles of human rights as they are understood today;
> 2) pledge to ensure, to the full extent that its powers allow, that such events will not happen again; and
> 3) recognize, with great respect, the fortitude and determination of Japanese Canadians who, despite great stress and hardship, retain their commitment and loyalty to Canada and contribute so richly to the development of the Canadian nation.[303]

334. In 1997, the French government, created by a decree a "Study Mission on the Spoliation of Jews in France" (also known as the "Mattéoli Mission") with the task of conducting a study of the various forms of spoliation visited upon the Jews of France during Second World War, and of the scope and effect of post-war restitution efforts.[304]

335. According to the Report on the Practice of Kuwait, Kuwait insisted, before the UN, on the restitution by Iraq of the cultural objects that were taken from Kuwaiti institutions during the occupation, or that compensation be paid.[305]

336. In 1993, the Chief Cabinet Secretary of the Japanese Ministry of Foreign Affairs stated, with respect to the recruitment and abuse during Second World War of the so-called "comfort women" by the Japanese military, that "the Government of Japan would like . . . to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women".[306]

[303] Canada, Prime Minister, *Agreement between the Government of Canada and the National Association of Japanese Canadians (Japanese-Canadian Redress Agreement)*, 22 September 1988.

[304] France, First Minister, Decree regarding the Study Mission on the Spoliation of Jews during World War II in France, 25 March 1997, *Journal Officiel de la République française*, 26 March 1997, p. 4721.

[305] Report on the Practice of Kuwait, 1997, Chapter 6.2.

[306] Japan, Ministry of Foreign Affairs, Statement by the Chief Cabinet Secretary on the result of the study on the issue of "comfort women", 4 August 1993.

337. In 1994, the Prime Minister of Japan stated that "on the issue of wartime 'comfort women' [recruited and abused by the Japanese military during Second World War], which seriously stained the honour and dignity of many women, I would like to . . . express my profound and sincere remorse and apologies".[307]

338. In 1995, the Chief Cabinet Secretary of the Japanese Ministry of Foreign Affairs made a statement to the effect that:

Based on our remorse for the past . . . the project of the "Asian Peace and Friendship Foundation for Women" will be undertaken as follows.

1. The following activities will be conducted for the former wartime comfort women, through the cooperation of the Japanese People and the Government:
   i. The Foundation will raise funds in the private sector as a means to enact the Japanese people's atonement for former wartime comfort women.
   ii. The Foundation will support those conducting medical and welfare projects and other similar projects which are of service to former wartime comfort women, through the use of government funding and other funds.
   iii. When these projects are implemented, the Government will express the nation's feelings of sincere remorse and apology to the former wartime comfort women.[308]

339. In 1995, the Prime Minister of Japan, with respect to the Asian Women's Fund established in July 1995 by the proponents from the legal, academic and NGO sectors in Japan with the support of the government of Japan to the benefit of the victims recruited and abused as "comfort women" by the Japanese military during Second World War, offered his "profound apology to all those who, as wartime comfort women, suffered emotional and physical wounds that can never be closed". The Prime Minister further stated that:

Established on this occasion and involving the cooperation of the Government and citizens of Japan, the "Asian Women's Fund" is an expression of atonement on the part of the Japanese people toward these women and supports medical, welfare, and other projects. As articulated in the proponents' Appeal, the Government will do its utmost to ensure that the goals of the Fund are achieved.[309]

340. In 1970, during a debate in the Special Political Committee of the UN General Assembly on measures carried out by Israel in the occupied territories, Poland stated that:

The destruction of houses and the confiscation of property, which were designed to demoralize the inhabitants of certain areas and to force them to abandon their homes, were in violation of the basic principles of international law and contrary to the provisions of article 46 of the [1907 HR] and article 53 of the fourth Geneva Convention. Since such acts were illegal, the Government of Israel was liable . . . for the restitution of confiscated property.[310]

[307] Japan, Statement by the Prime Minister on the "Peace, Friendship, and Exchange Initiative", 3 August 1994.
[308] Japan, Ministry of Foreign Affairs, Statement by the Chief Cabinet Secretary, 14 June 1995.
[309] Japan, Statement by the Prime Minister on the occasion of the establishment of the "Asian Women's Fund", July 1995.
[310] Poland, Statement before the Special Political Committee of the UN General Assembly, UN Doc. A/SPC/SR.748, 10 December 1970, § 9.

341. In a concurrent resolution adopted in 2000 concerning the war crimes committed by the Japanese military during Second World War, the US Congress expressed its sense that "the Government of Japan should – (1) formally issue a clear and unambiguous apology for the atrocious war crimes committed by the Japanese military during World War II".[311]
342. In 2001, a draft concurrent resolution was put before the US Congress for it to call upon the government of Japan to "formally issue a clear and unambiguous apology for the sexual enslavement of young women during colonial occupation of Asia and the Pacific Islands during World War II, known to the world as 'comfort women'".[312]

III. Practice of International Organisations and Conferences

United Nations
343. In a resolution adopted in 1976 on South Africa's military activities against Angola, the UN Security Council called upon the government of South Africa "to meet the just claims of the People's Republic of Angola . . . for the restoration of the equipment and materials which its invading forces seized".[313]
344. In a resolution adopted in 1980, the UN Security Council, recalling Articles 1 and 49 GC IV, called upon the government of Israel:

> to rescind the illegal measures taken by the Israeli military occupation authorities in expelling the mayors of Hebron and Halhoul and the Sharia Judge of Hebron, and to facilitate the immediate return of the expelled Palestinian leaders so that they can resume the functions for which they were elected and appointed.[314]

345. In Resolution 687 of 1991 on Iraq, the UN Security Council noted that "despite the progress being made in fulfilling the obligations of resolution 686 (1991), many Kuwaiti and third-State nationals are still not accounted for and property remains unreturned". It requested the UN Secretary-General "to report to the Council on the steps taken to facilitate the return of all Kuwaiti property seized by Iraq, including a list of any property that Kuwait claims has not been returned or which has not been returned intact".[315]
346. In a resolution on Liberia adopted in 1996, the UN Security Council condemned the looting of the equipment, supplies and personal property of members of ECOMOG, UNOMIL and international organisations and agencies delivering humanitarian assistance and called upon "the leaders of the factions to ensure the immediate return of looted property". It requested that the UN

[311] US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.
[312] US, House of Representatives, 107th Congress, 1st Session, Concurrent Resolution 195, HCON 195 IH, 24 July 2001.
[313] UN Security Council, Res. 387, 31 March 1976, § 4.
[314] UN Security Council, Res. 469, 20 May 1980, § 2.
[315] UN Security Council, Res. 687, 8 April 1991, preamble and § 15.

Secretary-General provide "information on how much of the stolen property has been returned".[316]

347. In 2001, the UN General Assembly adopted a resolution entitled "Responsibility of States for internationally wrongful acts", to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 34 ("Forms of reparation"), Article 35 ("Restitution") and Article 37 ("Satisfaction"), were annexed. In the resolution, the UN General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[317]

348. In a resolution adopted in 1998 on the situation of human rights in Afghanistan, the UN Commission on Human Rights urged all parties to the conflict to respect IHL and "to provide sufficient and effective remedies to the victims of grave violations and abuses of human rights and of accepted humanitarian rules and to bring the perpetrators to trial".[318]

349. In 1996, in a report on a mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences recommended, *inter alia*, that, at the national level:

> The Government of Japan should:
>
> (a) Acknowledge that the system of comfort stations set up by the Japanese Imperial Army during the Second World War was a violation of its obligations under international law and accept legal responsibility for that violation.
>
> . . .
>
> (d) Make a public apology in writing to individual women who have come forward and can be substantiated as women victims of Japanese military sexual slavery.[319]

350. In 2001, in its commentary on Article 33 of the 2001 ILC Draft Articles on State Responsibility, the ILC stated that:

> When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.[320]

316 UN Security Council, Res. 1071, 30 August 1996, § 8.
317 UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
318 UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(d); see also Res. 1996/75, 23 April 1996, § 10.
319 UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 137(a) and (d).
320 ILC, Commentary on Article 33 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, p. 234.

351. In 2001, in its commentary on Article 35 of the 2001 ILC Draft Articles on State Responsibility, the ILC noted that:

> (1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act . . .
> (3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory at Chorzów* case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible" . . .
> (5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory, the handing over to a State of . . . other types of property, including documents, works of art . . .[321]

352. In 2001, in its commentary on Article 36 of the 2001 ILC Draft Articles on State Responsibility, the ILC noted that:

> Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way . . . Satisfaction . . . is the remedy for those injuries, not financially assessable, which amount to an affront [of the State].[322]

353. In 2001, in its commentary to Article 37 of the 2001 ILC Draft Articles on State Responsibility, the ILC stated that:

> Satisfaction . . . is not a standard form of reparation . . . It is only in those cases where [restitution or compensation] have not provided full reparation that satisfaction may be required . . . Satisfaction . . . is the remedy for those injuries, not financially assessable, which amount to an affront to the State . . . The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.

[321] ILC, Commentary on Article 35 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 238–240.
[322] ILC, Commentary on Article 36 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 246 and 264.

Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury . . . , disciplinary or penal action against the individuals whose conduct caused the intentionally wrongful act or the award of symbolic damages for non-pecuniary injury. Assurances or guarantees of non-repetition, which are dealt with in the Articles in the context of cessation, may also amount to a form of satisfaction.[323]

Other International Organisations

354. No practice was found.

International Conferences

355. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

356. In its judgement in *Akdivar and Others v. Turkey* in 1998, the ECtHR stated that:

> 45. The applicants further submitted that the Court should confirm . . . that the government should (1) bear the costs of necessary repairs in [their village] to enable the applicants to continue their way of life there; and (2) remove any obstacle preventing the applicants from returning to their village.
>
> In their view, such confirmation was necessary to prevent future and continuing violations of the Convention, in particular the *de facto* expropriation of their property.
>
> 46. The government maintained that the restoration of rights is not feasible due to the emergency conditions prevailing in the region. However, resettlement will take place when the local inhabitants feel themselves to be safe from terrorist atrocities.
>
> 47. The Court recalls that a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they will comply with a judgement in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.

The Court awarded damages for pecuniary and non-pecuniary losses but dismissed the remainder of the claim for just satisfaction.[324]

357. In 2000, in *Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador)*, the IACiHR stated that:

> 122. . . . The IACHR concludes that El Salvador has violated, to the prejudice of the victim's relatives, the right to judicial guarantees established in Article 8(1) of the

[323] ILC, Commentary on Article 37 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 263–266.

[324] ECtHR, *Akdivar and Others v. Turkey*, Judgement, 1 April 1998, §§ 45–47.

American Convention and the right to judicial protection, set forth at Article 25 of the Convention. The Commission also concludes that the Salvadoran State, by virtue of the conduct of the authorities and institutions identified in this report, is responsible for failing to carry out its duty to investigate seriously and in good faith the violation of rights recognized by the American Convention; to identify the persons responsible for that violation, place them on trial, punish them, and make reparations for the human rights violations; and for failing in its duty to guarantee rights as established in Article 1(1)

...

147. For its part, the Human Rights Committee of the United Nations has established, on several occasions, and specifically with respect to violations of the right to life, that the victims' next-of-kin have a right to be compensated for those violations due, among other things, to the fact that they do not know the circumstances of the death and the persons responsible for the crime. The UN human rights organs have clarified and insisted that the duty to make reparations for damage is not satisfied merely by offering a sum of money to the victims' next-of-kin. First, an end must be brought to their uncertainty and ignorance, i.e. they must be given the complete and public knowledge of the truth.

148. The right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non- repetition. The right of a society to have full knowledge of its past is not only a mode of reparation and clarification of what has happened, but is also aimed at preventing future violations.[325]

358. In 2001, in the case of the *Street Children v. Guatemala*, the IACtHR, referring to other judgements which it had rendered, stated that:

100. On many occasions, this Court has referred to the right of the next of kin of the victims to know what happened and the identity of the State agents responsible for the acts. "[W]henever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality". Moreover, this Court has indicated that the State "is obliged to combat [impunity] by all available legal means, because [impunity] encourages the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin".

101. Accordingly, the Court reiterates that Guatemala is obliged to investigate the facts that generated the violations of the American Convention in the instant case, identify those responsible and punish them.[326]

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

359. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

Article 1, common to the four Geneva Conventions and to Protocol I, stipulates that the contracting States are under an obligation "to respect and ensure respect

[325] IACiHR, *Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador)*, Report, 13 April 2000, §§ 122 and 147–148.

[326] IACtHR, *Street Children v. Guatemala*, Judgement, 26 May 2001, §§ 100–101.

for" those instruments. Beyond that, and on a more general level, a State is responsible for every act or omission attributable to it and amounting to a breach of an international obligation incumbent on it, including in the field of the international protection of the environment. States affected by such a breach are entitled to insist on the implementation of such rules of State responsibility, including cessation of the unlawful conduct [and] restitution.[327]

VI. Other Practice

360. In 1936, during the Spanish Civil War, in a note to the Portuguese Minister of Foreign Negotiations, the President of the Spanish Junta de Defensa Nacional, while denouncing and condemning certain acts of assassination, mistreatment and damage allegedly committed against his side and non-belligerent third parties by members of the adverse party (the "Red Forces Armed by the Government of Madrid"), apologised to the offended foreign government on the ground that the opposite side had not been able to enforce border security because it lacked the most elemental attributes of a territorial power. The President of the Spanish Junta de Defensa Nacional gave a guarantee to the Portuguese authorities that in no case would such acts be repeated and that the culprits would be prosecuted and punished. Moreover, he expressed his intention to repair the damage caused.[328]

361. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury".[329]

362. The Restatement (Third) further provides that:

A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense

(a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims;
(b) in a court or other tribunal of that state pursuant to its law; or

[327] ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, § 47.

[328] Spain, Note from the President of the Spanish Junta de Defensa Nacional to the Portuguese Minister of Foreign Negotiations concerning a supposed incursion into Portuguese territory of "Red forces armed by the Government of Madrid" resulting in the death of a commander of the "National" army, mistreatment of Spanish and Portuguese subjects, and damage to Portuguese property, Burgos, 17 September 1936, reprinted in *Ministério dos Negócios Estrangeiros, Dez anos de política externa (1936–1947), A Nação portuguesa e a segunda Guerra Mundial*, 1964, pp. 285–287.

[329] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 901.

(c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.[330]

363. It was reported that, in the period from the beginning of its operations in March 1996 to the end of February 1999, the Commission for Displaced Persons and Refugees, established by Article VII of the Agreement on Refugees and Displaced Persons annexed to the 1995 Dayton Accords, had registered over 126,000 claims relating to almost 160,000 properties. It is expected that up to 500,000 claims may be submitted.[331]

364. The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery stated that "reparation includes any or all forms that are applicable to the situation and cover all injuries suffered by the victim".[332]

365. In 2001, a provincial arm of the ELN in Colombia publicly apologised for the death of three children and the destruction of civilian houses which resulted from an attack with explosives which members of the ELN had conducted against a police station in the district of San Francisco, Oriente Antioqueño (Industrial Area). The ELN, which itself defined the attack as an "action of war", expressed its deep and sincere condolences to all those who had been affected by the explosion and expressed its willingness to collaborate in the recuperation of the remaining objects.[333]

[330] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 906.

[331] Hans van Houtte, "Mass Property Claim Resolution in a Post-War Society: the Commission for Real Property Claims in Bosnia and Herzegovina", *ICLQ*, Vol. 48, 1999, p. 632.

[332] Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Summary of Findings, 12 December 2000, § 32.

[333] ELN, Head Office, Area Industrial, Communiqué relative to the events of 9 August 2001.

CHAPTER 43

INDIVIDUAL RESPONSIBILITY

A. Individual Responsibility

Individual criminal responsibility

I. Treaties and Other Instruments

Treaties

1. Article 227 of the 1919 Treaty of Versailles provides that:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused.

2. Article 228 of the 1919 Treaty of Versailles provides that:

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law.

3. Article 1 of the 1945 London Agreement provided that the IMT (Nuremberg) be established "for the trial of war criminals . . . whether they be accused

individually or in their capacity as members of organizations or groups or in both capacities".

4. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

> The Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against peace: . . .
> (b) War crimes: . . .
> (c) Crimes against humanity: . . .
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

5. Article 7 of the 1945 IMT Charter (Nuremberg) provides that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".

6. Article 1 of the 1948 Genocide Convention provides that "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish".

7. Article 49 GC I provides that:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

Corresponding provisions are contained in Articles 50 GC II, 129 GC III and 146 GC IV. The grave breaches to which the obligations of paragraphs 1 and 2 apply are defined in Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV.

8. Article 28 of the 1954 Hague Convention requires States "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit . . . a breach of the present Convention".

9. Article 2(2) of the 1973 Convention on Crimes against Internationally Protected Persons provides that "each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature".
10. Article 85(1) AP I provides that "the provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol". Article 85 AP I was adopted by consensus.[1] The grave breaches of AP I are defined in Articles 11(4) and 85(3) and (4) AP I.
11. Article 4 of the 1977 OAU Convention against Mercenarism, entitled "Scope of criminal responsibility", states that "a mercenary is responsible both for the crime of mercenarism and all related offences, without prejudice to any other offences for which he may be prosecuted".
12. Article 4 of the 1984 Convention against Torture requires each State to "ensure that all acts of torture are offences under its criminal law" and to "make these offences punishable by appropriate penalties which take into account their grave nature".
13. Article 9 of the 1994 Convention on the Safety of UN Personnel provides that:

1. The intentional commission of:
   (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
   (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
   (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
   (d) An attempt to commit any such attack; and
   (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.
2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

Article 2(2) underlines that:

this Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

14. Article 14 of the 1996 Amended Protocol II to the CCW provides that:

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

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

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

15. Article 9 of the 1997 Ottawa Convention provides that:

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

16. Article 2(1) of the 1998 Draft Convention on Forced Disappearance provides that:

The perpetrators or other participants in a constituent element of the offence as defined in article 1 of this Convention shall be punished for a forced disappearance where they knew or ought to have known that the offence was about to be or was in the process of being committed. The perpetrator of and other participants in the following acts shall also be punished:

(a) Instigation, incitement or encouragement of the commission of the offence of forced disappearance;
(b) Conspiracy or collusion to commit an offence of forced disappearance;
(c) Attempt to commit an offence of forced disappearance; and
(d) Concealment of an offence of forced disappearance.

2. Nonfulfilment of the legal duty to act to prevent a forced disappearance shall also be punished.

17. Article 1 of the 1998 ICC Statute provides for the establishment of an International Criminal Court with "the power to exercise jurisdiction over persons for the most serious crimes of international concern".

18. Article 5(1) of the 1998 ICC Statute provides for the jurisdiction of the Court over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

19. Article 8(2)(c) and (e) of the 1998 ICC Statute gives the Court jurisdiction over violations of common Article 3 of the 1949 Geneva Conventions and "other serious violations of the laws and customs applicable in armed conflicts not of an international character".

20. Article 25 of the 1998 ICC Statute, entitled "individual criminal responsibility", provides that:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      (ii) Be made in the knowledge of the intention of the group to commit the crime;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

21. Article 30(1) of the 1998 ICC Statute provides that "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge".
22. Article 15(1) of the 1999 Second Protocol to the 1954 Hague Convention provides a list of acts being considered as offences within the meaning of the Protocol. Article 15(2) provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that "this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".
23. Article 4 of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

24. Article 1(1) of the 2002 Agreement on the Special Court for Sierra Leone, concluded pursuant to Security Council Resolution 1315 (2000), provides for the establishment of a Special Court for Sierra Leone "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996".
25. Article 1(1) of the 2002 Statute of the Special Court for Sierra Leone provides that "the Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996".
26. Article 6 of the 2002 Statute of the Special Court for Sierra Leone, entitled "Individual criminal responsibility", provides that:

1. A person who planned, instigated, . . . committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute [i.e. crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of AP II, and other serious violations of international humanitarian law] shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Other Instruments
27. Article 44 of the 1863 Lieber Code provides that:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

28. Article 47 of the 1863 Lieber Code provides that:

Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

29. Article 84 of the 1880 Oxford Manual provides that "offenders against the laws of war are liable to the punishments specified in the penal law".
30. The 1919 Commission on Responsibility was mandated, *inter alia*, to investigate individual responsibility for breaches of the laws of war and to draft proposals for the establishment of a tribunal to try these offences. The Commission identified a non-exhaustive list of 30 categories of violations of the laws and customs of war.
31. In the 1943 Moscow Declaration, the UK, US and USSR, "speaking in the interest of the thirty-two United Nations", expressed their determination that:

> Those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished . . . Thus, Germans who take part in . . . [such acts] will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.

32. Article II, Section 4(a) of the 1945 Allied Control Council Law No. 10 provides that "the official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment".
33. Article 5 of the 1946 IMT Charter (Tokyo), entitled "Jurisdiction over Persons and Offences", provides that:

> The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against Peace: . . .
> (b) Conventional War Crimes: Namely, violations of the laws or customs of war;
> (c) Crimes against Humanity.

34. Article 6 of the 1946 IMT Charter (Tokyo), entitled "Responsibility of Accused", provides that:

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

35. Principle I of the 1950 Nuremberg Principles provides that "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".
36. Principle II of the 1950 Nuremberg Principles provides that "the fact that internal law does not impose a penalty for an act which constitutes a crime

under international law does not relieve the person who committed the act from responsibility under international law".

37. Principle III of the 1950 Nuremberg Principles provides that "the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law".

38. Principle VI of the 1950 Nuremberg Principles provides that:

> The crimes hereinafter set out are punishable as crimes under international law:
> (a) Crimes against peace: . . .
> (b) War crimes: . . .
> (c) Crimes against humanity.

39. Article 1 of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind provides that "offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished".

40. Article 3 of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind provides that "the fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code".

41. Paragraph 11 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

> Each party undertakes, when it is officially informed of such an allegation made or forwarded by the ICRC, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

42. Article 3 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

> 1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.
> 2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.
> 3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind . . . is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention.

43. Article 4 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "responsibility for a crime against the peace

and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime".

44. Article 13 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "the official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility".

45. Article 3(i) of the 1992 London Programme of Action on Humanitarian Issues provides that:

> In carrying out the Programme of Action, the parties to the conflict undertook to abide by the following provisions:
>
> i) all parties to the conflict are bound to comply with their obligations under International Humanitarian Law and in particular the Geneva Conventions of 1949 and the Additional Protocols thereto, and that persons who commit or order the commission of grave breaches are individually responsible.

46. Articles 2–5 of the 1993 ICTY Statute give the ICTY the power to prosecute grave breaches of the Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5). Article 5 expressly states that the Tribunal has jurisdiction over such crimes "when committed in armed conflict, whether international or internal in character".

47. Article 6 of the 1993 ICTY Statute provides that the ICTY has jurisdiction over natural persons.

48. Article 7 of the 1993 ICTY Statute provides that:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

49. Article 20 of the 1994 ILC Draft Statute for an International Criminal Tribunal provides for the jurisdiction of an International Criminal Court with respect to the following crimes:

> (a) the crime of genocide;
> (b) the crime of aggression;
> (c) serious violations of the laws and customs applicable in armed conflict;
> (d) crimes against humanity;
> (e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct of the alleged, constitute exceptionally serious crimes of international concern.

50. The Annex to the 1994 ILC Draft Statute for an International Criminal Tribunal, entitled "Crimes pursuant to Treaties (see art. 20 (e))" refers, *inter alia*, to grave breaches of the Geneva Conventions, AP I, the crimes defined by Article 2 of the 1973 Convention on Crimes against Internationally Protected Persons, and the crime of torture made punishable by Article 4 of the 1984 Convention against Torture.

51. The 1994 ICTR Statute grants the Tribunal the power to prosecute persons accused of genocide (Article 2), crimes against humanity (Article 3), and serious violations of common Article 3 of the 1949 Geneva Conventions and of AP II (Article 4).

52. Article 5 of the 1994 ICTR Statute provides that the ICTR shall have jurisdiction over natural persons.

53. Article 6 of the 1994 ICTR Statute provides that:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

54. Section 20 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that "in the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches . . . In serious cases, offenders shall be brought to justice."

55. Paragraph 30 of the 1994 CSCE Code of Conduct provides that "each participating State . . . will ensure that [armed forces personnel] are aware that they are individually accountable under national and international law for their actions".

56. Article 2 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Individual responsibility", provides that:

1. A crime against the peace and security of mankind entails individual responsibility.
   . . .
3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
   (a) intentionally commits such a crime;
   . . .
   (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
   (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;

(f) directly and publicly incites another individual to commit such a crime which in fact occurs;
(g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

57. Article 7 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment".

58. Article 16 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Crime of aggression", provides that "an individual who, as leader or organizer, actively participates in . . . the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression".

59. Section 4 of the 1999 UN Secretary-General's Bulletin provides that "in case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts".

60. Section 1(1) and (2) of the 2000 UNTAET Regulation No. 2000/15 "on the establishment of panels with exclusive jurisdiction over serious criminal offences" establishes "panels of judges . . . within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences" and "panels within the Court of Appeal in Dili to hear and decide an appeal".

61. Section 1(3) of the 2000 UNTAET Regulation No. 2000/15 provides that:

[The panels of judges] . . . shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences:
(a) Genocide;
(b) War Crimes;
(c) Crimes against Humanity;
(d) Murder;
(e) Sexual Offences; and
(f) Torture.

62. Section 14 of the 2000 UNTAET Regulation No. 2000/15 provides that:

14.1 The panels shall have jurisdiction over natural persons pursuant to the present regulation.
14.2 A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.
14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose . . .
(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;
(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

63. Article 58 of the 2001 ILC Draft Articles on State Responsibility, entitled "Individual responsibility", states that "these articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State".

II. National Practice

Military Manuals

64. Argentina's Law of War Manual reiterates the provisions of the Geneva Conventions requiring States to take the necessary legislative measures to provide effective penal sanctions for persons committing grave breaches.[2] It further notes that "offences under the laws of war do not constitute 'acts of war' and thus may be punished under the Military Penal Code or the Penal Code . . . All violations of the laws of war are offences which affect the international relations of the Nation and, as such, are subject to sanction."[3]

65. Australia's Defence Force Manual provides that "ADF members are open to prosecution for breaches of LOAC. Individual responsibility for compliance cannot be avoided and ignorance is not a justifiable excuse. ADF members will be held to account for any unlawful action that leads to a serious breach of LOAC."[4]

66. Australia's Defence Training Manual states that members of the ADF "are to be aware of the rules which, if violated, make an individual personally liable for breaches of LOAC".[5]

[2] Argentina, *Law of War Manual* (1989), § 8.02.
[3] Argentina, *Law of War Manual* (1989), § 8.05.
[4] Australia, *Defence Force Manual* (1994), § 1306; see also *Commanders' Guide* (1994), § 1207.
[5] Australia, *Defence Training Manual* (1994), § 8(d).

67. Benin's Military Manual provides that "the soldier shall know that respect for these rules [of the law of war] is a part of military discipline and that any violation will lead to disciplinary or criminal sanctions".[6]
68. Cameroon's Disciplinary Regulations provides that the violation of the rules of the law of war renders members of the armed forces war criminals, liable to prosecution under military jurisdiction.[7]
69. Canada's LOAC Manual states that "heads of state as well as members of the administration may be held personally and criminally responsible for illegalities committed in the performance of their official duties".[8] The manual further notes that "any person who planned, instigated, ... committed or otherwise aided and abetted in the planning, preparation or execution of a war crime ... may be held criminally responsible for the crime".[9] It adds that "the official position of any accused person, whether as Head of State or as a responsible government official, does not relieve such person of criminal responsibility nor mitigate punishment".[10]
70. Colombia's Basic Military Manual states that "under the terms of Chapter IX of the First Geneva Convention relative to the repression of abuses and infractions, IHL establishes the principle of individual responsibility".[11]
71. The Military Manual of the Dominican Republic tells soldiers: "If you violate any of the laws of war, you commit a crime and are subject to punishment under the ... laws and the Code of Military Justice".[12]
72. Ecuador's Naval Manual states that "acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population".[13]
73. El Salvador's Human Rights Charter of the Armed Forces provides that "nobody shall escape the law, when a violation of human rights has been committed".[14] It adds that "the committed violations shall not go unpunished".[15]
74. France's LOAC Manual states that "each individual is responsible for the violations of the law of armed conflict he has committed, whatever the circumstances".[16]
75. Germany's Military Manual provides that "each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he can be prosecuted according to penal or disciplinary provisions".[17] A commentary on the manual notes that:

[6] Benin, *Military Manual* (1995), Fascicule II, p. 15.
[7] Cameroon, *Disciplinary Regulations* (1975), Article 35.
[8] Canada, *LOAC Manual* (1999), p. 15-2, § 10.
[9] Canada, *LOAC Manual* (1999), p. 16-4, § 24.
[10] Canada, *LOAC Manual* (1999), p. 16-4, § 25.
[11] Colombia, *Basic Military Manual* (1995), p. 37.
[12] Dominican Republic, *Military Manual* (1980), p. 12.
[13] Ecuador, *Naval Manual* (1989), § 6.2.5.
[14] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 16.
[15] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 17.
[16] France, *LOAC Manual* (2001), p. 113.
[17] Germany, *Military Manual* (1992), § 1207.

The Second Additional Protocol (AP II) does not mention grave breaches. Article 6 nevertheless regulates the prosecution and punishment of criminal offences connected with armed conflict. The AP II presumes application of domestic criminal law, whereby the domestic power of sentence is subordinate to the demands of the Protocol.[18]

76. Italy's IHL Manual states that individual criminal responsibility for those who commit a war crime is provided for under Italian law.[19]

77. The Military Manual of the Netherlands contains a provision entitled "Individual responsibility", which refers to the detailed provisions on the suppression and punishment of war crimes contained in the manual.[20]

78. Peru's Human Rights Charter of the Security Forces provides that "nobody shall escape the law when a violation of human rights has been committed. There shall be no impunity when a violation of human rights has been committed."[21]

79. South Africa's LOAC Manual states that "the conventions and protocols place specific obligations on individual members of the SANDF; breaches thereof may lead to personal liability".[22] It further states that "signatory States are required to treat as criminals under domestic law anyone who commits or orders a grave breach".[23]

80. Spain's LOAC Manual provides that "each person is subject to personal responsibility for the acts he is committing in breach of the rules of armed conflicts and which are qualified as disciplinary offences, criminal offences or war crimes".[24]

81. Sweden's IHL Manual provides that "individual servicemen also bear a responsibility for the observance of international humanitarian law".[25]

82. Switzerland's Basic Military Manual provides that "the violations of the laws and customs of war, commonly known as war crimes, engage the individual responsibility of those who committed them".[26]

83. Togo's Military Manual provides that "the soldier shall know that respect for these rules [of the law of war] is a part of military discipline and that any violation will lead to disciplinary or criminal sanctions".[27]

84. The UK LOAC Manual states that "although international law is aimed mainly at regulating the conduct of States and their Governments, individual combatants are required to comply with the law of armed conflict".[28]

[18] Rüdiger Wolfrum, "Enforcement of International Humanitarian Law", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 524.
[19] Italy, *IHL Manual* (1991), Vol. I, § 83.
[20] Netherlands, *Military Manual* (1993), p. IX-3.
[21] Peru, *Human Rights Charter of the Security Forces* (1991), p. 21, see also p. 27.
[22] South Africa, *LOAC Manual* (1996), § 4.
[23] South Africa, *LOAC Manual* (1996), § 35.
[24] Spain, *LOAC Manual* (1996), Vol. I, § 7.6.b.
[25] Sweden, *IHL Manual* (1991), Section 4.2, p. 95.
[26] Switzerland, *Basic Military Manual* (1987), Article 191.
[27] Togo, *Military Manual* (1996), Fascicule II, p. 15.
[28] UK, *LOAC Manual* (1981), Section 2, p. 7, § 7.

85. The US Field Manual states that:

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offences in connection with war comprise:
a. Crimes against peace.
b. Crimes against humanity.
c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offences which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offences constituting "war crimes".[29]

The manual also states that "conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable".[30] After quoting the common articles of the Geneva Conventions on penal measures (Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV), the manual states that these provisions "are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own forces".[31] It adds that:

"Grave breaches" of the Geneva Conventions of 1949 and other war crimes which are committed by enemy personnel or persons associated with the enemy are tried and punished by United States tribunals as violations of international law. If committed by persons subject to US military law, the "grave breaches" constitute acts punishable under the Uniform Code of Military Justice. Moreover, most of the acts designated as "grave breaches" are, if committed within the United States, violations of domestic law over which the civil courts can exercise jurisdiction.[32]

86. The US Air Force Pamphlet states that "combatants individually are responsible for following the law of armed conflict which obligates their nation".[33] It further states that "individual criminal responsibility is another mechanism to enforce the law of armed conflict".[34] The Pamphlet also contains a list of "acts [in addition to the grave breaches of the Geneva Conventions of 1949"] . . . representative of situations involving individual criminal responsibility".[35]

87. The US Soldier's Manual tells soldiers that "if you violate any of the laws of war, you commit a crime and are subject to punishment under US law, which includes the Uniform Code of Military Justice (UCMJ)".[36]

[29] US, *Field Manual* (1956), § 498. [30] US, *Field Manual* (1956), § 500.
[31] US, *Field Manual* (1956), § 506(b). [32] US, *Field Manual* (1956), § 506(c).
[33] US, *Air Force Pamphlet* (1976), § 1-4(d). [34] US, *Air Force Pamphlet* (1976), § 10-6.
[35] US, *Air Force Pamphlet* (1976), § 15-3(c). [36] US, *Soldier's Manual* (1984), p. 26.

88. The US Naval Handbook provides that "acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population".[37]
89. The YPA Military Manual of the SFRY (FRY) provides that "parties to the conflict . . . are authorised and have the duty to invoke criminal responsibility" with respect to personnel of their own and enemy armed forces who commit violations of IHL.[38]

National Legislation
90. Numerous States have adopted instruments criminalising serious violations of IHL. This has been done in a number of ways. Because of their dualist approach to treaties, after ratifying the Geneva Conventions and the Additional Protocols, many States with a common-law tradition had to adopt implementing legislation, usually called Geneva Conventions Acts, to give national effect to these instruments and, in this implementing legislation, laid down the principle of criminal responsibility. Other States adopted provisions in their codes penalising the violations. Some States adopted specific legislation criminalising the violations.
91. Argentina's Penal Code provides that the penalty applied to the perpetrator of a crime shall also be applied to persons who cooperate with the perpetrator of the crime, which would not have taken place without such cooperation, and to those who "directly caused another person to commit the crime".[39]
92. Argentina's Draft Code of Military Justice provides for the introduction of the title "Offences against protected persons and objects in case of armed conflict" in the Code of Military Justice as amended.[40] This title provides for the punishment of specified prohibited acts "committed in the event of armed conflict".[41] As to this title's scope of application, the Draft Code states that:

[The present title applies to the following protected persons:]
1) The wounded, sick and shipwrecked and medical or religious personnel protected by [GC I and II or AP I];
2) Prisoners of war protected by [GC III or AP I];
3) The civilian population and [individual] civilian persons protected by [GC IV or AP I];
4) Persons *hors de combat* and the personnel of the protecting power and of its substitute, protected by [the Geneva Conventions or AP I];
5) *Parlementaires* and the persons accompanying them, protected by [the 1899 Hague Convention II];

[37] US, *Naval Handbook* (1995), § 6.2.5.
[38] SFRY (FRY), *YPA Military Manual* (1988), § 32.
[39] Argentina, *Penal Code* (1984), Article 45.
[40] Argentina, *Draft Code of Military Justice* (1998), Article 287, introducing a new Title XVIII, Chapter I in the *Code of Military Justice as amended* (1951).
[41] Argentina, *Draft Code of Military Justice* (1998), Articles 289–296, introducing new Articles 873–880 in the *Code of Military Justice as amended* (1951).

6) Any other person [to which AP II] or any other international treaty to which Argentina is a party applies.[42]

The Draft Code further provides that:

A soldier who, at the occasion of an armed conflict, commits . . . any other violation or act contrary to the provisions of the international treaties to which Argentina is a party and relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property in case of armed conflict, will be punished.[43]

93. In its Chapter 33 entitled "Crimes against the peace and security of mankind", Armenia's Penal Code provides for the punishment of certain acts, committed during armed conflicts, which violate the laws and customs of war, including "Serious breaches of international humanitarian law during armed conflict", crimes against humanity and genocide.[44]

94. Australia's War Crimes Act as amended provides that:

A person who:
(a) on or after 1 September 1939 and on or before 8 May 1945; and
(b) whether as an individual or as a member of an organisation;

committed a war crime is guilty of an indictable offence against this Act.[45]

A "serious crime" constitutes a "war crime" when committed "in the course of hostilities in a war", "in the course of an occupation", "in pursuing a policy associated with the conduct of a war or with an occupation" or, "on behalf of, or in the interests of, a power conducting a war or engaged in an occupation". War itself is defined as "(a) a war, whether declared or not; (b) any other armed conflict between countries; or (c) a civil war or similar armed conflict (whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945".[46]

95. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of Protocol I is guilty of an indictable offence".[47]

96. Australia's ICC (Consequential Amendments) Act contains a list of acts qualified as "Genocide" (Sections 268.3–268.7), "Crimes against humanity"

[42] Argentina, *Draft Code of Military Justice* (1998), Article 288, introducing a new Article 872 in the *Code of Military Justice as amended* (1951).
[43] Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the *Code of Military Justice as amended* (1951).
[44] Armenia, *Penal Code* (2003), Articles 383, 386–387 and 390–397.
[45] Australia, *War Crimes Act as amended* (1945), Section 9(1).
[46] Australia, *War Crimes Act as amended* (1945), Sections 5 and 7(1).
[47] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

(Sections 268.8–268.23), "War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions" (Sections 268.24–268.34), "Other serious war crimes that are committed in the course of an international armed conflict" (Sections 268.35–268.68), "War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict" (Sections 268.69–268.76), "War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict" (Sections 268.77–268.94), "War crimes that are grave breaches of Protocol I to the Geneva Conventions" (Sections 268.95–268.101). The Act also includes the penalty to be imposed for each of these crimes.[48]

97. Under Austria's Penal Code, "not only the immediate perpetrator commits a crime, but also anybody who is instigating another to commit a crime, as well as anybody who makes any contribution to somebody else's criminal act".[49]

98. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War is applicable "in case Azerbaijan is a participant of intergovernmental armed conflict (war) or in case of internal armed conflict in its territory, between Azerbaijan Republic and two or more parties, even if one of these parties does not confirm the existence of such a conflict" and provides for the protection of civilian persons, POWs, the wounded and the sick as well as the missing and the dead. It states that "for the violation of the provisions of this law, accused persons are subject to disciplinary, administrative or criminal liability in accordance with the legislation of Azerbaijan Republic".[50]

99. Azerbaijan's Criminal Code provides for punishment, *inter alia*, in case of war crimes (Article 57). In the chapter entitled "War crimes", the Code contains further provisions criminalising: the use of "mercenaries" (Article 114); "violations of [the] laws and customs of war" (Article 115); "violations of the norms of international humanitarian law in time of armed conflict" (Article 116); "negligence or giving criminal orders in time of armed conflict" (Article 117); "pillage" (Article 118); and "abuse of protected signs" (Article 119).[51]

100. Bangladesh's International Crimes (Tribunal) Act provides that:

> The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely: –
> (a) Crimes against humanity . . .
> (b) Crimes against peace . . .
> (c) Genocide . . .
> (d) War Crimes . . .
> (e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

[48] Australia, *ICC (Consequential Amendments)* Act (2002), Sections 268.3–268.101.
[49] Austria, *Penal Code* (1974), Article 12.
[50] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 1 and 31.
[51] Azerbaijan, *Criminal Code* (1999), Articles 57 and 114–119.

(f) any other crimes under international law;
(g) attempt, abatement or conspiracy to commit any such crimes;
(h) complicity in or failure to prevent commission of any such crimes.[52]

101. The Geneva Conventions Act of Barbados provides that:

(1) A grave breach of any of the Geneva Conventions of 1949 that would, if committed in Barbados, be an offence under any law of Barbados, constitutes an offence under that law when committed outside Barbados.
(2) A person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished.[53]

102. The Criminal Code of Belarus, in a chapter entitled "War crimes and other violations of the laws and customs of war", provides, *inter alia*, for the punishment of specified acts, such as "mercenary activities" (Article 133), "use of weapons of mass destruction" (Article 134), "violations of the laws and customs of war" (Article 135), "criminal offences against the norms of international humanitarian law during armed conflicts" (Article 136), or "abuse of signs protected by international treaties" (Article 138).[54]

103. Article 1 of Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides a list of punishable acts or omissions ("grave breaches") committed against persons protected by the Geneva Conventions and both AP I and AP II.[55] The 1993 law was amended in 1999 to expand the range of crimes to which it applied. Since then, the crime of genocide and crimes against humanity also constitute punishable crimes under this Law.[56]

104. The Criminal Code of the Federation of Bosnia and Herzegovina contains provisions regarding the punishment of certain acts, some of them committed "in time of war or armed conflict", such as: "war crimes against civilians" (Article 154); "war crimes against the wounded and sick" (Article 155); "war crimes against prisoners of war" (Article 156); "organizing a group and instigating the commission of genocide and war crimes" (Article 157); "unlawful killing or wounding of the enemy" (Article 158); "marauding" (Article 159); "using forbidden means of warfare" (Article 160); "violating the protection granted to bearers of flags of truce" (Article 161); "cruel treatment of the wounded, sick and prisoners of war" (Article 163); "destruction of cultural and historical monuments" (Article 164); and "misuse of international emblems" (Article 166).[57] The Criminal Code of the Republika Srpska contains the same provisions.[58]

[52] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2).
[53] Barbados, *Geneva Conventions Act* (1980), Section 3(1) and (2).
[54] Belarus, *Criminal Code* (1999), Articles 132–138.
[55] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).
[56] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(1) and (2).
[57] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154–161 and 163–166.
[58] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433–445.

105. Botswana's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV] shall be guilty of an offence and [be punished].[59]

106. Bulgaria's Penal Code as amended provides for the punishment of a list of specified acts entitled "Crimes against the laws and customs of waging war".[60]

107. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that:

Whosoever conceives, plans, plots, orders, instigates to commit, attempts to commit or commits one of the infringements aimed at in articles 2, 3 and 4 respectively of this law [i.e. genocide, crimes against humanity and war crimes] is guilty of a crime of genocide, a crime against humanity [and/or] a war crime.[61]

War Crimes are defined as the grave breaches of the 1949 Geneva Conventions, "other serious violations of the laws and customs applicable to international armed conflicts" "serious violations of article 3 common to the four Geneva Conventions" or "other serious violations of the laws and customs applicable to armed conflicts not of an international character".[62]

108. Cambodia's Law on the Khmer Rouge Trial provides that:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in Articles 3, 4, 5, 6, 7, and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The Articles referred to deal with "any of the crimes set forth in the 1956 Penal Code", such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the Convention on Crimes against Internationally Protected Persons (Article 8), all of these acts having been committed during the period from 1975 to 1979.[63]

109. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach referred

[59] Botswana, *Geneva Conventions Act* (1970), Section 3(1).
[60] Bulgaria, *Penal Code as amended* (1968), Articles 410–415.
[61] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 5.
[62] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4.
[63] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.

to in Article 50 [GC I], Article 51 [GC II], Article 130 [GC III], Article 147 [GC IV] or Article 11 or 85 [AP I] is guilty of an indictable offence and [is liable to punishment]".[64]

110. Canada's Crimes against Humanity and War Crimes Act states that for offences within Canada, "every person is guilty of an indictable offence who commits (a) genocide; (b) a crime against humanity; or (c) a war crime".[65] It also states that "every person who, either before or after coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime is guilty of an indictable offence and may be prosecuted".[66] It further adds that "war crime means an act or omission committed during an armed conflict that... constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts" and it specifies that the crimes described in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law".[67]

111. Chile's Code of Military Justice, under the heading "Offences against international law", provides, *inter alia*, for the punishment of certain war crimes.[68]

112. China's Law Governing the Trial of War Criminals contains a list of punishable offences such as war crimes.[69]

113. Colombia's Penal Code, under the heading "Crimes against persons and objects protected by international humanitarian law", contains a list of provisions concerning the punishment of specified crimes committed "in the event and during an armed conflict". The persons protected are: the civilians, the persons not taking part in the hostilities and the civilians in the power of the adverse party, the wounded, sick and shipwrecked placed *hors de combat*, the combatants who have laid down their arms, because of capture, surrender, or any similar reason, the persons considered as stateless or refugees before the beginning of the conflict, and the persons protected under the 1949 Geneva Conventions and AP I and AP II.[70]

114. The DRC Code of Military Justice as amended contains provisions for the punishment of a list of offences such as war crimes which are applicable "in time of war or in an area where a state of siege or a state of emergency has been proclaimed".[71]

115. Congo's Genocide, War Crimes and Crimes against Humanity Act provides for the punishment of the authors and perpetrators of acts such as:

[64] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).
[65] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4(1).
[66] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 6.
[67] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4(3) and (4).
[68] Chile, *Code of Military Justice* (1925), Articles 261–264.
[69] China, *Law Governing the Trial of War Criminals* (1946), Article 3.
[70] Colombia, *Penal Code* (2000), Articles 135–164.
[71] DRC, *Code of Military Justice as amended* (1972), Articles 436, 455, 472 and 522–526.

a) grave breaches of the Geneva Conventions ...
b) other grave breaches of the laws and customs applicable to international armed conflicts in the scope established by international law;
c) grave breaches of article 3 common to the four Geneva Conventions ...
d) and other grave breaches recognized as applicable to armed conflicts which are not of an international character, within the scope established by international law.[72]

116. The Geneva Conventions and Additional Protocols Act of the Cook Islands, referring to Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV and Articles 11(4) and 85(2), (3) and (4) AP I, provides that "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of [AP I] is guilty of an offence".[73]

117. Costa Rica's Penal Code as amended provides for the punishment of offences such as acts of genocide and "other punishable acts against human rights and international humanitarian law, provided for in the treaties adhered to by Costa Rica or in this Code".[74] Under another provision entitled "War crimes", it also provides for the punishment of:

Whoever, in the event of an armed conflict, commits or orders to be committed acts which can be qualified as grave breaches or war crimes, in conformity with the provisions of international treaties to which Costa Rica is a party, regarding the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property, [applicable] in cases of armed conflict, and under any other instrument of international humanitarian law.[75]

The Penal Code as amended further provides for the punishment of crimes against humanity.[76]

118. Côte d'Ivoire's Penal Code as amended, in a chapter dealing with offences against the law of nations, provides for the punishment of certain acts committed "in time of war or occupation", such as "crimes against the civilian population (Article 138) and "crimes against prisoners of war" (Article 139). It further provides for the punishment of the illegal use of distinctive signs and emblems (Article 473).[77]

119. Croatia's Criminal Code, in a chapter entitled "Criminal offences against values protected by international law", provides for a list of punishable acts committed by "whoever" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against the civilian population" (Article 158);

[72] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Articles 4, 5, 10 and 11.
[73] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).
[74] Costa Rica, *Penal Code as amended* (1970), Article 7.
[75] Costa Rica, *Penal Code as amended* (1970), Article 378.
[76] Costa Rica, *Penal Code as amended* (1970), Article 379.
[77] Côte d'Ivoire, *Penal Code as amended* (1981), Articles 138–139 and 473.

"war crimes against the wounded and sick" (Article 159); "war crimes against prisoners of war" (Article 160); "unlawful killing and wounding of the enemy" (Article 161); "unlawful taking of the belongings of those killed or wounded on the battlefield" (Article 162); "forbidden means of combat" (Article 163); "injury of an intermediary" (Article 164); "brutal treatment of the wounded, sick and prisoners of war" (Article 165); "unjustified delay in the repatriation of prisoners of war" (Article 166); "destruction of cultural objects or of facilities containing cultural objects" (Article 167); and "misuse of international symbols" (Article 168).[78]

120. Cuba's Military Criminal Code, in a chapter entitled "Offences committed during combat actions", provides for the punishment of certain acts such as: "mistreatment of prisoners of war" (Article 42); "plundering" (Article 43); "violence against the population of the area of military activities" (Article 44); and "prohibited use of banners or symbols of the Red Cross" (Article 45).[79]

121. Cyprus's Geneva Conventions Act, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, provides that:

> Any person who, in spite of nationality, commits in the Republic or outside the Republic, any serious violation or takes part, or assists or incites another person in the commission of serious violations of the Geneva Conventions . . . shall be guilty of an offence and in case of conviction . . . be liable [to punishment].[80]

122. Cyprus's AP I Act provides that:

> Any person who, in spite of nationality, commits in the Republic or outside the Republic any serious violation of the provisions of [AP I], or takes part or assists or incites another person in the commission of such a violation, shall be guilty of an offence and in case of conviction . . . be liable [to punishment].[81]

123. The Czech Republic's Criminal Code as amended, under the heading "Crimes against humanity", provides for the punishment of certain offences such as: "genocide" (Article 259); "torture and other inhuman and cruel treatment" (Article 259a); "use of a forbidden weapon or an unpermitted form of combat" (Article 262); "wartime cruelty" (Article 263); "persecution of a population" (Article 263a); "plunder in a theatre of war" (Article 264); and "misuse of internationally recognised insignia and state insignia" (Article 265).[82]

124. The Code of Military Justice of the Dominican Republic provides for the punishment of a soldier who infringes certain rules of the LOAC, notably against prisoners of war, hospitals, temples or parlementaires.[83]

[78] Croatia, *Criminal Code* (1997), Articles 158–168.
[79] Cuba, *Military Criminal Code* (1979), Articles 42–45.
[80] Cyprus, *Geneva Conventions Act* (1966), Section 4(1).
[81] Cyprus, *AP I Act* (1979), Section 4(1).
[82] Czech Republic, *Criminal Code as amended* (1961), Articles 259–259(a) and 262–265.
[83] Dominican Republic, *Code of Military Justice* (1953), Article 201.

125. El Salvador's Code of Military Justice provides for the punishment of various offences committed "in time of international or civil war", such as arson, destruction of property, plundering of inhabitants or acts of violence against persons (Article 68). It also provides for the punishment of other acts committed "in time of international war", including offences against prisoners of war, attacks on medical units, transports or personnel, abuse of the red cross, destruction of cultural property, offences against parlementaires (Article 69), despoliation of the wounded or prisoners (Article 70), despoliation of the dead (Article 71), and unnecessary requisition of buildings and objects (Article 72).[84]

126. El Salvador's Penal Code provides for the punishment of acts of "Genocide" (Article 361), "Violations of the laws and customs of war" committed "during an international or a civil war" (Article 362), "Violations of the duties of humanity" (Article 363), and "Enforced disappearance of persons" (Article 364).[85]

127. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of a list of crimes committed during an international or internal armed conflict.[86]

128. Estonia's Penal Code provides that the author of crimes against humanity (paragraph 89), genocide (paragraph 90), crimes against peace (paragraphs 91–93) or war crimes (paragraphs 94–109) shall be punished.[87] It further provides that:

> (1) Offences committed in times of war which are not provided for under this section [dealing with war crimes] are punishable on the basis of other provisions of the special part of this Code.
> (2) A person who has committed an offence provided for under this section shall be punished only for the commission of a war crime even if the offence comprises the necessary elements of other offences provided for in the special part of this Code.[88]

129. Ethiopia's Penal Code, under the heading "Offences against the law of nations", provides for a list of punishable acts committed by "whosoever" such as: "war crimes against the civilian population" (Article 282); "war crimes against wounded, sick or shipwrecked persons" (Article 283); "war crimes against prisoners and interned persons" (Article 284); "pillage, piracy and looting" (Article 285); "provocation and preparation [of the above-mentioned acts]" (Article 286); "dereliction of duty towards the enemy" (Article 287); "use of illegal means of combat" (Article 288); "maltreatment of, or dereliction of duty towards, wounded, sick or prisoners" (Article 291); "denial of justice" (Article 292); "hostile acts against international humanitarian organizations" (Article 293); "abuse of international emblems and insignia" (Article 294); and

[84] El Salvador, *Code of Military Justice* (1934), Articles 68–72.
[85] El Salvador, *Penal Code* (1997), Articles 361–364.
[86] El Salvador, *Draft Amendments to the Penal Code* (1998), Title XIX.
[87] Estonia, *Penal Code* (2001), §§ 89–109.
[88] Estonia, *Penal Code* (2001), § 94.

"hostile acts against the bearer of a flag of truce" (Article 295). Some of these provisions specify that the acts concerned be committed "in time of war, armed conflict (or occupation)" and/or "in violation of the rules of public international law".[89] According to the Report on the Practice of Ethiopia, acts which constitute "war crimes in the context of [an] international armed conflict would also be crimes in the context of [an] internal armed conflict".[90]

130. In 1992, the transitional government of Ethiopia adopted the Special Public Prosecutor's Office Establishment Proclamation which provides that:

> Whereas . . . it is essential that higher officials of the WPE and members of the security and armed forces who have been detained at the time the EPRDF assumed control of the Country and thereafter and who are suspected of having committed offences . . . must be brought to trial;
> . . .
> Whereas it is necessary to provide for the establishment of a Special Public Prosecutor's Office that shall conduct prompt investigation and bring to trial detainees as well as those persons who are responsible for having committed offences and are at large both within and without the Country;
> Now therefore . . . it is hereby proclaimed as follows:
> . . .
> The Special Public Prosecutor's Office . . . is hereby established.
> . . .
> The Office shall, in accordance with the law, have the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Dergue-WPE regime.[91]

131. Finland's Revised Penal Code contains a chapter entitled "War crimes and crimes against humanity" and therein provides for the punishment of individuals who commit acts listed under the chapter. In some of the provisions in this chapter the Revised Penal Code specifies that the acts be committed "in an act of war" (Section 1) or punishes "violations of human rights in a state of emergency", defined as violations of "the rules on the protection of the wounded, the sick or the distressed, the treatment of prisoners of war and the protection of the civilian population, which . . . are to be followed during war, armed conflict or occupation" (Section 4).[92]

132. France's Ordinance on Repression of War Crimes provides for the prosecution of certain persons having committed specific acts from the opening of hostilities.[93]

[89] Ethiopia, *Penal Code* (1957), Articles 282–288 and 291–295.
[90] Report on the Practice of Ethiopia, 1998, Chapter 6.4.
[91] Ethiopia, *Special Public Prosecutor's Office Establishment Proclamation* (1992), preamble and Articles 2(1) and 6.
[92] Finland, *Revised Penal Code* (1995), Chapter 11, Sections 1–4.
[93] France, *Ordinance on Repression of War Crimes* (1944), Article 1.

133. France's Code of Military Justice provides for the punishment of acts of pillage (Articles 427 and 428) and illegal use, in times of war, of "distinctive signs and emblems defined by international conventions" (Article 439).[94]
134. France's Penal Code provides for the punishment of a list of certain acts such as genocide and crimes against humanity and also provides for a special provision in case such crimes are committed "in times of war".[95]
135. France's Laws on Cooperation with the ICTY and with the ICTR provide for the punishment of authors and accomplices of serious violations of IHL.[96]
136. Georgia's Criminal Code, in a part entitled "Crimes against peace and security of mankind and international humanitarian law", provides a list of punishable offences such as: "genocide" (Article 407); "crimes against humanity" (Article 408); "mercenaries" (Article 410); "wilful breaches of norms of international humanitarian law committed in armed conflict" (Article 411); "wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury" (Article 412); and "other breaches of norms of international humanitarian law" (Article 413), the latter including "any other war crime provided for in the [1998 ICC Statute]".[97] For some of these offences, the Code specifies that the acts be committed "in an international or internal armed conflict".[98]
137. Germany's Law Introducing the International Crimes Code provides for the punishment of, *inter alia*, genocide (Article 1, paragraph 6), crimes against humanity (Article 1, paragraph 7) and war crimes, including "War crimes against persons" (Article 1, paragraph 8), "War crimes against property and other rights" (Article 1, paragraph 9), "War crimes against humanitarian operations and emblems" (Article 1, paragraph 10), "War crimes consisting in the use of prohibited methods of warfare" (Article 1, paragraph 11) and "War crimes consisting in employment of prohibited means of warfare" (Article 1, paragraph 12).[99] Some of these crimes must be punished when committed "in connection with an international armed conflict or with an armed conflict not of an international character", some others when committed "in connection with an international armed conflict".[100]
138. Guatemala's Penal Code provides for the punishment of certain war crimes, namely those committed against prisoners of war, the civilian population and certain objects.[101]

[94] France, *Code of Military Justice* (1982), Articles 427, 428 and 439.
[95] France, *Penal Code* (1994), Articles 211(1)–212(3).
[96] France, *Law on Cooperation with the ICTY* (1995), Article 2; *Law on Cooperation with the ICTR* (1996), Article 2.
[97] Georgia, *Criminal Code* (1999), Articles 407–408 and 410–413.
[98] Georgia, *Criminal Code* (1999), Articles 411–412.
[99] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 6–12.
[100] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 8(1)–(2), 9(1), 10(1)–(2), 11(1)–(2) and 12 (international and non-international armed conflict); Article 1, §§ 8(3), 9(2) and 11(3) (international armed conflict).
[101] Guatemala, *Penal Code* (1973), Article 378.

139. Guinea's Criminal Code provides for the punishment of certain acts constitutive of violations of IHL, such as pillage, the despoliation of the dead, wounded, sick and shipwrecked in a zone of military operations and the use, in an area of military operations and in violation of the laws and customs of war, of distinctive insignia or emblems defined under international conventions.[102]
140. Hungary's Criminal Code as amended, under the title "Crimes against humanity", provides for the punishment of a list of certain acts including genocide and war crimes, such as "Violence against the civilian population" (Article 158), "War-time looting" (Article 159), "Wanton warfare" (Article 160), "Use of weapons prohibited by international treaty" (Article 160/A), "Battlefield looting" (Article 161), "Violence against a war emissary" (Article 163) and "Misuse of the red cross" (Article 164), some of them when committed "in an operational or occupied area" or "violating the rules of the international law of warfare".[103]
141. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the [Geneva] Conventions, he shall be punished".[104]
142. Ireland's Geneva Conventions Act as amended provides that:

> Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] Conventions or Protocol I shall be guilty of an offence and on conviction on indictment [be liable to punishment].[105]

The Act also provides that:

> Any person, whatever his nationality, who, in the State, commits, or aids, or abets or procures the commission in the State by any other person of any other minor breach of any of the [Geneva] Conventions or of Protocol I or Protocol II shall be guilty of an offence.
> ...
> Any person, whatever his nationality, who, outside the State, commits, or aids, or abets or procures the commission outside the State by any other person of any other minor breach of any of the [Geneva] Conventions or of Protocol I or Protocol II shall be guilty of an offence.
> Any person who is guilty of an offence under this section shall be liable [to punishment].[106]

143. Israel's Nazis and Nazi Collaborators (Punishment) Law provides that:

> A person who has committed one of the following offences –

[102] Guinea, *Criminal Code* (1998), Articles 569, 570 and 579.
[103] Hungary, *Criminal Code as amended* (1978), Sections 155–165.
[104] India, *Geneva Conventions Act* (1960), Section 3.
[105] Ireland, *Geneva Conventions Act as amended* (1962), Section 3.
[106] Ireland, *Geneva Conventions Act as amended* (1962), Section 4.

(1) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against the Jewish people;
(2) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against humanity;
(3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime,

is liable to the death penalty.[107]

144. Italy's Wartime Military Penal Code provides for the punishment of a list of various offences related to wartime activity.[108]
145. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", provides for the punishment of a series of offences "committed in time of armed conflicts".[109]
146. Kazakhstan's Penal Code, in a special part entitled "Crimes against the peace and security of mankind", provides for the punishment of a list of acts such as: "the use of prohibited means and methods of warfare" in an armed conflict (Article 159); "genocide" (Article 160); "ecocide" (Article 161); "mercenaries" (Article 162); and "attacks against persons or organisations beneficiaries of an international protection" (Article 163).[110]
147. Kenya's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions such as is referred to in the following Articles [i.e. Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV] is guilty of an offence and [shall be sentenced].[111]

148. Kyrgyzstan's Criminal Code provides for the punishment of persons committing acts such as: "intentional destruction of historical and cultural monuments" (Article 172); "capture of hostages" (Article 224); "ecocide" (Article 374); the participation of mercenaries "in an armed conflict or in hostilities" (Article 375); and "attacks against persons or institutions under international protection" (Article 376).[112]
149. Latvia's Criminal Code, in a chapter entitled "Crimes against humanity and peace, war crimes and genocide", provides for the punishment of persons who commit certain offences such as "genocide" (Section 71), "war crimes" (Section 74), "pillage" (Section 76) and "destruction of cultural and national heritage" (Section 79).[113]

[107] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(a).
[108] Italy, *Wartime Military Penal Code* (1941), Articles 167–230.
[109] Jordan, *Draft Military Criminal Code* (2000), Article 41.
[110] Kazakhstan, *Penal Code* (1997), Articles 156–164.
[111] Kenya, *Geneva Conventions Act* (1968), Section 3.
[112] Kyrgyzstan, *Criminal Code* (1997), Articles 172, 224 and 374–376.
[113] Latvia, *Criminal Code* (1998), Sections 71–79.

150. The Draft Amendments to the Code of Military Justice of Lebanon provide for the punishment of persons committing acts listed under a new article 146 on war crimes. Referring to the 1949 Geneva Conventions and AP I, this article should be incorporated under new section 7 entitled "Offences against persons and objects protected under the Geneva Conventions applicable in time of armed conflicts".[114]

151. Lithuania's Criminal Code as amended, in a chapter entitled "War crimes", contains a list of punishable offences. Some of these offences are to be punished when committed in "violation of humanitarian law in time of war, during an international armed conflict or occupation". Some others are to be punished when committed "in time of war, during an armed conflict or occupation".[115]

152. Luxembourg's Law on the Repression of War Crimes provides for the prosecution and sentencing of non-nationals of Luxembourg who have committed war crimes, "if such infringements have been committed at the occasion or under the pretext of war and if they are not justified by the laws and customs of war".[116] It also provides for the prosecution, as co-authors or accomplices, of persons who, "without being superiors in rank of the principal authors, have aided those crimes or offences".[117]

153. Luxembourg's Law on the Punishment of Grave Breaches provides for the punishment of perpetrators of grave breaches of the 1949 Geneva Conventions as well as of persons who build, hold or transport instruments or other devices in the knowledge that they are intended to be used in the commission of a grave breach.[118] It also provides for the punishment of persons who, "without being superiors in rank of the principal authors, have aided those crimes or offences".[119]

154. Malawi's Geneva Conventions Act provides that:

> Any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by another person of any such grave breach of any of the Conventions as is referred to in [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV] shall without prejudice to his liability under any other written law be guilty of an offence and [be liable to imprisonment].[120]

155. Malaysia's Geneva Conventions Act provides that:

> Any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by another person

[114] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146.
[115] Lithuania, *Criminal Code as amended* (1961), Articles 333–344.
[116] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 1.
[117] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 3.
[118] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Articles 1–3.
[119] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 5.
[120] Malawi, *Geneva Conventions Act* (1967), Section 4(1).

of any such grave breach of [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV], shall be guilty of an offence and on conviction thereof [be punished].[121]

156. Mali's Penal Code provides for the punishment of the perpetrators of certain crimes such as "crimes against humanity" (Article 29), "genocide" (Article 30) and a list of "war crimes" covering the grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict (Article 31).[122]

157. The Geneva Conventions Act of Mauritius provides that:

Any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions shall commit an offence . . . Any person who commits an offence against this section shall, on conviction, be liable [to punishment].[123]

158. Mexico's Penal Code as amended, under the heading "Offences against the duties of humanity", provides for the punishment of a number of offences committed against certain protected persons and objects.[124]

159. Mexico's Code of Military Justice, under the headings "Crimes against the laws of nations" and "Crimes committed in the exercise of military duties or in relation to them", provides for the punishment of perpetrators of a number of offences related to war operations.[125] Under a separate provision, the Code also provides that "those who immediately commit any act of murder, physical injury or damage to property outside the fighting will be held responsible".[126]

160. Moldova's Penal Code contains provisions which provide for the punishment of perpetrators of certain acts such as: "abusive use of the emblem and signs of the Red Cross and the Red Crescent" (Article 217); "violence against the civilian population in areas of military operations" (Article 268); "bad treatment of prisoners of war" (Article 269); and "illegal wearing and abusive use of signs of the Red Cross and Red Crescent in areas of military action" (Article 270).[127]

161. Moldova's Penal Code provides for the punishment of certain offences such as "genocide" (Article 135), "ecocide" (Article 136), "inhuman treatments" (Article 137), "violations of international humanitarian law" committed "during an armed conflict or hostilities" (Article 138), "mercenary activity . . . in an armed conflict or military hostilities" (Article 141), "use of prohibited means and methods of warfare . . . during an armed conflict" (Article 143), "unlawful use of the red cross signs" (Article 363), "pillage of the dead on the battlefield" (Article 389), "acts of violence against the civilian population in

[121] Malaysia, *Geneva Conventions Act* (1962), Section 3(1).
[122] Mali, *Penal Code* (2001), Articles 29–31.
[123] Mauritius, *Geneva Conventions Act* (1970), Section 3.
[124] Mexico, *Penal Code as amended* (1931), Article 149.
[125] Mexico, *Code of Military Justice as amended* (1933), Articles 208–215 and 324–337.
[126] Mexico, *Code of Military Justice as amended* (1933), Article 222.
[127] Moldova, *Penal Code* (1961), Articles 217 and 268–270.

the area of military hostilities" (Article 390), "grave breaches of international humanitarian law . . . committed during international and internal armed conflicts" (Article 391) and "perfidious use of the red cross emblem as a protective sign during armed conflict" (Article 392).[128]

162. Mozambique's Military Criminal Law provides for the punishment of persons committing crimes listed thereunder, some of them when committed "in an armed confrontation [and in violation of] generally accepted international rules" or "in times of war" and/or "in the theatre of operations".[129]

163. The Criminal Law in Wartime Act as amended of the Netherlands establishes provisions "concerning offences committed in the event of war and their prosecution", expressly stating that the term "war" shall include civil war.[130]

164. The International Crimes Act of the Netherlands provides for the punishment of: "anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands . . . [or] if the crime is committed against a Dutch national; [or] any Dutch national who commits any of the crimes defined in this Act outside the Netherlands." The crimes defined in the Act are genocide (Article 3), crimes against humanity (Article 4), war crimes committed in international armed conflicts (Article 5) or non-international armed conflicts (Article 6), and torture (Article 8). The Act also punishes "anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in Articles 5 and 6".[131]

165. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".[132]

166. New Zealand's International Crimes and ICC Act provides that "every person is liable on conviction on indictment to the penalty specified in subsection (3) who, in New Zealand or elsewhere, commits a war crime". The Act includes similar provisions with respect to genocide and crimes against humanity. War crimes, genocide and crimes against humanity are defined as the acts specified in the 1998 ICC Statute.[133]

167. Nicaragua's Military Penal Law provides for the punishment of persons who commit "mistreatment of prisoners of war (Article 80), "looting" (Article 81), "abuses at the occasion of military activities" (Article 82) and "unlawful use of the symbols of the Red Cross" (Article 83).[134]

168. Nicaragua's Military Penal Code, under the headings "Crimes against international humanitarian law" and "Specific crimes against the laws and

[128] Moldova, *Penal Code* (2002), Articles 135–138, 141, 143, 363 and 389–392.
[129] Mozambique, *Military Criminal Law* (1987), Articles 83–89.
[130] Netherlands, *Criminal Law in Wartime Act as amended* (1952), preamble and Article 1(3).
[131] Netherlands, *International Crimes Act* (2003), Articles 2(1) and 3–8.
[132] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).
[133] New Zealand, *International Crimes and ICC Act* (2000), Sections 9–11.
[134] Nicaragua, *Military Penal Law* (1980), Articles 80–83.

customs of war", provides for the punishment of certain offences. Article 47, which is subsidiary to the other articles dealing with violations of IHL, punishes any "military who, during an international or civil war commits serious violations of the international conventions ratified by Nicaragua".[135]

169. Nicaragua's Revised Penal Code provides for the punishment of "anyone who, during an international or a civil war, commits serious violations of the international conventions relating to the use of prohibited weapons, the treatment of prisoners and other norms related to war".[136]

170. Nicaragua's Draft Penal Code, in a part entitled "Crimes against the international order", provides for the punishment of a list of offences, for most of which it is specifies that they be committed "at the occasion", "in times of" and/or "during" an international or internal armed conflict.[137]

171. Niger's Penal Code as amended, in a chapter entitled "Crimes against humanity and war crimes", provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes defined as serious offences against the persons and objects protected under the 1949 Geneva Conventions, AP I and AP II.[138]

172. Nigeria's Geneva Conventions Act provides that "if, whether in or outside the Federation, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva Conventions]... he shall, on conviction thereof, [be punished]".[139]

173. Norway's Military Penal Code provides for the punishment of "anyone who uses a weapon or means of combat which is prohibited by any international agreement to which Norway has acceded, or who is accessory thereto". It also provides for the punishment of:

> anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in
>
> a) the Geneva Conventions of 12 August 1949 concerning the amelioration of the conditions of the wounded and sick in armed forces in the field, the amelioration of the conditions of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war,
> b) the two additional protocols to these conventions of 10 June 1977.[140]

174. Papua New Guinea's Geneva Conventions Act provides that "a person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions is guilty of an offence".[141]

[135] Nicaragua, *Military Penal Code* (1996), Articles 47–61.
[136] Nicaragua, *Revised Penal Code* (1997), Article 551.
[137] Nicaragua, *Draft Penal Code* (1999), Articles 444–472.
[138] Niger, *Penal Code as amended* (1961), Article 208.1–208.8.
[139] Nigeria, *Geneva Conventions Act* (1960), Section 3(1).
[140] Norway, *Military Penal Code* (1902), Articles 107–108.
[141] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

175. Paraguay's Military Penal Code, under the heading "Provisions with regard to times of war", contains a list of offences for which it provides punishment.[142]

176. Paraguay's Penal Code provides for the punishment of offences such as "torture" (Article 309), "genocide" (Article 319) and a list of "war crimes" (Article 320), specifying with respect to "war crimes" that they be committed "in violation of international laws of war, armed conflict or military occupation".[143]

177. Peru's Code of Military Justice, in a part entitled "Violations of the law of nations", provides for the punishment of a list of offences, specifying that some of them be committed "in times of war".[144]

178. The War Crimes Trial Executive Order of the Philippines provides for the punishment of offenders having committed certain acts, including "violations of the laws and customs of war" and other more specified acts committed "before or during the war . . . whether or not in violation of the local laws".[145]

179. Poland's Penal Code, in a special part entitled "Offences against peace, humanity and war offences", provides for the punishment of certain acts, some of them when committed "during hostilities" or "in violation of international law", such as internationally prohibited acts against certain specific protected persons – including persons "who, during hostilities, enjoy international protection" – and objects, as well as the use of means or methods of combat prohibited by international law.[146]

180. Portugal's Penal Code, under the headings "War crimes against civilians" and "Destruction of monuments", provides for the punishment of certain offences committed "in times of war, of armed conflict or occupation".[147]

181. Romania's Law on the Punishment of War Criminals provides for the punishment of more precisely defined "criminals of war".[148]

182. Romania's Penal Code, in provisions entitled "[Unlawful] use of the emblem of the Red Cross" (Article 294), "Use of the emblem of the Red Cross during military operations" (Article 351), "Inhuman treatment" (Article 358) and "Destruction of objects and appropriation of property" (Article 359), provides for the punishment of offences listed thereunder, stating for some of those offences that they be committed "in times of war and in relation with military operations" or "in times of war".[149]

183. Russia's Decree on the Punishment of War Criminals states that:

[142] Paraguay, *Military Penal Code* (1980), Articles 282–296.
[143] Paraguay, *Penal Code* (1997), Articles 309 and 319–320.
[144] Peru, *Code of Military Justice* (1980), Articles 91–96.
[145] Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2) and (3).
[146] Poland, *Penal Code* (1997), Articles 117–126.
[147] Portugal, *Penal Code* (1996), Articles 241–242.
[148] Romania, *Law on the Punishment of War Criminals* (1945), Articles I and III.
[149] Romania, *Penal Code* (1968), Articles 294, 351 and 358–359.

The peoples of the Soviet Union that suffered losses during the war cannot let fascist barbarians go unpunished. The Soviet State has always proceeded from the universally recognised rules of international law that provide for the inevitable prosecution of Nazi criminals, no matter where and for how long they have been hiding from justice.[150]

It also provides that "Nazi criminals, guilty of most serious crimes against peace and humanity and war crimes, are subject to prosecution and punishment".[151]

184. Russia's Criminal Code provides that "persons who have committed crimes shall . . . be held criminally responsible".[152] In a chapter entitled "Crimes against the peace and security of mankind" and under a provision entitled "Use of banned means and methods of warfare", the Code provides for the punishment of "cruel treatment of prisoners of war, deportation of the civilian population, plunder of the national property in the occupied territory and use in a military conflict of means and methods of warfare banned by [international treaties to which Russia is a party]".[153] The Code further provides for the punishment of offences such as genocide, ecocide, use of, and participation by, mercenaries in an armed conflict or hostilities and assaults on persons or institutions enjoying international protection.[154]

185. Rwanda's Law Setting up Gacaca Jurisdictions aims:

to organize the putting on trial of persons prosecuted for having, between 1 October 1990 and 31 December 1994, committed acts qualified and punished by the Penal Code and which constitute:

a) . . . crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by the [1949 GC IV and the 1977 Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity].[155]

It further provides that:

Following acts of participation in offences in question in Article one of this organic law and committed between 1 October 1990 and 31 December 1994, the prosecuted person can be classified in one of the following categories:

Category 1:

a) The person whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors of the crime of genocide or crime against humanity;
b) The person who, acting in a position of authority at the national, provincial or district level, within political parties, army, religious denominations or militia, has committed these offences or encouraged others to commit them;

[150] Russia, *Decree on the Punishment of War Criminals* (1965), preamble.
[151] Russia, *Decree on the Punishment of War Criminals* (1965).
[152] Russia, *Criminal Code* (1996), Article 4.
[153] Russia, *Criminal Code* (1996), Article 356.
[154] Russia, *Criminal Code* (1996), Articles 357–360.
[155] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1.

c) The well-known murderer who distinguished himself in the location where he lived or wherever he passed, because of zeal which has characterised him in killings or excessive wickedness with which they were carried out;
d) The person who has committed rape or acts of torture against person's sexual parts.
...

Category 2:
a) The person whose criminal acts or criminal participation place among authors, co-authors or accomplices of deliberate homicides or serious attacks against persons which caused death.
b) The person who, with intention of giving death, has caused injuries or committed other serious violence, but from which the victims have not died.

Category 3:
The person who has committed criminal acts or has become accomplice of serious attacks, without the intention of causing death to victims.
Category 4:
The person having committed offences against assets.[156]

The Law adds that:

The persons in the position of authority at the level of Sector or Cell at the time of genocide are classified in the category corresponding to offences they have committed, but their quality of leaders expose them to the most severe penalty for the defendants who are in the same category.[157]

Moreover, the Law provides that "for the implementation of this organic law, the accomplice is the person who will have, by any means, assisted to commit offences to persons referred to in Article 51 of this organic law".[158]

186. The Geneva Conventions Act of the Seychelles provides that:

Any person, whatever his nationality, who, whether in or outside Seychelles, commits, or aids, abets or procures the commission by another person of, any such grave breach of any of the [Geneva] Conventions ... is guilty of an offence and ... shall on conviction [be punished].[159]

187. Singapore's Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [of the Geneva Conventions] shall be guilty of an offence under this Act and on conviction thereof ... [be punished].[160]

188. Slovakia's Criminal Code as amended, under the heading "Crimes against humanity", provides for the punishment of certain offences such as: "genocide"

[156] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 51.
[157] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 52.
[158] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 53(1).
[159] Seychelles, *Geneva Conventions Act* (1985), Section 3(1).
[160] Singapore, *Geneva Conventions Act* (1973), Section 3(1).

(Article 259); "torture and other inhuman and cruel treatment" (Article 259a); "use of a forbidden weapon or an unpermitted form of combat" (Article 262); "wartime cruelty" (Article 263); "persecution of a population" (Article 263a); "plunder in a theatre of war" (Article 264); and "misuse of internationally recognised insignia and state insignia" (Article 265).[161]

189. Slovenia's Penal Code, in a chapter entitled "Criminal offences against humanity and international law", provides for a list of punishable acts committed by "whoever" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against the civilian population" (Article 374); "war crimes against the wounded and sick" (Article 375); "war crimes against prisoners of war" (Article 376); "use of unlawful weapons" (Article 377); "unlawful killing and wounding of the enemy" (Article 379); "unlawful plundering on the battlefield" (Article 380); "infringement of the rights of parlementaires" (Article 381); "maltreatment of the sick and wounded, and of prisoners of war" (Article 382); "unjustified delay in the repatriation of prisoners of war" (Article 383); "destruction of cultural and historical monuments and natural sites" (Article 384); and "abuse of international symbols" (Article 386).[162]

190. Under Spain's Law on Judicial Power, Spanish criminal courts have jurisdiction over offences committed by Spanish nationals and aliens, on Spanish territory or outside it, which constitute genocide or any other offence that, according to international treaties or conventions, must be prosecuted in Spain.[163]

191. Spain's Military Criminal Code contains a part on "Crimes against the laws and customs of war" and provides for the punishment of soldiers committing acts listed thereunder.[164]

192. Spain's Penal Code contains chapters entitled "Genocide" and "Offences against protected persons and objects in the event of armed conflict" and provides for the punishment of offences listed thereunder. Protected persons in the meaning of the latter are those protected by the Geneva Conventions and both Additional Protocols, as well as those falling within the scope of "whatever other international treaty to which Spain is a party". The chapter contains several provisions regarding the punishment of certain acts "committed in the event of an armed conflict".[165]

193. Sri Lanka's Draft Geneva Conventions Act provides that:

> A person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any person to commit,
>
> (a) a grave breach of any of the [Geneva] Conventions; or
> (b) a breach of common Article 3 of the [Geneva] Conventions
>
> is guilty of an indictable offence.[166]

[161] Slovakia, *Criminal Code as amended* (1961), Articles 259–259(a) and 262–265.
[162] Slovenia, *Penal Code* (1994), Articles 374–386.
[163] Spain, *Law on Judicial Power* (1985), Article 23(4).
[164] Spain, *Military Criminal Code* (1985), Articles 69–78.
[165] Spain, *Penal Code* (1995), Articles 607–614.
[166] Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 3(1).

It further provides that such a person "is liable to [punishment]".[167]

194. Sweden's Penal Code as amended provides for the punishment of "a person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts".[168]

195. Switzerland's Military Criminal Code as amended states that the provisions of its chapter dealing with "Offences committed against the law of nations in case of armed conflict" are "applicable in case of declared war and other armed conflicts between two or more States", and also provide for "the punishment of violations of international agreements if these agreements provide for a wider scope of application" (Article 108). The Code provides for the punishment of offences listed under this chapter, and especially – among other more specific offences – of "anyone who contravenes the prescriptions of international conventions relating to the conduct of hostilities, as well as to the protection of persons and objects, [and] anyone who violates other recognised laws and customs of war".[169] Other offences, such as pillage committed in time of war or marauding on the battlefield are also to be punished.[170]

196. Tajikistan's Criminal Code provides for the punishment of: "illegal use of emblems and signs of the Red Cross and Red Crescent" (Article 333); "genocide" (Article 398); "biocide" (Article 399); "ecocide" (Article 400); "mercenarism" (Article 401); "attacks against persons and establishments under international protection" (Article 402); "wilful breaches of norms of international humanitarian law committed in [an international or internal] armed conflict" (Article 403); "wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury" (Article 404); and "other breaches of the norms of international humanitarian law" (Article 405).[171]

197. Thailand's Prisoners of War Act provides for the punishment of persons committing offences listed under the heading "Offences with respect to prisoners of war" and offences listed under the heading "Offences in the case of armed conflict not of an international character".[172]

198. Trinidad and Tobago's Draft ICC Act provides that:

> Any person who commits any of the crimes specified in Articles 6 [of the 1998 ICC Statute – genocide], 7 [of the 1998 ICC Statute – crimes against humanity] and 8 [of the 1998 ICC Statute – war crimes] outside Trinidad and Tobago, may be prosecuted and punished for that crime in Trinidad and Tobago as if the crime had been committed in Trinidad and Tobago.[173]

199. Uganda's Geneva Conventions Act provides that:

[167] Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 4(1).
[168] Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.
[169] Switzerland, *Military Criminal Code as amended* (1927), Articles 108–114.
[170] Switzerland, *Military Criminal Code as amended* (1927), Articles 139–140.
[171] Tajikistan, *Criminal Code* (1998), Articles 333 and 398–405.
[172] Thailand, *Prisoners of War Act* (1955), Sections 12–19.
[173] Trinidad and Tobago, *Draft ICC Act* (1999), Part II, Section 5(2).

Any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions . . . commits an offence and on conviction thereof [shall be punished].[174]

200. Ukraine's Criminal Code provides for the punishment of offenders having committed an act described in a list of punishable offences such as, *inter alia*: "looting" (Article 432); "violence against the civilian population in areas of war operations" (Article 433); "bad treatment of prisoners of war" (Article 434); "unlawful use or misuse of the Red Cross and Red Crescent symbols" (Article 435); "violations of the laws and customs of war", notably those provided for in international instruments to which Ukraine is a party (Article 438); "use of weapons of mass destruction" (Article 439); "ecocide" (Article 441); "genocide" (Article 442); "illegal use of the symbols of the red cross and red crescent" (Article 445); and "mercenarism" (Article 447).[175]

201. The UK Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] conventions or [AP I] shall be guilty of an offence and on conviction on indictment [shall be punished].[176]

202. The UK UN Personnel Act provides that:

If a person commits, outside the United Kingdom, any act to or in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of [murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping, abduction or false imprisonment], he shall in that part of the United Kingdom be guilty of that offence.[177]

This Act does not apply to any UN operation "which is authorised by the Security Council of the United Nations as an enforcement action under Chapter VII of the Charter of the United Nations, . . . in which UN workers are engaged as combatants against organised armed forces, and . . . to which the law of international armed conflict applies".[178]

203. The UK War Crimes Act grants the UK courts jurisdiction over murder, manslaughter or culpable homicide committed in Germany or German-occupied territory during the Second World War, provided that the offence "constituted a violation of the laws and customs of war". The Act applies to a person who was, in 1990, a British citizen or resident in the UK, the Isle of Man or any of the Channel Islands, "irrespective of his nationality at the time of the alleged offence".[179]

[174] Uganda, *Geneva Conventions Act* (1964), Section 1(1).
[175] Ukraine, *Criminal Code* (2001), Articles 432–447.
[176] UK, *Geneva Conventions Act as amended* (1957), Section 1(1).
[177] UK, *UN Personnel Act* (1997), Section 1.
[178] UK, *UN Personnel Act* (1997), Section 4(3).
[179] UK, *War Crimes Act* (1991), Section 1.

204. The UK ICC Act includes as offences under domestic law the acts of genocide, crimes against humanity and war crimes as defined in the 1998 ICC Statute. Thus, it provides that "it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime". There is a similar provision for Northern Ireland.[180]

205. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established provisions for the punishment of the perpetrators of a list of specified offences and also of "all other offences against the laws or customs of war", to be pronounced by the military commissions.[181]

206. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established provisions for the punishment of the perpetrators of a list of "violations of the laws and customs of war" and other specified acts committed "against any civilian population before or during the war", to be pronounced by the military commissions.[182]

207. The US War Crimes Act as amended provides that:

> (a) Offense. – Whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
> . . .
> (c) Definition. – As used in this section the term "war crime" means any conduct –
> (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
> (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
> (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
> (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.[183]

208. Uruguay's Military Penal Code as amended, under the heading "Crimes which affect the moral strength of the army and of the naval forces", lists a number of acts, such as the violation of the rule of humane treatment of POWs,

[180] UK, *ICC Act* (2001), Part 5, Sections 50, 51 and 58.
[181] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.
[182] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b) and (c).
[183] US, *War Crimes Act as amended* (1996), Section 2441.

looting and attacks against certain specified objects, for which it provides punishment.[184]

209. Uzbekistan's Criminal Code, in a chapter entitled "Crimes against the peace and security of mankind", provides for the punishment of, *inter alia*, "violations of laws and customs of war" (Article 152), "genocide" (Article 153) and the participation of "mercenaries" in "armed conflict or military actions" (Article 154).[185]

210. Vanuatu's Geneva Conventions Act provides that:

> Any grave breach of any of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu.[186]

211. Venezuela's Code of Military Justice as amended, under a chapter dealing with "Crimes against international law", provides for the punishment of the offenders of a list of certain war crimes.[187]

212. Venezuela's Revised Penal Code provides for the punishment of Venezuelan nationals and foreigners who have committed certain acts "during a war between Venezuela and another nation" or who "violate the conventions or treaties [to which Venezuela is a party] in a way which entails the responsibility of the latter".[188]

213. Vietnam's Penal Code provides for the punishment of anyone who commits, *inter alia*, one of the offences listed under the following headings: "Violation of policy concerning soldiers killed or wounded in combat" (Article 271); "Theft or destruction of war booty" (Article 272); "Harassment of civilians" (Article 273); "Exceeding military need in performance of a mission" (Article 274); "Mistreatment of a prisoner of war or of a soldier who has surrendered" (Article 275); "Crimes against humanity" committed in time of peace or in time of war (Article 278); "War crimes", such as "acts seriously breaching international norms contained in the treaties to which Vietnam is a party" (Article 279); and "Recruitment of mercenaries and service as a mercenary" (Article 280).[189]

214. Yemen's Military Criminal Code provides for the punishment of a list of offences such as war crimes committed in a "zone of military operations" (Article 20) or "during a war [and] against persons and objects protected under the international conventions to which the Republic of Yemen is a party" (Article 21).[190]

[184] Uruguay, *Military Penal Code as amended* (1943), Article 58.
[185] Uzbekistan, *Criminal Code* (1994), Articles 152–154.
[186] Vanuatu, *Geneva Conventions Act* (1982), Section 4.
[187] Venezuela, *Code of Military Justice as amended* (1998), Article 474.
[188] Venezuela, *Revised Penal Code* (2000), Article 156.
[189] Vietnam, *Penal Code* (1990), Articles 271–280.
[190] Yemen, *Military Criminal Code* (1998), Articles 5 and 20–23.

215. The Criminal Offences against the Nation and State Act of the SFRY (FRY) provides for the punishment of "any person who commits a war crime, i.e., who during the war or the enemy occupation acted as an instigator or organiser, or who . . . assisted or otherwise was the direct executor of [one of the acts listed thereunder]".[191]

216. The Penal Code as amended of the SFRY (FRY), in a chapter entitled "Criminal acts against humanity and international law", provides for a list of punishable acts committed by "any person" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against civilians" (Article 142); "war crimes against the wounded and the ill" (Article 143); "war crimes against prisoners of war" (Article 144); "unlawful killing and wounding of the enemy" (Article 146); "unlawful seizure of belongings from the killed and wounded in a theatre of war" (Article 147); "use of prohibited means of combat" (Article 148); "harming a parlementaires" (Article 149); "cruel treatment of the wounded, the ill and prisoners of war" (Article 150); "unjustified delay in the repatriation of prisoners of war" (Article 150-a); "destruction of cultural and historic monuments" (Article 151); and "misuse of international emblems" (Article 153).[192] A commentary on these Code's provisions emphasises that these crimes can be committed in time of war, armed conflict (or occupation).[193] The Report on the Practice of the SFRY (FRY) notes that the term "armed conflict" in this context should be interpreted as including internal conflicts.[194]

217. Zimbabwe's Geneva Conventions Act as amended provides that:

> Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [the Geneva Conventions or AP I] shall be guilty of an offence.
>
> A person guilty of an offence in terms of [the above] shall be liable [to punishment].[195]

National Case-law

218. In the *Violations of IHL in Somalia and Rwanda case* in 1997, a Belgian Military Court acquitted two Belgian soldiers accused of having injured and threatened, in 1993, the civilian population whilst performing duties as part of the UNOSOM II peacekeeping operation in Somalia. The Court came to the conclusion that the Geneva Conventions and their Additional Protocols were not applicable to the armed conflict in Somalia and that, therefore, the civilian population could not be granted protection on this basis. The Court held that even common Article 3 of the 1949 Geneva Conventions did not apply to the

[191] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[192] SFRY (FRY), *Penal Code as amended* (1976), Articles 142–153.
[193] SFRY (FRY), *Penal Code as amended* (1976), Commentary to Articles 142–144, 146, 148–151 and 153.
[194] Report on the Practice of the SFRY (FRY), 1997, Chapter 6.4.
[195] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1) and (2).

situation, as the Somali militia did not have an organised military structure, a responsible leadership or exercise authority over a specific part of the territory. Consequently, the Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (as amended) was also inapplicable. The Court further stated that the members of the UNOSOM II mission could not be considered as "combatants" since their primary task was not to fight against any of the factions, nor could they fall into the category of an "occupying force".[196]

219. In *The Four from Butare case* in 2001, a Belgian court found the accused individually responsible and guilty of war crimes during the 1994 genocide in Rwanda. The four Rwandans had been arrested under the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (as amended). They had been charged with violations of grave breaches of provisions of the Geneva Conventions and AP I, as well as violations of common Article 3 of the 1949 Geneva Conventions and Articles 1, 2 and 4 AP II.[197] In 2002, the judgement was confirmed by the Belgian Court of Cassation.[198]

220. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 involving the question of criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for having negligently performed a military duty, the Court of Appeal (majority) stated that:

> I see no basis in law for the inference that the [1949] Geneva Conventions or the relevant provisions of the [*Unit Guide* (1990)] impose on service members the obligation, not otherwise found in Canadian law, to take positive steps to prevent or arrest the mistreatment or abuse of prisoners in Canadian Forces custody by other members of the forces, particularly other members of superior rank. I do not wish to comment on the duty that a superior officer might have in similar circumstances, but assert that a military duty in the sense of [Section 124 of the *National Defence Act* (1985)], to protect civilian prisoners not under one's custody cannot be inferred from the broad wording of the relevant sections of the [*Unit Guide* (1990)] or of [GC IV]. I agree with the prosecution . . . that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner consistent with Canada's international obligations, the rule of law and simply humanity. There was evidence in this case to suggest that the respondent could readily have reported the misdeeds of his comrades. However, absent specific wording in the relevant international conventions and more specifically, the [*Unit Guide* (1990)], I simply cannot conclude that a member of the Canadian Forces has a penally enforceable obligation to intervene whenever he witnesses mistreatment of a prisoner who is not in his custody.
>
> . . .
>
> In closing, I would remark that . . . it remains open to the chief of defence staff to define in more explicit terms the standards of conduct expected of soldiers in

[196] Belgium, Military Court, *Violations of IHL in Somalia and Rwanda case*, Judgement, 17 December 1997.
[197] Belgium, Cour d'Assises de Bruxelles, *The Four from Butare case*, Judgement, 7–8 June 2001.
[198] Belgium, Court of Cassation, *The Four from Butare case*, Judgement, 9 January 2002.

respect of prisoners who are in Canadian Forces custody. It is open to the chief of defence staff to . . . impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge . . . This might prove a useful undertaking.[199]

221. In the *Sarić case* in 1994, the Danish High Court found a Bosnian Croat refugee guilty on numerous charges of war crimes committed in a Croat-run prison camp in Bosnia in 1993. The Court based its judgement namely on the grave breaches provisions in Articles 129 and 130 GC III and Articles 146 and 147 GC IV.[200] In 1995, Denmark's Supreme Court upheld his conviction.[201]
222. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Col. Mengistu Haile Mariam and former members of the Derg for allegedly committing crimes against humanity and war crimes during the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply to the objection filed by counsels for the defendants, referred, *inter alia*, to the 1919 Treaty of Versailles, to the 1945 IMT Charter (Nuremberg) and Nuremberg trials and to the 1993 ICTY Statute. He stated that:

Whosoever commits an international criminal offence in a capacity as a Head of State or responsible government official shall always be accountable for his acts and the punishment shall always be aggravated. Heads of State and other higher responsible government officials in any form of government are all required and obliged to know international crimes thereunder . . . By the same token, they must also be equally responsible and severely punished whenever they are found guilty of the commission of these acts.[202]

The Special Prosecutor further noted that "it is also known that there is a Geneva Convention which regulates the protection of the right of life of a person in time of war by providing for an effective means of penalty".[203]
223. In the *Javor case* in 1994, a civil suit filed in France by Bosnian nationals alleging ill-treatment in a Serb-run detention camp, the Paris High Court found that it had jurisdiction over the claims of war crimes. In its consideration of the charge, the Court focused on the grave breaches of the Geneva Conventions.[204] The Court of Appeal of Paris reversed this decision and held, *inter alia*, the absence of direct applicability of the Geneva Conventions.[205]

[199] Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996; see also Court Martial Appeal Court, *Brown case*, Judgement, 6 January 1995 and *Boland case*, Judgement, 16 May 1995; *Seward case*, Judgement, 16 May 1995.
[200] Denmark, High Court, *Sarić case*, Judgement, 25 November 1994.
[201] Denmark, Supreme Court, *Sarić case*, Judgement, 15 August 1995.
[202] Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 1.6.
[203] Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 1.13.
[204] France, Tribunal de Grande Instance de Paris, *Javor case*, Order establishing partial lack of jurisdiction and the admissibility of a civil suit, 6 May 1994.
[205] France, Court of Appeal of Paris, *Javor case*, Judgement, 24 November 1994.

224. In the *Djajić case* in 1997, Germany's Supreme Court of Bavaria tried a national of the former Yugoslavia. In its judgement, the Court referred to GC IV and the grave breaches regime. It considered the conflict to be an international conflict (in June 1992) and regarded the victims as "protected persons" in the meaning of Article 4 GC IV. The accused was found guilty of complicity in 14 counts of murder and 1 count of attempted murder.[206]

225. In the *Jorgić case* before Germany's Higher Regional Court at Düsseldorf in 1997, the accused, a Bosnian Serb, was tried for acts committed in 1992 in Bosnia and Herzegovina which were punishable under the German Penal Code. The Court referred, *inter alia*, to Article 147 GC IV. It considered the conflict to be an international conflict in 1992, and the victims to be "protected persons" in the meaning of Article 4 GC IV. The accused was found guilty of complicity in genocide, in conjunction with murder, dangerous bodily harm and deprivation of liberty.[207] In 1999, the Federal Supreme Court upheld the conviction in the *Jorgic case* for the most part.[208] In 2000, the German Federal Constitutional Court confirmed that the accused could be tried by German courts and under German penal law.[209]

226. In the *Kusljić case* in 1999, Germany's Supreme Court of Bavaria a national of Bosnia and Herzegovina for crimes committed during 1992 in the territory of Bosnia and Herzegovina. The accused was sentenced to life imprisonment for, *inter alia*, genocide in conjunction with six counts of murder.[210] In 2001, the German Federal Supreme Court revised this judgement into a life sentence for, *inter alia*, six counts of murder. It considered the acts of the accused to be grave breaches in the meaning of Articles 146 and 147 GC IV.[211]

227. In the *Sokolović case* before Germany's Higher Regional Court at Düsseldorf in 1999, a Bosnian Serb accused of acts committed in 1992 in Bosnia and Herzegovina was sentenced for complicity in genocide, deprivation of liberty and dangerous bodily injury.[212] In 2001, the Federal Supreme Court upheld this judgement and referred, *inter alia*, to Articles 146 and 147 GC IV and provisions of the German Penal Code. The situation in 1992 in Bosnia and Herzegovina was qualified as an international armed conflict and the victims were considered to be "protected persons" in the meaning of Article 4 GC IV.[213]

228. In its judgement in the *Eichmann case* in 1961, Israel's District Court of Jerusalem rejected arguments that the acts of which Eichmann was accused constituted acts of State for which Germany alone was responsible. The Court relied on the repudiation of the doctrine of act of State, stating that this had

[206] Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.
[207] Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997.
[208] Germany, Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.
[209] Germany, Federal Constitutional Court, *Jorgić case*, Decision, 12 December 2000.
[210] Germany, Supreme Court of Bavaria, *Kusljić case*, Judgement, 15 December 1999.
[211] Germany, Federal Supreme Court, *Kusljić case*, Decision, 21 February 2001.
[212] Germany, Higher Regional Court at Düsseldorf, *Sokolović case*, Judgement, 29 November 1999.
[213] Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.

been acknowledged by, *inter alia*, the 1945 IMT Charter (Nuremberg) and the Nuremberg judgements, by the US Military Tribunal's decision in the *Altstötter (The Justice Trial) case*, by UN General Assembly Resolution 96 (I) and by Article 4 of the 1948 Genocide Convention.[214] The Court quoted the US Supreme Court judgement in the *Quirin case*, stating that "the principle of international law which, under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law". It went on to state that:

> It is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own "acts of State", including the crimes attributed to the accused. But that responsibility does not detract one iota from the personal responsibility of the accused for his acts.[215]

Referring to Article 4 of the 1948 Genocide Convention, the Court noted that:

> This Article affirms a principle recognized by all civilized nations . . . and inasmuch as Germany, also, has adhered to this Convention, it is possible that even according to Kelsen – who requires an international convention or the consent of the State concerned – there is no longer any basis for pleading "act of State". But the rejection of this plea does not depend on the affirmation of this principle by Germany, for the plea had already been invalidated by the law of nations. For these reasons we reject the plea of "act of State".[216]

229. In the *Eichmann case* in 1962, Israel's Supreme Court upheld the lower court's decision. In a part of the judgement dealing with the question of whether Israel's Nazis and Nazi Collaborators (Punishment) Law of 1950 was in conformity with principles of international law, the Supreme Court held that "the crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility".[217] In the part of the judgement dealing with the character of international crimes, it went on to affirm its "view that the crimes in question must today be regarded as crimes which were also in the past banned by the law of nations and entailed individual criminal responsibility" and stated as to the "features which identify crimes that have long been recognized by customary international law" that:

> These include, among others, the following features: these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations. The underlying principle in international law regarding such crimes

[214] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.
[215] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 28.
[216] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 28.
[217] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 10.

is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of this act, must account for his conduct.[218]

As to individual responsibility for war crimes "in the conventional sense", the Supreme Court held that:

It will be recalled that the reference here is to a group of acts committed by members of the armed forces of the enemy which are contrary to the "laws and customs of war". These acts are deemed to constitute in essence *international* crimes; they involve the violation of the provisions of customary international law which obtained before the Hague Conventions of 1907, the latter merely "declaring" the rules of warfare as dictated by recognized humanitarian principles. Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilized nations. When a belligerent State punishes for such acts, it does so not only because persons who were its nationals – be they soldiers taken prisoner by the enemy or members of the civilian population – suffered bodily harm or material damage, but also, and principally, because they involve the perpetration of an international crime which all the nations of the world are interested in preventing.

...

The [1945 IMT Charter (Nuremberg)], with all the principles embodied in it – including that of individual responsibility – must be seen as "the expression of international law existing at the time of its creation; and to that extent (the Charter) is itself a contribution to international law".

...

The outcome ... is that the crimes set out in the Law of 1950 ... must be seen today as acts that have always been forbidden by customary international law – acts which are of a "universal" criminal character and entail individual criminal responsibility.[219]

In another part of the judgement dealing with the submission of the defendant that his acts had constituted acts of State, the Supreme Court held that:

The contention of counsel for the appellant is ... that the acts done by his client for the realization of the "Final Solution" had their origin in Hitler's decision to put that plan into effect and consequently they were purely "Acts of State", responsibility for which does not rest on the appellant.

We utterly reject this contention, as did the District Court ... There is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of "crimes against humanity" (in the wide sense). Of such odious acts it must be said that in point of international law they are completely outside the "sovereign" jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission, or behind the "Laws" of the State by virtue of which they purported to act. Their position may be compared with that of a person who, having committed an offence in the interests of a corporation

[218] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 11.
[219] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 11.

which he represents, is not permitted to hide behind the collective responsibility of the corporation therefor. In other words, international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of "international crime", that a person who was a party to such a crime must bear individual responsibility for it. If it were otherwise, the penal provisions of international law would be a mockery . . . Indeed, even before the Second World War the defence of "Act of State" was not regarded as an adequate defence to the charge of an offence against the "laws of war" (a "conventional" war crime) . . . The plea of "Act of State" is rejected.[220]

230. In the *Priebke case* in 1996, Italy's Military Tribunal of Rome found a German soldier and former member of the "SS" guilty of multiple first-degree murder charges, acts which it qualified as war crimes, for his role and participation in the 1944 Ardeatine caves killings when 335 persons (both civilians and members of the armed forces) were killed in reprisal for the killing of 33 German soldiers. The Tribunal considered the reprisal to be disproportionate to the acts which had led to the reprisal, and Priebke was found responsible for having drawn up a list of the names of the victims to be killed, for having checked the identity of the victims being transferred to the place of the killings, and for having shot two of the victims himself. However, the Tribunal found that the accused could not be punished for reasons of statute of limitations.[221] On appeal, the judgement was annulled by the Supreme Court of Cassation and another trial ordered.[222]

231. In the *Hass and Priebke case* in 1997 dealing with the same events as in the *Priebke case*, Italy's Military Tribunal of Rome found the accused guilty of multiple charges of aggravated murder for their respective roles in the reprisal killings. It sentenced the accused for war crimes to imprisonment.[223] In its relevant parts, the judgement was confirmed by the Military Appeals Court and the Supreme Court of Cassation, although the Courts settled on life imprisonment.[224]

232. In the *Ercole case* in 2000, Italy's Tribunal of Livorno tried and sentenced a former paratrooper to 18 months' suspended imprisonment for abusing his authority during his participation in a multinational peacekeeping operation in Somalia and, pending the outcome of connected civil proceedings, made him provisionally liable to the payment of 30,000,000 Italian lire to a Somali

[220] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 14.
[221] Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996.
[222] Italy, Supreme Court of Cassation, *Priebke case*, Judgement Cancelling Verdict of First Instance, 15 October 1996.
[223] Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997.
[224] Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke* case, Judgement in Trial of Third Instance, 16 November 1998.

citizen who had been tortured.[225] However, in 2001, the Court of Appeals at Florence declared that a crime of abuse of authority was covered by statutory limitations.[226]

233. In the *Grabež case* in 1997, a person born in the former Yugoslavia was prosecuted by a Swiss Military Tribunal for violations of the laws and customs of war under the Swiss Military Criminal Code as amended on charges of beating and injuring civilian prisoners in the camps of Omarska and Keraterm in Bosnia and Herzegovina. The Tribunal held that it had jurisdiction under Articles 108(2) and 109 of the Swiss Military Criminal Code as amended over violations of the laws and customs of war, grave breaches of GC III, GC IV and AP I and violations of AP II, but acquitted the accused for lack of sufficient evidence.[227]

234. In the *Niyonteze case* in 1999, a Swiss Military Tribunal convicted a Rwandan national and former burgomaster for, *inter alia*, grave breaches of IHL committed in Rwanda on the basis of common Article 3 of the 1949 Geneva Conventions and AP II. The defendant had been charged, in the context of the Rwandan genocide in 1994, with inciting the population to kill Tutsis and moderate Hutus and with exhorting refugees to go back to their homes, with the intention of having them killed and taking their property. The Tribunal sentenced the accused to life imprisonment.[228] In 2000, the Military Court of Appeals partially upheld the judgement, reducing the sentence to 14 years' imprisonment. It found that the defendant was guilty under Article 109 of the Swiss Penal Code relating to violations of the laws of war, common Article 3 of the Geneva Conventions and Article 4 AP II.[229] At the final instance, the Military Court of Cassation, partially dismissing the previous judgement, confirmed the findings on the guilt of the defendant.[230]

235. In the *Auschwitz and Belsen case* in 1945, the UK Military Tribunal at Lüneberg admitted that:

> There has not been universal agreement on the extent to which an individual can be held personally liable for breaches of such international agreements as the Hague Convention No. IV (Rules of Land Warfare) and the Geneva Prisoners of War Convention of 1929, according to the strict letter of which the responsibility for breach thereof lies on the State authority to which the perpetrator owes allegiance.

However, quoting the IMT's opinion on the enforcement of the 1907 Hague Convention (IV) personally against its violators, the Court went on to state that:

[225] Italy, Tribunal at Livorno, *Ercole case*, 13 April 2000.
[226] Italy, Court of Appeals at Florence, *Ercole case*, 22 February 2001.
[227] Switzerland, Military Tribunal at Lausanne, *Grabež case*, Judgement, 18 April 1997.
[228] Switzerland, Military Tribunal at Lausanne, *Niyonteze case*, Judgement, 30 April 1999.
[229] Switzerland, Military Court of Appeals, *Niyonteze case*, Judgement, 26 May 2000.
[230] Switzerland, Military Court of Cassation, *Niyonteze case*, Judgement, 27 April 2001.

The trend of opinion and the practice followed by the Courts, however, has been to make the individual responsible for his acts in breach of international conventions, and this trend was illustrated on a high level by the decision pronounced by the International Military Tribunal at Nuremberg, that certain accused had made themselves criminals by waging war in breach of the terms of an inter-governmental agreement renouncing war undertaken as an instrument of national policy, the Briand-Kellogg Pact.[231]

236. In the *Essen Lynching case* in 1945 dealing with the liability of two soldiers and several civilians for the alleged killing of unarmed POWs during the Second World War in violation of the laws and usages of war, the UK Military Court at Essen (Germany) found the accused guilty, stating with regard to the latter that every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims. With regard to one of the soldiers, a Captain in the German army who had not been physically involved in the killing but had allegedly given instructions that the POWs should be taken to a certain place and that he had given the order in a loud voice so that it could be heard by a crowd gathering nearby, the Court found that he was guilty of being concerned in the killing for his positive utterances.[232]

237. In the *Quirin case* in 1942, dealing with the trial, by a military commission, of German soldiers who had landed on US territory in 1942 and were charged, *inter alia*, with war crimes, the US Supreme Court, stating, however, that it was not "concerned with any question of the guilt or innocence of petitioners", held that:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War . . . Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offences against the law of war in appropriate cases.

In its ruling, the Supreme Court gave a list of cases in which individual offenders had been charged with offences against the law of war.[233]

238. In the *Yamashita case* in 1946, in which the US Supreme Court was called upon to decide whether the accused, the military governor and commanding general of Japan in the Philippines between 9 October 1944 and 2 September 1945, was responsible for the violations of IHL committed by the troops under his command, the accused was tried for his responsibility as a commander.[234] However, one of the judges, in his dissenting opinion, referred to US military law and stated that "from this the conclusion seems inescapable that the United

[231] UK, Military Tribunal at Lüneberg, *Auschwitz and Belsen case*, Judgement, 17 September 1945.
[232] UK, Military Court at Essen, *Essen Lynching case*, Judgement, 21–22 December 1945.
[233] US, Supreme Court, *Quirin case*, Judgement, 31 July 1942.
[234] US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.

States recognizes individual criminal responsibility for violations of the laws of war only as to those who commit the offences or who order or direct their commission".[235]

239. In the *Altstötter (the Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg held that:

> As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State in whose hands the perpetrators fall
>
> ...
>
> It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorised jurisdiction ...
>
> The very essence of the prosecution case is that the laws, the Hitlerian decrees and the draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.[236]

240. In its judgement in the *Flick case* in 1947, the US Military Tribunal at Nuremberg noted that "it can no longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals". The Tribunal also rejected the argument that the fact that the defendants were private individuals rather than public officials representing the State meant that they could not be criminally responsible for a violation of international law. Instead, it held that "international law ... binds every citizen just as does ordinary municipal law ... The application of international law to individuals is no novelty."[237]

241. In its judgements in the *Krauch (I. G. Farben Trial) case* and in the *Von Leeb case (The High Command Trial)* in 1948, the US Military Tribunal at Nuremberg reiterated the principle of individual responsibility.[238]

242. In its decision in the *Karadžić case* in 1995, the US Court of Appeals for the Second Circuit referred, *inter alia*, to the recognition, by the Executive Branch, of the liability of private persons for certain violations of customary

[235] US, Supreme Court, *Yamashita case*, Dissenting Opinion of Mr Justice Murphy, 4 February 1946.

[236] US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

[237] US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

[238] US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 27 August 1947–30 July 1948; *Von Leeb case (The High Command Trial)*, Judgement, 30 December 1947–28 October 1948.

international law and the availability of the Alien Tort Claims Act to remedy such violations. It held that:

> We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals . . . The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II.[239]

243. In the *Ademi case* in 2000, the Communal Court of Mitrovica in Kosovo (FRY) convicted the accused, a member of the local security force of Albanian origin, for "violating the Rules of International Law during the war conflict against the civilian population" in joint action with members of the armed forces.[240]

244. In the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, a Kosovo Serb and former chief of police, was convicted, *inter alia*, for having participated in crimes committed against the civilian population in 1999, acts which the District Court found had to be qualified as war crimes under Article 142 of the Penal Code of the FRY, as well as crimes against humanity. The Court also found that the acts had been committed "in time of war".[241] However, on appeal, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial. The Supreme Court found, *inter alia*, that:

> The state of facts was erroneously established in relation to all charges as there is no direct or conclusive evidence that the accused acted personally or gave orders leading to the alleged crimes or that he should be held liable under command responsibility duties concerning the above-mentioned crimes . . . During the retrial, the court of first instance should therefore assess . . . the issue of the accused's personal responsibility for participation in the crimes alleged.[242]

245. In a written opinion in the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

> This Opinion has concluded that [the accused] was not properly found guilty of any of the crimes under individual liability (the direct giving of orders to commit the crimes, or committing them as a co-perpetrator, or under accomplice liability) . . . Individual responsibility subsumes command responsibility. Because of this "subsuming rule", we must first evaluate whether individual responsibility might attach, as a finding that a defendant is individually responsible for a war crime or crime against humanity will preclude the need to analyse his culpability under command responsibility. The rule is stated in the statute and decisions of the ICTY . . . As to any particular criminal act found to be a war crime or crime against

[239] US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.
[240] SFRY (FRY), Communal Court of Mitrovica, *Ademi case*, Judgement, 30 August 2000.
[241] SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.
[242] SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.

humanity sanctioned under international law, command responsibility can only attach where the accused cannot be found individually responsible for the crime. Therefore an individual responsibility analysis must precede and may preclude a command responsibility analysis. It is this Opinion that any liability for the war crimes enumerated by the Verdict must be through command responsibility, and not through individual responsibility.[243]

Other National Practice

246. In 1998, at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, the Afghan Vice-Minister for Foreign Affairs declared that:

Since the second World War in the framework of the United Nations we have been witnessing an unprecedented expansion in the international protection of Human Rights. This expansion could be ascribed to an ever-increasing sharing of fundamental values and expectation among nations. Consequently the World community now acknowledges the need to protect the individual from different varieties of human depredations by creating an International Permanent Criminal Court, which should prosecute and punish those who are escaping national jurisdiction under different circumstances.[244]

247. In 1994, in a report to UNESCO on measures to implement the 1954 Hague Convention, Australia noted that at the most elementary level of training provided for all members of the armed forces, it was emphasised that "individual officers and soldiers will be held accountable for any violations [of the rules of the LOAC]".[245]

248. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Australia stated that:

Governments must also denounce – and denounce strongly – attacks against United Nations personnel and humanitarian workers and take all measures to bring perpetrators of violence to justice. Impunity, as so many of my colleagues have emphasized in this discussion, cannot be allowed.

...

The enforcement of international humanitarian law must also be strengthened in order to bring those responsible to justice and to send a clear message of the international community's intolerance of this violence.[246]

[243] SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections IV and IV(A).

[244] Afghanistan, Statement by the Vice-Minister for Foreign Affairs at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 16 June 1998.

[245] Australia, Department of Foreign Affairs and Trade, Report to UNESCO on Australian measures to implement the 1954 Hague Convention and associate regulations, 13 July 1994, § 1(b).

[246] Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, pp. 6 and 7.

249. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War, Austria stated that "there could be no doubt as to the illegality of the acts committed by Iraq, entailing . . . personal criminal liability of those responsible for those acts".[247]

250. In 1998, at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, the Chilean Under-Secretary of Justice declared that crimes such as genocide, war crimes, which he defined as crimes committed in international armed conflicts or conflicts of an internal character, and crimes against humanity should be included in the competence of the Court.[248]

251. According to the Report on the Practice of China, which refers to a statement made in 1955 by a representative of the Chinese Ministry of Foreign Affairs, in 1954, China remitted 410 Japanese military personnel who had committed various crimes during the Japanese invasion of China and the Chinese war of liberation. The report notes that this clearly indicates that the Chinese government does not make a distinction between international armed conflicts and internal armed conflicts, and that China "consistently holds that foreigners also shall take criminal responsibility for committing war crimes in internal armed conflicts".[249]

252. In 1983, during a debate in the Sixth Committee of the UN General Assembly on the ILC Draft Code of Offences against the Peace and Security of Mankind, China stated that "such crimes could be committed by both individuals and States and the responsibility of either would vary only as to its character or extent".[250]

253. In 1992, the Office of the Special Public Prosecutor (SPO) was established in Ethiopia after the fall of the regime of Colonel Mengistu Haile Mariam in 1991. In a letter to the Assistant Secretary-General for Human Rights, Ethiopia explained that the SPO had "the power to conduct investigations and institute proceedings against those it suspects of committing crimes and/or abusing their positions of authority in the former [Mengistu] regime".[251]

254. In 1994, in a statement before the UN Commission on Human Rights, the Chief Special Prosecutor of the Ethiopian Transitional Government stated

[247] Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.19, 23 October 1991, § 5.

[248] Chile, Statement by the Under-Secretary of Justice at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 16 June 1998.

[249] Report on the Practice of China, 1997, Chapters 6.3 and 6.5, referring to Statement by the Ministry of Foreign Affairs on the issue of the "so-called withdrawal of Japanese nationals in China put forward by the Japanese government", 16 August 1995, *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 3, p. 338.

[250] China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/38/SR.52, 23 November 1983, § 25.

[251] Ethiopia, Transitional government, Letter dated 28 January 1994 to the Assistant UN Secretary-General for Human Rights, UN Doc. E/CN.4/1994/103, 3 February 1994, § 3.

that the SPO was established "to compile a list of all the abuses committed by the previous regime and to bring those responsible to justice".[252]

255. According to a statement made in 1997 by Ethiopia's Office of the Special Public Prosecutor (SPO), which is in charge of prosecuting persons who allegedly committed crimes of genocide, crimes against humanity and war crimes between 1974 and 1991, since its establishment in 1992 by Proclamation 22/1992 of the transitional government of Ethiopia, a total of 5,198 persons had been charged by 1997, 54 of them with war crimes and most of the others with genocide, the defendants being classified into three major groups: policy- and decision-makers; field commanders; and the perpetrators of the crimes. The charges were based on Ethiopia's Penal Code.[253]

256. In 1993, the French Ministers of State and Foreign Affairs wrote a letter to the Chairman of the Committee of French Jurists entrusted to study the establishment of an international criminal tribunal for the former Yugoslavia, stating that:

> Unfortunately there is no longer any doubt that particularly serious crimes are being committed in the territory of the former Yugoslavia that constitute war crimes, crimes against humanity or serious violations of certain international conventions.
>
> Such actions cannot go unpunished, and the absence of real penalties, in addition to being an affront to public conscience, could encourage the perpetrators of these crimes to pursue their regrettable course of action.[254]

257. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, France stated that:

> In adopting resolution 827 (1993), the Security Council has just established an International Tribunal that will prosecute, judge and punish people from any community who have committed or continue to commit crimes in the territory of the former Yugoslavia . . .
>
> The expression "laws or customs of war" used in Article 3 of the [1993 ICTY Statute] covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed".[255]

258. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the report of the ILC, France referred to the draft statute for an international criminal tribunal for the former Yugoslavia and stated that:

[252] Ethiopia, Transitional Government, Statement by the Chief Special Prosecutor before the UN Commission on Human Rights, 17 February 1994, UN Doc. E/CN.4/1994/SR.28, 22 January 1996, § 2.

[253] Ethiopia, Office of the Special Public Prosecutor, Statement of the Chief Special Public Prosecutor, Addis Ababa, 13 February 1997.

[254] France, Minister of State and Minister of Foreign Affairs, Letter dated 16 January 1993 to the Procurator-General of the Court of Cassation and Chairman of the Committee of French Jurists, annexed to Letter dated 10 February 1993 to the UN Secretary-General, UN Doc. S/25266, 10 February 1993, p. 52.

[255] France, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, pp. 10–11.

Although it was true that barbarity had always existed, it was no less true that impunity for the guilty was no longer acceptable. Therefore, the establishment of an international criminal jurisdiction, although it would not fully satisfy those with the most exacting consciences, was a step forward in achieving respect for the rule of law and a better lot for the victims of the conflicts.[256]

259. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the question of responsibility for attacks on UN and associated personnel and measures to ensure that those responsible for such attacks were brought to justice, Germany, referring to a draft of the Convention on the Safety of UN Personnel which had been introduced by New Zealand, stated that:

[This draft convention] also established the personal responsibility of the perpetrators by making such acts crimes punishable under the national laws of States parties. That was especially important when the United Nations was operating in areas of the world where there was no effective authority to guarantee that the perpetrators were actually punished. The draft convention would fill a vacuum.[257]

260. According to a representative of the German Central Office for the Investigation of National-Socialist Atrocities at Ludwigsburg (*Zentrale Stelle zur Aufklärung nationalsozialistischer Gewaltverbrechen*), established by the judicial administrations of the German States in 1958, by September 1999, Germany had investigated the cases against more than 100,000 accused and suspected persons for crimes committed during the Nazi regime. In all, 7,225 of the proceedings were handed over to the public prosecution and about 6,500 individuals were convicted. The representative stated that "it is important that [even the elderly persons accused of having committed such crimes] must be held responsible for their deeds".[258]

261. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, Hungary noted that:

This is the first time that the United Nations established an international criminal jurisdiction to prosecute persons who commit grave violations of international humanitarian law . . . We note . . . the importance of the fact that the jurisdiction of the [ICTY] covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of former Yugoslavia.[259]

262. In 1996, during a debate in the Parliamentary Assembly of the Council of Europe on the report of the Committee on Migration, Refugees and Demography on refugees, displaced persons, and reconstruction in certain countries

[256] France, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.18, 26 October 1993, § 35.
[257] Germany, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.16, 21 October 1993, § 65.
[258] Willi Dressen, "Eine Behörde gegen das Vergessen", *Die Welt*, 2 September 1999.
[259] Hungary, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 20.

in the former Yugoslavia, Hungary declared that "those who committed war crimes or crimes against humankind should be prosecuted and held responsible for their acts before an international court, namely the International Criminal Tribunal for the Former Yugoslavia".[260]

263. In 1996, during a debate in the UN Security Council on the report of the UN Secretary-General on the situation in Burundi, Indonesia stated that:

> We would like to recall that all persons who committed or authorized the commission of serious violations of international humanitarian law are individually responsible for such violations and should be held accountable. Those responsible for crimes against humanity and, in this case, their fellow countrymen should be brought to justice.[261]

264. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC's work on the Nuremberg Principles, Israel declared that the principles in question "had become a constituent part not only of universal international law, but also of the law of the United Nations".[262]

265. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC's work on the Nuremberg Principles, and in reply to a statement by the UK "that the concept of the direct responsibility of the individual under international law without the interposition of the national State was 'convenient and picturesque' but unscientific", the Netherlands emphasised that it was apparent from the judgement of the 1945 IMT (Nuremberg) that "there were rules of international law which applied directly to individuals, without passing through the intermediary of national law, and that some obligations of international law transcended the obligations imposed by the national administration".[263]

266. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, and specifically with regard to the alleged shooting down of two UN aircraft in Angola in December 1998 and January 1999 respectively, New Zealand stated that:

> The premeditated destruction of those aircraft would be one of the most flagrant crimes against this Organization and its personnel ever recorded . . . It is essential that the perpetrators be brought to justice, however long it takes. There can be no impunity for crimes of such nature.[264]

[260] Hungary, Statement before the Parliamentary Assembly of the Council of Europe, Ordinary Session (First part), 24 January 1996, *Official Report of Debates*, Vol. I, p. 181.

[261] Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3692, 28 August 1996, p. 21.

[262] Israel, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 55.

[263] Netherlands, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 24.

[264] New Zealand, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 9.

During the same debate, New Zealand stated, with regard to the "inclusion of deliberate attacks on personnel involved in a humanitarian situation or peacekeeping mission in the [1998 ICC Statute] as a war crime over which the International Criminal Court will have jurisdiction", that "we hope that the [International Criminal] Court . . . will contribute towards ending the impunity enjoyed by perpetrators of such attacks in the past".[265]

267. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Norway stated that "States need to hold . . . non-State actors accountable for their attacks on humanitarian workers operating in territory under their control".[266]

268. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC's work on the Nuremberg Principles, Pakistan stated that:

> The Nürnberg principles, involving as they did the grave problems of war and peace, were of great importance and deep significance to international law. They proclaimed that . . . those who violated the laws [and] customs of war or committed inhuman acts against civilian populations thereby rendered themselves guilty of international crimes and liable to judgment and punishment.[267]

269. In 2001, in a statement before the UN Commission on Human Rights, the Rwandan Minister of Justice stated that his government "was also committed to doing its utmost to prosecute and sentence those responsible for the genocide and other serious violations of human rights and international humanitarian law".[268]

270. In 1996, during a debate in the UN Security Council on the report of the UN Secretary-General on the situation in Burundi, South Africa stated that:

> The international community can no longer allow acts of unbridled violence to continue with impunity. Those who commit serious violations of international humanitarian law should be made to realize that they are individually responsible for such violations and will be held accountable.[269]

271. In 1990, during a debate in the Sixth Committee of the UN General Assembly, the UK stated that:

> Recent events in the Persian Gulf demonstrated all too clearly the relevance of the topic of the draft Code of crimes against the peace and security of mankind.

[265] New Zealand, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 9.
[266] Norway, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 10.
[267] Pakistan, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 38.
[268] Rwanda, Statement by the Minister of Justice before the UN Commission on Human Rights, 30 March 2001, UN Doc. E/CN.4/2001/SR.25, 6 May 2002, § 73.
[269] South Africa, Statement before the UN Security Council, UN Doc. S/PV.3692, 28 August 1996, p. 12.

The catalogue of the international legal obligations which had been violated was endless. It must be clear that individuals were personally responsible for crimes of that nature, since the responsibility of the State, if there was such responsibility, was not in itself a sufficient response.[270]

272. In 1990, during a debate in the UN Security Council concerning the application of GC IV in Kuwait following its occupation by Iraq, the UK representative stated that:

I should also recall the terms of paragraph 13 of resolution 670 (1990), under which individuals are held individually responsible for grave breaches of the Geneva Convention. We should also hold personally responsible those involved in violations of the laws of armed conflict, including the prohibition against initiating the use of chemical or biological weapons contrary to the [1925 Gas Protocol], to which Iraq is a party.[271]

273. On 21 January 1991, in the context of the Gulf War, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq's obligations under international law. According to a statement by an FCO spokesperson following the meeting, the UK Minister had "also reminded the Iraqi Ambassador of the personal liability of those individuals who broke the Conventions . . . He again reminded the Ambassador of the personal liability of those who authorised [the] use [of chemical and biological weapons]".[272]

274. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK, with regard to the treatment of British POWs by Iraq, stated that "the Iraqi Ambassador was reminded of the responsibility of . . . individual Iraqis for any grave breach of the [Geneva] Conventions".[273]

275. In 1991, in a written reply to a question in the House of Commons, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that "we have consistently stated that individuals bear personal responsibility for crimes under international law. This position is reflected in Security Council resolution 674."[274]

276. In 1991, during a debate in the House of Lords on the subject of peace and security in the Middle East, a UK government spokesperson stated that:

We have made it clear that anyone who breaks the provisions of the Geneva Conventions may be held liable, and that remains the case. That will not be a decision for the [UK] alone. Machinery already exists under the [Geneva Conventions Act as

[270] UK, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/45/SR.35, 8 November 1990, § 27.
[271] UK, Statement before the UN Security Council, UN Doc., S/PV.2963, 29 November 1990, p. 82.
[272] UK, Statement by a FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.
[273] UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.
[274] UK, House of Commons, Reply to a written question by Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 February 1991, Vol. 186, Written Answers, col. 583.

amended (1957)] for prosecuting grave breaches. The Kuwaiti Government intends to establish a commission to catalogue war crimes, which we welcome.[275]

277. In 1991, during a debate in the House of Commons on the subject of peace and security in the Middle East, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Anyone who breaks the provisions of the Geneva conventions may be held liable. Thus, individual Iraqis now bear personal responsibility for breaches of them. That position was reaffirmed in Security Council resolutions 670 and 674 . . . Machinery already exists under [the Geneva Conventions Act as amended (1957)] for prosecuting grave breaches of them.[276]

278. In 1993, during a debate in the UN Security Council on the establishment of the ICTY, the UK, with regard to "continued reports of massive breaches of international humanitarian law and human rights in Bosnia", declared that:

The perpetrators must be called to account, whoever is responsible, throughout the territory of the former Yugoslavia. Those who have perpetrated these shocking breaches of international humanitarian law should be left in no doubt that they will be held individually responsible for their actions.[277]

279. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the UK stated that:

It is essential that those who commit [violations of IHL in the former Yugoslavia] be in no doubt that they will be held individually responsible. It is essential that these atrocities be investigated and the perpetrators called to account, whoever and wherever they may be . . . Articles 2 to 5 of the draft [ICTY] statute describe the crimes within the jurisdiction of the Tribunal. The Statute does not, of course, create new law, but reflects existing international law in this field. In this connection, it would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions and that Article 5 covers acts committed in time of armed conflict.[278]

280. In 1994, during a debate in the UN Security Council on acts committed in Rwanda, the UK stated that:

[Resolution 935] of the UN Security Council sends a clear message to those responsible for grave violations of international humanitarian law, or acts of genocide, that they will be held individually responsible for those acts. The international community is determined that they be brought to justice; it is our duty to ensure that this is done.[279]

[275] UK, House of Lords, Statement by a government spokesperson, *Hansard*, 6 March 1991, Vol. 526, cols. 1484–1485.
[276] UK, House of Commons, Statement by the Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 March 1991, Vol. 188, col. 1100.
[277] UK, Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 14.
[278] UK, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 19.
[279] UK, Statement before the UN Security Council, UN Doc. S/PV.3400, 1 July 1994, p. 8.

281. In 1994, during a debate in the UN Security Council, the UK reiterated that the establishment of the ICTR "is a signal of the international community's determination that offenders must be brought to justice" and that "it is also a matter of the greatest importance to the British Government that the perpetrators of the genocide be brought to justice".[280]

282. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that:

> The Government of the United States reminds the Government of Iraq that under International Law, violations of the Geneva Conventions, the Geneva [Gas] Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.[281]

In another such diplomatic note a few days later, the US reiterated that "Iraqi individuals who are guilty of . . . war crimes . . . are personally liable and subject to prosecution at any time".[282]

283. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War and the environmental damage caused, the US maintained that "existing international law not only prohibited the type of acts committed by Iraq, but also provided important remedies to address and deter such acts, in particular with respect to personal criminal liability".[283]

284. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that:

> Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes . . . And to those who committed [violations of IHL in the former Yugoslavia], we have a clear message: war criminals will be prosecuted and justice will be rendered.
>
> The crimes being committed . . . are not just isolated acts of drunken militiamen, but often are the systematic and orchestrated crimes of Government officials, military commanders, and disciplined artillerymen and foot soldiers. The men and women behind these crimes are individually responsible for the crimes of those they purport to control; the fact that their power is often self-proclaimed does not lessen their culpability.
>
> . . .

[280] UK, Statement before the UN Security Council, UN Doc. S/PV.3453, 8 November 1994, p. 6; see also Statement before the UN Security Council, UN Doc. S/PV.3605, 12 December 1995, p. 5.

[281] US, Department of State, Diplomatic note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

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

[283] US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 39.

It is understood that the "laws or customs of war" referred to in Article 3 [of the 1993 ICTY Statute] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.

...

With respect to paragraph 1 of Article 7, it is our understanding that individual liability arises in the case of a conspiracy to commit a crime referred to in Articles 2 through 5.[284]

285. In 1995, in its *amicus curiae* brief presented to the ICTY in the *Tadić case* on the issue of the Tribunal's jurisdiction, the US stated that:

We believe that the "grave breaches" provisions of Article 2 of the [1993 ICTY] Statute apply to armed conflicts of a non-international character as well as those of an international character ...

Insofar as Common Article 3 [of the 1949 Geneva Conventions] prohibits certain acts with respect to "[p]ersons taking no active part in hostilities" in cases of armed conflict not of an international character, it is consistent with the ordinary meaning of the Geneva Conventions to treat such persons as persons protected by the Conventions ...

... Article 3 of the [1993 ICTY] Statute authorizes the prosecution of "persons violating the laws or customs of war. Such violations shall include, but not be limited to ..." a series of specific acts that would constitute such violations. This is only an exemplary and not an exhaustive list, and the language of Article 3 is otherwise broad enough to cover all relevant violations of the laws or customs of war, whether applicable in international or non-international armed conflict".[285]

286. The 1998 version of the US Department of Defense Directive on the Law of War Program stated that "all reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action". A "reportable incident" is defined as "a possible, suspected, or alleged violation of the law of war".[286]

287. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC's work on the Nuremberg Principles, the SFRY stated that "all civilized nations considered that the principles recognized in the Charter of the Nürnberg Tribunal were principles of positive international law which all States should respect".[287]

[284] US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, pp. 13–16.

[285] US, *Amicus Curiae* brief presented to the ICTY, *Tadić case*, Motion Hearing, 25 July 1995, pp. 35-37.

[286] US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Sections 3.2 and 4.3.

[287] SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.234, 6 November 1950, § 7.

288. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that "war crimes and other grave breaches of norms of law on warfare are serious criminal offences and call for criminal liability of all perpetrators".[288]

III. Practice of International Organisations and Conferences

United Nations

289. In a resolution adopted in 1980, the UN Security Council, after recalling "the applicability of GC IV to the Arab territories occupied by Israel" and, in particular, Article 27 thereof, stated that it was:

deeply concerned that the Jewish settlers in the occupied Arab territories are allowed to carry arms thus enabling them to perpetrate crimes against the civilian Arab population,

1. condemns the assassination attempts on the lives of the mayors of Nablus, Ramallah and Al Bireh and calls for the immediate apprehension and prosecution of the perpetrators of these crimes.[289]

290. In a resolution adopted in 1990 in the context of the Iraqi occupation of Kuwait, the UN Security Council stated that:

The Fourth Geneva Convention applies to Kuwait and ... as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and, in particular, is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit ... grave breaches.[290]

291. In a resolution adopted in 1992 on violations of humanitarian law in the territory of the former Yugoslavia and in Bosnia and Herzegovina, the UN Security Council reaffirmed that "persons who commit ... grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches".[291]

292. In a resolution adopted in 1992 establishing the Commission of Experts to examine and analyse evidence of grave breaches of the Geneva Conventions and other violations of IHL in the former Yugoslavia, the UN Security Council recalled that "persons who commit ... grave breaches of the Conventions are individually responsible in respect of such breaches".[292]

293. In a resolution on Somalia adopted in 1992, the UN Security Council strongly condemned "all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery

[288] SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 2.
[289] UN Security Council, Res. 471, 5 June 1980, § 1.
[290] UN Security Council, Res. 670, 25 September 1990, § 13.
[291] UN Security Council, Res. 771, 13 August 1992, § 1.
[292] UN Security Council, Res. 780, 6 October 1992, preamble; see also Res. 764, 13 July 1992, § 10.

of food and medical supplies essential for the survival of the civilian population" and affirmed that "those who commit . . . such acts will be held individually responsible in respect of such acts".[293]

294. In a resolution adopted in 1993 on the establishment of the ICTY, the UN Security Council recalled that "persons who commit . . . grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches" and expressed itself "determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for [violations of international humanitarian law]".[294]

295. In a resolution on Somalia adopted in 1993, the UN Security Council reiterated its demand that "all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law" and reaffirmed that "those responsible for such acts be held individually accountable".[295]

296. In a resolution adopted in 1993 with respect to the former Yugoslavia, the UN Security Council reaffirmed that "those who commit or have committed [massive, organized and systematic detention and rape of women] will be held individually responsible in respect of such acts".[296]

297. By Resolution 827 of May 1993, the UN Security Council established the ICTY as an *ad hoc* international tribunal "for the sole purpose of prosecuting the persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia". To the same end, it decided to adopt the ICTY Statute.[297]

298. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council recalled "the principle of individual responsibility for the perpetration of war crimes and other violations of international humanitarian law and its decision in resolution 827 (1993) to establish an International Tribunal".[298]

299. In a resolution adopted in 1994 with respect to the former Yugoslavia, the UN Security Council reiterated that "any persons committing violations of international humanitarian law will be held individually responsible".[299]

300. In a resolution on Rwanda adopted in 1994, the UN Security Council recalled a statement by its President in which it "*inter alia*, condemned all breaches of international humanitarian law in Rwanda, particularly those perpetrated against the civilian population and recalled that persons who instigate or participate in such acts are individually responsible". The Security Council also recalled that "all persons who commit or authorize the commission of

[293] UN Security Council, Res. 794, 3 December 1992, § 5.
[294] UN Security Council, Res. 808, 22 February 1993, preamble.
[295] UN Security Council, Res. 814, 26 March 1993, § 13.
[296] UN Security Council, Res. 820, 17 April 1993, § 6.
[297] UN Security Council, Res. 827, 25 May 1993, § 2.
[298] UN Security Council, Res. 859, 24 August 1993, § 7.
[299] UN Security Council, Res. 913, 22 April 1994, preamble.

serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice".[300]

301. By Resolution 955 of November 1994, the UN Security Council established the ICTR as an *ad hoc* tribunal

> for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

To this end, the Security Council decided to adopt the ICTR Statute, annexed to the resolution.[301]

302. In a resolution adopted in 1995 concerning the conflict in the former Yugoslavia, the UN Security Council reiterated that "all those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".[302]

303. By Resolution 1012 of 1995, the UN Security Council established the International Commission of Inquiry in Burundi, *inter alia*, to recommend measures to bring to justice persons responsible for the assassination of the President of Burundi, the massacres and other related serious acts of violence which followed, to prevent any repetition of deeds similar to those investigated by the commission and, in general, to eradicate impunity. The Security Council recalled that "all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for these violations and should be held accountable".[303]

304. In a resolution on the former Yugoslavia adopted in 1995, the UN Security Council strongly condemned "all violations of international humanitarian law and of human rights in the territory of the former Yugoslavia" and reiterated that "all those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".[304]

305. In a resolution on Burundi adopted in 1996, the UN Security Council recalled that "all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for such violations and should be held accountable" and reaffirmed "the need to put an end to impunity for such acts and the climate that fosters them".[305]

306. In a resolution on Angola adopted in 1996, the UN Security Council stressed "the need for the Angolan parties to give greater attention to

[300] UN Security Council, Res. 935, 1 July 1994, preamble.
[301] UN Security Council, Res. 955, 8 November 1994, § 1.
[302] UN Security Council, Res. 1009, 10 August 1995, § 4; see also Res. 1010, 10 August 1995, § 3.
[303] UN Security Council, Res. 1012, 28 August 1995, preamble and § 1.
[304] UN Security Council, Res. 1034, 21 December 1995, § 1.
[305] UN Security Council, Res. 1072, 30 August 1996, preamble.

preventing incidents of human rights abuse, investigating alleged human rights violations, and punishing those found guilty by due process of law".[306]

307. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council reaffirmed that "persons who commit . . . grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches".[307]

308. In a resolution on East Timor adopted in 1999, the UN Security Council expressed "its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor" and stressed that "persons committing such violations bear individual responsibility". It also demanded that "those responsible for . . . acts [of violence in East Timor] be brought to justice".[308]

309. In the resolution establishing UNTAET in 1999 in the context of the situation in East Timor, the UN Security Council expressed "its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor" and stressed that "persons committing such violations bear individual responsibility". It also demanded that "those responsible for . . . violence [in East Timor] be brought to justice".[309]

310. By Resolution 1315 of 2000, the UN Security Council established the Special Court for Sierra Leone. In the resolution, it reaffirmed that "persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice".[310] It also recommended that:

> The special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2 [notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone].[311]

311. In 1992, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council condemned attacks on the UNPROFOR position in Sarajevo and stated that "the members of the Council call upon all parties to ensure that those responsible for these intolerable acts are quickly called to account".[312]

312. In February 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council declared that:

[306] UN Security Council, Res. 1087, 11 December 1996, preamble.
[307] UN Security Council, Res. 1193, 28 August 1998, § 12.
[308] UN Security Council, Res. 1264, 15 September 1999, preamble and § 1.
[309] UN Security Council, Res. 1272, 25 October 1999, preamble and § 16.
[310] UN Security Council, Res. 1315, 14 August 2000, preamble.
[311] UN Security Council, Res. 1315, 14 August 2000, § 3.
[312] UN Security Council, Statement by the President, UN Doc. S/24379, 4 August 1992.

The deliberate impeding of the delivery of food and humanitarian relief essential for the survival of the civilian population in Bosnia and Herzegovina constitutes a violation of the Geneva Conventions of 1949 and the Council is committed to ensuring that individuals responsible for such acts are brought to justice.[313]

313. In March 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that "those guilty of crimes against international humanitarian law will be held individually responsible by the world community".[314]

314. In April 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that "those guilty of crimes against international humanitarian law will be held individually responsible by the world community".[315]

315. In April 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council condemned all violations of GC III and IV and reaffirmed that "those who commit . . . such acts will be held personally responsible".[316]

316. In June 1993, in a statement by its President regarding the conflict in Angola, the UN Security Council strongly condemned an attack by UNITA on a train carrying civilians, qualifying it "as a clear violation of . . . international humanitarian law" and stressing that "those responsible must be held accountable".[317]

317. In October 1993, in a statement by its President following a reported "massacre of the civilian population . . . by troops of the Croatian Defence Council" and "accounts of attacks against UNPROFOR by armed persons bearing uniforms of the Bosnian Government forces, and of an attack to which an humanitarian convoy under the protection of UNPROFOR was subjected" in central Bosnia, the UN Security Council reiterated that "those responsible for such violations of international humanitarian law should be held accountable in accordance with the relevant resolutions of the Council".[318]

318. In January 1994, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council condemned "the flagrant violations of international humanitarian law which have occurred for which it holds the perpetrators individually responsible".[319]

[313] UN Security Council, Statement by the President, UN Doc. S/25334, 25 February 1993, p. 1.
[314] UN Security Council, Statement by the President, UN Doc. S/25361, 3 March 1993, p. 1.
[315] UN Security Council, Statement by the President, UN Doc. S/25520, 3 April 1993, p. 1.
[316] UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.
[317] UN Security Council, Statement by the President, UN Doc. S/25899, 8 June 1993.
[318] UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993.
[319] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1.

319. In March 1994, in a statement by its President regarding the conflict in Afghanistan, the UN Security Council recalled that "those who violate international humanitarian law bear individual responsibility".[320]

320. In April 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council condemned the killing of "Government leaders, many civilians and at least ten Belgian peace-keepers as well as the reported kidnapping of others" and stated that the perpetrators of these "horrific attacks . . . must be held responsible".[321]

321. In August 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council stated that:

> The Council encourages the Government of Rwanda to cooperate with the United Nations, in particular with the Commission of Experts established by the Council in its resolution 935 (1994), in ensuring that those guilty of the atrocities committed in Rwanda, in particular the crime of genocide, are brought to justice through an appropriate mechanism or mechanisms which will ensure fair and impartial trials in accordance with international standards of justice.[322]

322. In September 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council condemned "all violations of international humanitarian law in the conflict in the Republic in Bosnia and Herzegovina, for which those who commit them are personally responsible".[323]

323. In October 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council reaffirmed its view that "those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice".[324]

324. In 1994, in a statement by its President concerning the situation in Burundi, the UN Security Council reaffirmed "the importance of bringing to justice those responsible for the coup of 21 October 1993 and subsequent inter-ethnic massacres and other violations of international humanitarian law".[325]

325. In July 1995, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed "its condemnation of all violations of international humanitarian law" and reiterated "to all concerned that those who have committed . . . such acts will be held individually responsible in respect of such acts".[326]

326. In 1995, in a statement by its President regarding the situation in Croatia, the UN Security Council reminded "the parties of their responsibilities under

[320] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/12, 23 March 1994.
[321] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994.
[322] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/42, 10 August 1994.
[323] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/50, 2 September 1994.
[324] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/59, 14 October 1994, p. 2.
[325] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/60, 21 October 1994.
[326] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/33, 20 July 1995.

international humanitarian law" and reiterated that "those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".[327]

327. In September 1995, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated that "those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".[328] The same message was conveyed by the Security Council in a subsequent statement by its President.[329]

328. In October 1995, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that "those who have committed ... violations of international humanitarian law will be held individually responsible for them".[330]

329. In 1998, in a statement by its President concerning the situation in the DRC, the UN Security Council stated that it:

> recognizes the necessity to investigate further the massacres, other atrocities and violations of international humanitarian law and to prosecute those responsible. It deplores the delay in the administration of justice. The Council calls on the Governments of the Democratic Republic of the Congo and Rwanda to investigate without delay, in their respective countries, the allegations contained in the report of the Investigative Team and to bring to justice any persons found to have been involved in these or other massacres, atrocities and violations of international humanitarian law. The Council takes note of the stated willingness of the Government of the Democratic Republic of the Congo to try any of its nationals who are guilty of or were implicated in the alleged massacres ... Such action is of great importance in helping to bring an end to impunity and to foster lasting peace and stability in the region. It urges Member States to cooperate with the Governments of the Democratic Republic of the Congo and Rwanda in the investigation and prosecution of these persons.[331]

The UN Security Council further expressed its

> readiness to consider, as necessary in light of actions by the Governments of the Democratic Republic of the Congo and Rwanda, additional steps to ensure that the perpetrators of the massacres, other atrocities and violations of international humanitarian law are brought to justice.[332]

330. In 1998, in a statement by its President concerning the situation in the DRC, the UN Security Council reaffirmed that "all persons who

[327] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995.
[328] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/43, 7 September 1995, p. 1.
[329] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 2.
[330] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/52, 12 October 1995, p. 2.
[331] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, pp. 1–2.
[332] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, p. 2.

commit . . . grave breaches of the [Geneva Conventions of 1949 and the Additional Protocols of 1977] are individually responsible in respect of such breaches".[333]

331. In a resolution adopted in 1946, the UN General Assembly affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal". It also called upon the Committee on the Progressive Development of International Law and its Codification (a predecessor of the ILC)

> to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.[334]

332. By Resolution 177 (II) of 1947, the UN General Assembly established the ILC which was directed, *inter alia*, to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal".[335] However, after the ILC had formulated the 1950 Nuremberg Principles, the General Assembly did not formally adopt them by a resolution.

333. In a resolution adopted in 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly stated that "persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they have committed those crimes".[336]

334. In a resolution adopted in 1981 regarding the conflict in the Near East, the UN General Assembly expressed "deep concern that Israel, the occupying Power, has failed so far to apprehend and prosecute the perpetrators of the assassination attempts" which had been carried out against the Mayors of Nablus, Ramallah and Al Bireh. It referred to Article 27 GC IV.[337]

335. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly urged the UN Security Council "to consider recommending the establishment of an ad hoc international war crimes tribunal to try and punish those who have committed war crimes in the Republic of Bosnia and Herzegovina".[338]

336. In a resolution adopted in 1993 in the context of the conflict in the former Yugoslavia, the UN General Assembly, "welcoming the establishment of

[333] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, pp. 1–2.
[334] UN General Assembly, Res. 95 (I), 11 December 1946.
[335] UN General Assembly, Res. 177 (II), 21 November 1947, § (a).
[336] UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 5.
[337] UN General Assembly, Res. 36/147 G, 16 December 1981, preamble and § 1.
[338] UN General Assembly, Res. 47/121, 18 December 1992, § 10.

the [ICTY]", reaffirmed that "all persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations".[339]

337. In a resolution on the former Yugoslavia adopted in 1993, the UN General Assembly, "welcoming the convening of the [ICTY] and the naming of its Chief Prosecutor", stated that it supported "the determination of the Security Council that all persons who perpetrate or authorize violations of international humanitarian law are individually responsible for those breaches and that the international community shall exert every effort to bring them to justice".[340]

338. In a resolution adopted in 1994 on the situation in Bosnia and Herzegovina, the UN General Assembly, "welcoming the establishment of the [ICTY]", affirmed "individual responsibility for the perpetration of crimes against humanity and other serious violations of international humanitarian law committed in Bosnia and Herzegovina".[341]

339. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly noted that "all serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 are within the jurisdiction of the [ICTY], and that persons who commit such acts in the context of the existing conflict will be held accountable".[342]

340. In a resolution adopted in 1994 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that "all persons who perpetrate or authorize crimes against humanity or other violations of international law are individually responsible for those violations".[343]

341. In a resolution adopted in 1994 on the situation of human rights in Rwanda, the UN General Assembly reaffirmed that:

> All persons who commit or authorize genocide or other grave violations of international humanitarian law or those who are responsible for grave violations of human rights are individually responsible and accountable for those violations and . . . the international community will exert every effort to bring those responsible to justice in accordance with international principles of due process.[344]

The General Assembly also welcomed the establishment of the ICTR.[345]

342. In a resolution adopted in 1995 on rape and abuse of women in areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that "all persons who perpetrate or authorize crimes against humanity or other

[339] UN General Assembly, Res. 48/143, 20 December 1993, preamble and § 5.
[340] UN General Assembly, Res. 48/153, 20 December 1993, preamble and § 7.
[341] UN General Assembly, Res. 49/10, 3 November 1994, preamble and § 26.
[342] UN General Assembly, Res. 49/196, 23 December 1994, § 11.
[343] UN General Assembly, Res. 49/205, 23 December 1994, § 6.
[344] UN General Assembly, Res. 49/206, 23 December 1994, § 4; see also Res. 50/200, 22 December 1995, § 6 and Res. 51/114, 12 December 1996, § 4.
[345] UN General Assembly, Res. 49/206, 23 December 1994, § 5.

violations of international humanitarian law are individually responsible for those violations".[346]

343. In a resolution on the former Yugoslavia adopted in 1995, the UN General Assembly condemned "in the strongest terms all violations of human rights and international humanitarian law by the parties to the conflict" and stated that "persons who commit such acts will be held personally responsible and accountable".[347]

344. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly urged "the Afghan authorities ... to bring perpetrators [of grave violations of human rights and of accepted humanitarian rules] to trial in accordance with internationally accepted standards".[348]

345. In a resolution adopted in 1996 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that "all persons who perpetrate or authorize crimes against humanity or other violations of international humanitarian law are individually responsible for those violations".[349]

346. In a resolution adopted in 2001 entitled "Responsibility of States for internationally wrongful acts", to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 58 concerning "Individual responsibility", was annexed, the UN General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".[350]

347. In a resolution adopted in 1993 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights affirmed that:

> All persons who perpetrate or authorize violations of international humanitarian law, including the above-mentioned acts, are individually responsible and accountable for those violations and ... the international community will exert every effort to bring those responsible for such violations to justice in accordance with internationally recognized principles of due process.[351]

348. In a resolution adopted in 1993 on rape and abuse of women in the territory of the former Yugoslavia, the UN Commission on Human Rights reaffirmed that:

> All persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and ... those in positions of authority who have failed adequately to

[346] UN General Assembly, Res. 50/192, 22 December 1995, § 4.
[347] UN General Assembly, Res. 50/193, 22 December 1995, § 3.
[348] UN General Assembly, Res. 51/108, 12 December 1996, § 11.
[349] UN General Assembly, Res. 51/115, 12 December 1996, § 4.
[350] UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.
[351] UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 18.

ensure that persons under their control comply with the relevant international instruments are accountable along with the perpetrators.[352]

349. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that "all persons who perpetrate or authorize violations of international humanitarian law are individually responsible and accountable".[353]

350. In a resolution adopted in 1994 on rape and abuse of women in the territory of the former Yugoslavia, the UN Commission on Human Rights reaffirmed that:

> All persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and that those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable together with the perpetrators.[354]

351. In a resolution adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that "all persons who perpetrate or authorize violations of international humanitarian law are individually responsible and accountable".[355]

352. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights reaffirmed that "all persons who plan, commit or authorize [violations of human rights and IHL] will be held personally responsible and accountable" and called upon the government of Croatia "to pursue vigorously prosecutions against those suspected of past violations of international humanitarian law and human rights".[356]

353. In resolutions on Rwanda adopted in 1995 and 1996, the UN Commission on Human Rights reaffirmed the principle that "all persons who commit or authorize genocide or other grave violations of international humanitarian law and those who are responsible for grave violations of human rights are individually responsible and accountable for those violations".[357]

354. In a resolution on East Timor adopted in 1999, the UN Commission on Human Rights affirmed that:

> All persons who commit or authorize violations of human rights or international humanitarian law are individually responsible and accountable for those violations and . . . the international community will exert every effort to ensure that those

[352] UN Commission on Human Rights, Res. 1993/8, 23 February 1993, § 5.
[353] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 17.
[354] UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 5.
[355] UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 19.
[356] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, §§ 1 and 22.
[357] UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 4; Res. 1996/76, 23 April 1996, § 4.

responsible are brought to justice, while affirming that the primary responsibility for bringing perpetrators to justice rests with national judicial systems.[358]

The Commission also called upon the government of Indonesia "to ensure, in cooperation with the Indonesian National Commission on Human Rights, that the persons responsible for acts of violence and flagrant and systematic violations of human rights are brought to justice". It requested the UN Secretary-General "to establish an international commission of inquiry . . . in order . . . to gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote".[359]

355. In a resolution on Sierra Leone adopted in 1999, the UN Commission on Human Rights reminded all factions and forces in Sierra Leone that "in any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law".[360]

356. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights emphasised "the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law". It also recognised that "crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and that perpetrators of such crimes should be prosecuted . . . by States".[361]

357. In a resolution adopted in 1993 on punishment of the crime of genocide, the UN Sub-Commission on Human Rights affirmed that "all persons who perpetrate or authorize the commission of genocide and related crimes are individually responsible for such actions".[362]

358. In a resolution adopted in 2000 on the role of universal or extraterritorial competence in preventive action against impunity, the UN Sub-Commission on Human Rights stated that it believed that "the highest priority should be given, independently of the circumstances in which these violations were committed, to legal proceedings against all individuals responsible for war crimes and crimes against humanity, including former heads of State or Government".[363]

359. In 1993, in his report on the draft Statute of the ICTY, the UN Secretary-General stated that:

[358] UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 4.
[359] UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, §§ 5(a) and 6.
[360] UN Commission on Human Rights, Res. 1999/1, 6 April 1999, § 2.
[361] UN Commission on Human Rights, Res. 2002/79, 25 April 2002, §§ 2 and 11.
[362] UN Sub-Commission on Human Rights, Res. 1993/8, 20 August 1993, § 1.
[363] UN Sub-Commission on Human Rights, Res. 2000/24, 18 August 2000, § 2.

53. An important element in relation to the competence *ratione personae* (personal jurisdiction) of the [ICTY] is the principle of individual criminal responsibility . . . The Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.
54. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.[364]

360. In 2001, in the recommendations in his report on the protection of civilians in armed conflict, the UN Secretary-General urged:

the Security Council and the General Assembly to provide, from the outset, reliable, sufficient and sustained funding for international efforts, whether existing or future international tribunals, arrangements established in the context of United Nations peace operations or initiatives undertaken in concert with individual Member States, to bring to justice perpetrators of grave violations of international humanitarian and human rights law.[365]

361. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, the UN Deputy Secretary-General stated, *inter alia*, that "the perpetrators of attacks against United Nations and humanitarian personnel must be brought to justice".[366]

362. In 1997, in his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights stated that:

In requesting the de facto authorities to take steps to punish the blunders and the massacres, the Special Rapporteur is seeking, not to single them out, but rather to encourage them to honour the commitments made earlier by the Burundi Government. As he said in his previous report to the General Assembly . . . the violence and the unrest which prevail in Burundi can be attributed to several actors or parties, first and foremost to the armed forces and the security forces, next, to the militias, which are related to them, and, lastly, to an armed opposition that itself comprises various groups. All these actors are responsible, although to varying degrees, for the grave violations of human rights and international humanitarian law which are being perpetrated.[367]

363. In 2000, in a report on the situation of human rights in Rwanda, the Special Representative of the UN Commission on Human Rights stated that, as at 30 November 1999, 2,406 of the 121,500 persons in detention had been tried in Rwanda before a special genocide court. Of these, 348 (14.4 per cent)

[364] UN Secretary-General, Report pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, §§ 53–54.
[365] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 1.
[366] UN Deputy Secretary-General, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 11.
[367] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 11.

were condemned to death, 30.3 per cent were sentenced to life imprisonment, 34 per cent received jail terms of between 1 and 20 years, and 19 per cent were acquitted. The Special Representative also noted and applauded the introduction of a new system of community justice for genocide suspects known as *gacaca*.[368]

364. In 1998, in a report submitted to the UN Sub-Commission on Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur concluded that:

> Individual perpetrators of slavery, crimes against humanity, genocide, torture and war crimes – whether State or non-State actors – must be held responsible for their crimes at the international level, depending on the circumstances of the case and on the capacity and availability of forums to adjudicate fairly and dispense justice adequately.[369]

365. In 1999, in a report on the situation in East Timor, the UN High Commissioner for Human Rights stated that:

> 4. It has become a widely accepted principle of contemporary international law and practice that wherever human rights are being grossly violated . . . the facts must be gathered with a view to shedding light on what has taken place and with a view to bringing those responsible to justice; and that the perpetrators of gross violations must be made accountable and justice rendered to the victims.
> . . .
> 48. The High Commissioner has urged the Indonesian authorities to cooperate in the establishment of an international commission of inquiry into the violations so that those responsible are brought to justice.[370]

366. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that "there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes".[371] Referring to common Article 3 of the 1949 Geneva Conventions, AP II and Article 19 of the 1954 Hague Convention, the Commission noted that these provisions did not use the terms "grave breaches" or "war crimes". It added that "the content of customary law applicable to internal armed conflict is debatable", and as a result, "in general, unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed

[368] UN Commission on Human Rights, Special Representative on the Situation of Human Rights in Rwanda, Report, UN Doc. A/55/269, 4 August 2000, §§ 144 and 156–176.

[369] UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 113.

[370] UN High Commissioner for Human Rights, Report on the situation of human rights in East Timor, UN Doc. E/CN.4/2000/44, 24 March 2000, §§ 4 and 48.

[371] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 42.

conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification".[372]

367. In 1994, in its preliminary report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) strongly recommended that "the Security Council take all necessary and effective action to ensure that the individuals responsible for the serious violations of human rights in Rwanda during armed conflict . . . are brought to justice before an independent and impartial international criminal tribunal".[373]

368. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) noted that it had been informed by the Rwandan Minister of Defence that the government had detained 70 FPR soldiers and intended to try and punish them for private acts of revenge exacted against Hutus. The government emphasised that these acts were not only unauthorised, but subject to heavy military discipline and punishment. The Commission of Experts considered that "the armed conflict between 6 April and 15 July 1994 qualifies as a non-international armed conflict".[374]

369. In 1996, in its final report, the International Commission of Inquiry in Burundi stated with regard to the assassination of Burundi's President Ndadaye as well as that of the person constitutionally entitled to succeed him that "it is not in a position to identify the person that should be brought to justice for this crime".[375] It also stated that "evidence is sufficient to establish that acts of genocide . . . took place in Burundi", noting, however, that "with the evidence at hand, it is not in a position to identify by name the persons that should be brought to justice for the acts to which the conclusions refer".[376]

370. In a report in 1947, the UN Committee on the Progressive Development of International Law and its Codification concluded that the ILC should be established which would have to formulate the Nuremberg Principles within a Code of Offences against the Peace and Security of Mankind.[377]

371. The ILC Commentary on Principle I of the 1950 Nuremberg Principles notes that "the general rule underlying Principle I is that international law

[372] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 52.
[373] UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Preliminary report, UN Doc. S/1994/1125, 4 October 1994, § 150.
[374] UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, §§ 99 and 108.
[375] International Commission of Inquiry in Burundi, Final report, UN Doc. S/1996/682, 22 August 1996, Annex, § 213.
[376] International Commission of Inquiry in Burundi, Final report, UN Doc. S/1996/682, 22 August 1996, Annex, § 487.
[377] UN Committee on the Progressive Development of International Law and its Codification, Report, UN Doc. A/332, 21 July 1947.

may impose duties on individuals directly without any interposition of internal law".[378]

372. The ILC Commentary on Principle II of the 1950 Nuremberg Principles notes that:

> This Principle is a corollary to Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country . . . The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the "supremacy" of international law over national law.[379]

Other International Organisations

373. In a resolution adopted in 1991, the Parliamentary Assembly of the Council of Europe called for a war crimes tribunal to be established to deal with crimes committed by the Iraqi authorities during the Gulf War.[380]

374. In a recommendation adopted in 1992, the Parliamentary Assembly of the Council of Europe called for the establishment of a permanent international court to try war criminals generally.[381]

375. In 1993 and 1995, the Parliamentary Assembly of the Council of Europe welcomed the establishment of the ICTY, condemning all human rights violations committed during the conflicts in the former Yugoslavia and insisting that "the perpetrators of such offences be brought to justice".[382]

376. In a declaration adopted in 1991, the EC Ministers of Foreign Affairs expressed their determination that "those responsible for the unprecedented violence in Yugoslavia, with its ever-increasing loss of life, should be held accountable under international law for their actions".[383]

377. In 1994, in a statement contained in a EU Council decision related to a EU common position adopted on Rwanda, the Council of the EU stressed:

> the importance of bringing to justice those responsible for the grave violations of humanitarian law, including genocide. In this respect the European Union considers

[378] ILC, Report of the International Law Commission Covering its Second Session, UN Doc. A/1316, 5 June–29 July 1950, § 99.

[379] ILC, Report of the International Law Commission Covering its Second Session, UN Doc. A/1316, 5 June–29 July 1950, §§ 100–102.

[380] Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 11.

[381] Council of Europe, Parliamentary Assembly, Rec. 1189, 1 July 1992.

[382] Council of Europe, Parliamentary Assembly, Rec. 1218, 27 September 1993; Res. 1066, 27 September 1995, § 7.

[383] EC, Declaration on Yugoslavia, Haarzuilens, 6 October 1991, annexed to Letter dated 7 October 1991 from the Netherlands to the UN Secretary-General, UN Doc. A/46/533, 7 October 1991, Annex II.

the establishment of an international tribunal as an essential element to stop a tradition of impunity and to prevent future violations of human rights.[384]

378. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council demanded, with regard to the "Serb Aggression on the Republic of Bosnia and Herzegovina", that the UN Security Council bring to account "all those responsible for crimes committed against humanity, in accordance with the Geneva Conventions".[385]

379. In a resolution adopted in 1983, the Council of the League of Arab States invited the UN Secretary-General to send a fact-finding committee to investigate the occurrence in the territories occupied by Israel of "crimes which breach international charters, conventions and resolutions on the protection of civilian populations in times of occupation and to organize the trials of those who perpetrate such crimes against humanity".[386]

380. In a resolution on Liberia adopted in 1996, the OAU Council of Ministers warned the warring faction leaders that:

> Should the ECOWAS assessment of the Liberian peace process . . . turn out to be negative, the OAU will help sponsor a draft resolution in the UN Security Council for the imposition of severe sanctions on them including the possibility of the setting up of a war crime tribunal to try the leadership of the Liberian warring factions on the gross violation of the human rights of Liberians.[387]

International Conferences

381. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States recalled that "those who violate international humanitarian law are held personally accountable".[388]

382. In a decision adopted in 1993, the Ministerial Council of the CSCE stated that "the Ministers focused attention on the need for urgent action to enforce the strict observance of the norms of international humanitarian law, including the prosecution and punishment of those guilty of war crimes and other crimes against humanity".[389]

[384] EU, Council, Decision 94/697/CFSP concerning the common position adopted on the basis of Article J.2 of the Treaty of the European Union on the objectives and priorities of the European Union *vis-à-vis* Rwanda, 24 October 1994, *Official Journal* L 283, 29 October 1994, pp. 1–2, Article 1 and Annex.

[385] GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 9.

[386] League of Arab States, Council, Res. No. 4238, 31 March 1993, § 3.

[387] OAU, Council of Ministers, Sixty-Fourth Ordinary Session, Yaoundé, 1–5 July 1996, Res. 1650 (LXIV), § 12, reprinted in UN Doc. A/51/524, 18 October 1996, p. 15.

[388] CSCE, Helsinki Summit of Heads of State or Government, Helsinki, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 49.

[389] CSCE, Ministerial Council, Fourth Meeting: CSCE and the New Europe – Our Security is Indivisible, Rome, 30 November 1993–1 December 1993, Decisions, Chapter X: Declaration on Aggressive Nationalism, Racism, Chauvinism, Xenophobia and Anti-Semitism, § 4.

383. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon all African States to bring to justice "those who continue to recruit or use children as soldiers".[390]

384. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants committed themselves to see "that individuals responsible for violations of [IHL] be brought to justice and punished".[391]

IV. Practice of International Judicial and Quasi-judicial Bodies

385. In its judgement of 1946, the IMT (Nuremberg) asserted that the Charter which had established it, inasmuch as it provided for individual responsibility for crimes against the peace, war crimes and crimes against humanity, "is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal . . . is the expression of international law existing at the time of its creation".[392] Still on the subject of individual responsibility, the Tribunal rejected arguments that international law was exclusively concerned with the actions of sovereign States and provided no punishment for individuals. The Tribunal held that it was long established that international law imposed duties and liabilities on individuals as well as on States and referred to a number of authorities which showed that individuals could be punished for violations of international law. It added that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[393]

386. In its judgement in the *Application of Genocide Convention case* (Preliminary Objections) in 1996, the ICJ addressed the FRY's contention that the 1948 Genocide Convention was not applicable in internal conflicts. The Court referred to Article 1 of the Convention, which provides that "genocide, whether committed in time of peace or in time of armed war, is a crime under international law which [the Contracting Parties] undertake to prevent and punish". The ICJ determined that there was nothing in this provision "which would make the applicability of the Convention subject to the condition that the acts contemplated by it should have been committed within the framework of a particular type of conflict".[394]

[390] African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 2.

[391] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble and § 11.

[392] IMT (Nuremberg), Judgement, 1 October 1946, § 2.

[393] IMT (Nuremberg), Judgement, 1 October 1946, pp. 218, 222 and 223.

[394] ICJ, *Application of Genocide Convention case* (Preliminary Objections), Judgement, 11 July 1996, § 31.

387. In its judgement in the *Akayesu case* in 1998, the ICTR quoted Article 6(1) of the 1994 ICTR Statute and stated that:

> 472. ... Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, ... or aids and abets them to commit those acts.
> 473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.
> 474. Article 6(1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime ... could incur individual criminal responsibility.[395]

Making a distinction between Article 6(1) and Article 6(3) of the 1994 ICTR Statute, the ICTR further stated that:

> 479. ... As can be seen, the forms of participation referred to in Article 6(1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge. This greatly differs from Article 6(3) ... which does not necessarily require that the superior acted knowingly to render him criminally liable ...
> 480. The first form of liability set forth in Article 6(1) is *planning* of a crime. Such planning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common law, as stipulated in Article 2(3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.
> 481. The second form of liability is "*incitation*" (in the French version of the Statute) to commit a crime, reflected in the English version of Article 6(1) by the word *instigated*. In English, it seems the words incitement and instigation are synonymous. Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments. However, in certain legal systems and, under Civil law, in particular, the two concepts are very different. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6(1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2(3)(c) of the Statute) which, in this instance, translates *incitation* into English as "incitement" and no longer "instigation". Some people are of that opinion. The Chamber also accepts this interpretation.

[395] ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 472–474.

482. That said, the form of participation through instigation stipulated in Article 6(1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator.[396] [emphasis in original]

The ICTR further added that:

611. For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 [of the Geneva Conventions] and parts of Article 4 of Additional Protocol II – which comprise the subject-matter jurisdiction of Article 4 of the Statute – form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.
612. As regards individual criminal responsibility for serious violations of Common Article 3, the ICTY has already affirmed this principle in the *Tadić case*. In the ICTY Appeals Chamber, the problem was posed thus:

"Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such provisions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction."

613. Basing itself on rulings of the Nuremberg Tribunal, on "elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts", as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals Chamber reached the conclusion:

"All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."

614. This was affirmed by the ICTY Trial Chamber when it rendered in the *Tadić* judgment.
615. The Chamber considers this finding of the ICTY Appeals Chamber convincing and dispositive of the issue, both with respect to serious violations of Common Article 3 and of Additional Protocol II.[397]

[396] ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 479–482.
[397] ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 611–615.

388. In its judgement in the *Kayishema and Ruzindana case* in 1999, the ICTR, quoting Article 6(1) of the 1994 ICTR Statute, stated that:

197. . . . If any of the modes of participation delineated in Article 6(1) can be shown, and the necessary *actus reus* and *mens rea* are evidenced, then that would suffice to adduce criminal responsibility under this Article.
198. The Trial Chamber is of the opinion that . . . there is a further two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6(1). This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime.
. . .
202. This jurisprudence extends naturally to give rise to responsibility when the accused failed to act in breach of a clear duty to act . . . Individual responsibility pursuant to Article 6(1) is based, in this instance, not on the duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.[398]

389. In its judgement in the *Rutaganda case* in 1999, the ICTR stated that:

86. . . . In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, it was incumbent on the Chambers to decide whether or not the said principle had been adhered to, and whether individuals incurred individual criminal responsibility for violations of these international instruments.
87. In the *Akayesu Judgement*, the Chamber expressed its opinion that the "norms of Common Article 3 [of the Geneva Conventions] had acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3". The finding of the Trial Chamber in this regard followed the precedents set by the ICTY, which established the customary nature of Common Article 3. Moreover, the Chamber in the *Akayesu Judgement* held that, although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof, which reaffirm and supplement Common Article 3, form part of existing international law. All of the norms reproduced in Article 4 of the Statute are covered by Article 4(2) of Additional Protocol II.
88. Furthermore, the Trial Chamber in the *Akayesu Judgement* concluded that violations of these norms would entail, as a matter of customary international law, individual responsibility for the perpetrator. It was also recalled that as Rwanda had become a party to the 1949 Geneva Conventions and their 1977 Additional Protocols, on 5 May 1964 and 19 November 1984, respectively, these instruments were in any case in force in the territory of Rwanda in 1994, and formed part of Rwandan law. Thus, Rwandan nationals who violated these international instruments incorporated into national law,

[398] ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, §§ 197–198 and 202.

including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts.

89. In the *Kayishema and Ruzindana Judgement*, Trial Chamber II deemed it unnecessary to delve into the question as to whether the instruments incorporated in Article 4 of the Statute should be considered as customary international law. Rather the Trial Chamber found that the instruments were in force in the territory of Rwanda in 1994 and that persons could be prosecuted for breaches thereof on the basis that Rwanda had become a party to the Geneva Conventions and their Additional Protocols. The offences enumerated in Article 4 of the Statute, said the Trial Chamber, also constituted offences under Rwandan law.
90. Thus it is clear that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the guarantees provided for by the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, incurred individual responsibility, and could result in the prosecution of the authors of the offences.[399]

390. In its judgement in the *Musema case* in 2000, the ICTR stated that:

The Chamber therefore concludes that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, attracted individual criminal responsibility and could result in the prosecution of the authors of the offences.[400]

391. In the *Tadić case* (Interlocutory Appeal) in 1995, the ICTY Appeals Chamber addressed the issue of whether the Tribunal had jurisdiction over violations committed in non-international armed conflicts. The Appeals Chamber concluded that Article 2 of the Statute which gave the Tribunal jurisdiction over grave breaches of the Geneva Conventions was limited to violations committed in international conflicts.[401] Despite this conclusion, the Appeals Chamber nevertheless referred to the agreement between the conflicting parties in Bosnia and Herzegovina of 1 October 1992, which provided for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and, noting that the agreement "was clearly concluded within a framework of an internal armed conflict", accepted that the agreement "could be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts".[402] Turning to Article 3 of the 1993 ICTY Statute on violations of the laws or customs of war, the Appeals Chamber stated that "Article 3 is intended to cover *all violations* of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered

[399] ICTR, *Rutaganda case*, Judgement, 6 December 1999, §§ 86–90.
[400] ICTR, *Musema case*, Judgement, 27 January 2000, § 242.
[401] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 81.
[402] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 83.

by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap)".[403] (emphasis in original) The Appeals Chamber then laid down a number of conditions that would have to be met for a violation of IHL to be subject to Article 3, the last of which was that "the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule".[404] Under a special heading entitled "Individual Criminal Responsibility in Internal Armed Conflict", the Appeals Chamber stated that:

128. . . . It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches . . .
129. Applying the [criteria set fourth by the IMT (Nuremberg)] to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.
130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts . . . During the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law.[405]

Moreover, referring to, *inter alia*, military manuals of Germany, New Zealand, UK and US, as well as to certain provisions of the Penal Code as amended of the SFRY (FRY), to Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, and to two UN Security Council resolutions on Somalia, the Appeals Chamber stated that:

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3 [of the 1949 Geneva Conventions], as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.
135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity . . . Such violations were punishable under the [SFRY (FRY) Penal Code as amended] . . . Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they

[403] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 87.
[404] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 94.
[405] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 128–130.

were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.[406]

The Appeals Chamber further referred to the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina and to the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners and stated that:

As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.[407]

The Appeals Chamber concluded that:

in the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 [of the 1993 ICTY Statute] as well as customary international law, . . . , under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict.[408]

392. In a separate opinion in the *Tadić case* (Interlocutory Appeal) in 1995, Judge Abi-Saab asserted that "a strong case can be made for the application of Article 2 [of the 1993 ICTY Statute], even when the incriminated act takes place in an internal conflict". With regard to the position under customary law, he added that:

A growing practice and *opinio juris*, both of States and international organisations, has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles as well as for the other serious violations of the *jus in bello*, even when they are committed in the course of an internal armed conflict.[409]

393. In the indictment in the *Mrkšić case* before the ICTY in 1996, the Prosecutor, with regard to the individual responsibility of the accused for the killing of 260 persons, stated that:

Each of the accused is individually responsible for the crimes alleged against him in this indictment pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.[410]

394. In its sentencing judgement in the *Erdemović case* in 1998, the ICTY Trial Chamber found the accused guilty of the "violation of the laws and customs

[406] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 131–135.
[407] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 136.
[408] ICTY, *Tadić case*, Interlocutory Appeal, Decision, 2 October 1995, § 137.
[409] ICTY, *Tadić case*, Interlocutory Appeal, Separate Opinion of Judge Abi-Saab, 2 October 1995, p. 5.
[410] ICTY, *Mrkšić case*, Review of the Indictment, 3 April 1996, § 24.

of war" to which the accused himself had pleaded guilty, stating, however, that "there is nothing to substantiate Defence Counsel's submission to Trial Chamber (which was not raised again before this Trial Chamber) that when the accused committed the killings, he 'lacked mental responsibility because he suffered a temporary mental disorder or, at best, his mental responsibility was significantly diminished also'".[411]

395. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber, referring to Article 7(1) of the 1993 ICTY Statute, held that "this recognition that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law".[412] The Trial Chamber further stated that:

> It is . . . the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have "a direct and substantial effect on the commission of the illegal act". The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime".[413]

396. In the *Furundžija case* in 1998, the ICTY Trial Chamber found the accused guilty of "violations of the laws and customs of war" (torture and outrages upon personal dignity, including rape) under Article 3 of the 1993 ICTY Statute.[414] It stated that:

> Article 3 [of the 1993 ICTY Statute] has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is immaterial whether the breach occurs within the context of an international or internal armed conflict.[415]

As to the count of torture, the Trial Chamber held that:

> Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts . . . Individuals are personally responsible,

[411] ICTY, *Erdemović case*, Sentencing Judgement bis, 5 March 1998, §§ 16 and 23.
[412] ICTY, *Delalić case*, Judgement, 16 November 1998, § 321.
[413] ICTY, *Delalić case*, Judgement, 16 November 1998, § 326.
[414] ICTY, *Furundžija case*, Judgement, 10 December 1998, Chapter IX.
[415] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 132.

whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the [1993 ICTY] Statute and article 6(2) of the [1994 ICTR Statute] . . . are indisputably declaratory of customary international law.[416]

Examining the count of "rape and other serious sexual assaults in international law", the Trial Chamber, referring to numerous instances of case-law, noted that:

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.[417]

397. In its judgement in the *Aleksovski case* in 1999, the ICTY Trial Chamber noted that "the accused was held responsible under Article 7(1) [of the 1993 ICTY Statute] not for the crimes that he allegedly committed himself but for those committed by others which he is said to have personally ordered, instigated or otherwise aided and abetted".[418] Referring to previous judgements of both the ICTR and the ICTY, it stated that:

> 62. The forms of participation recognised as sufficient in customary international law are not limited to physical assistance provided while the unlawful act is being committed . . . Participation may occur before, during or after the act is committed. It can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed, that is, behaviour which may in fact clearly constitute instigation or abetment of the perpetrators of the crime . . .
> 63. Such participation need not be manifested through physical assistance. Moral support or encouragement expressed in words or even by the mere presence at the site of the crime have at times been considered sufficient to conclude that the accused participated.
> 64. Mere presence constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea* . . .
> 65. . . . An individual's position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime. It must be noted in fact that the aforementioned cases did not establish an individual's responsibility on this basis alone. Admittedly, the presence of an individual with uncontested authority over the perpetrators of the unlawful act may, in some

[416] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 140.
[417] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 249.
[418] ICTY, *Aleksovski case*, Judgement, 25 June 1999, § 59.

> circumstances, be interpreted as approval of that conduct. The aforementioned cases moreover took into account the accused's prior or concomitant behaviour or statements in order to interpret his presence as an act of abetting. Moreover, it can hardly be doubted that the presence of an individual with authority will frequently be perceived by the perpetrators of the criminal act as a sign of encouragement likely to have a significant or even decisive effect on promoting its commission. The *mens rea* may be deduced from the circumstances, and the position of authority constitutes one of the circumstances which can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrator of the wrongful act as a sign of support or encouragement. An individual's authority must therefore be considered to be an important indicium as establishing that his mere presence constitutes an act of intentional participation under Article 7(1) of the [1993 ICTY] Statute. Nonetheless, responsibility is not automatic and merits consideration against the background of the factual circumstances.[419]

398. In its judgement in the *Jelisić case* in 1999, the ICTY Trial Chamber stated that "as a rule of customary international law, Article 3 common to the Geneva Conventions is covered by Article 3 of the [1993 ICTY] Statute" and, besides considering acts of murder and cruel treatment, with regard to Article 3(e) of the 1993 ICTY Statute found that "the individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators".[420] It found the accused guilty on various counts of "violations of the laws and customs of war" and crimes against humanity.[421]
399. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber stated, with regard to Article 3 of the 1993 ICTY Statute, that:

> Violations of Article 3 of the [1993 ICTY] Statute which include violations of the [1907 HR] and those of Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute. They are thus likely to incur individual criminal responsibility in accordance with Article 7 of the Statute.
> ...
> The Trial Chamber is of the opinion that ... customary international law imposes criminal responsibility for serious violations of Common Article 3 [of the 1949 Geneva Conventions].[422]

Drawing a clear distinction between Article 7(1) and Article 7(3) of the 1993 ICTY Statute, the Trial Chamber noted that:

> Whilst Article 7(1) deals with the commander's participation in the commission of a crime, Article 7(3) enshrines the principle of command responsibility in the strict sense which entails the commander's individual criminal responsibility if he did

[419] ICTY, *Aleksovski case*, Judgement, 25 June 1999, §§ 62–65.
[420] ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 34 and 48.
[421] ICTY, *Jelisić case*, Judgement, 14 December 1999, § 138.
[422] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 176.

not prevent crimes from being committed by his subordinates or, where applicable, punish them.[423]

The Trial Chamber further stated that:

The Trial Chamber concurs with the views deriving from the Tribunal's case-law, that is, that individuals may be held responsible for their participation in the commission of offences under any of the heads of individual criminal responsibility in Article 7(1) of the Statute. This approach is consonant with the general principles of criminal law and customary international law.[424]

400. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber stated that:

> 168. As to the argument that Additional Protocol I does not entail individual criminal responsibility, the Trial Chamber recalls a statement in the *Tadić* Jurisdiction Decision:
>
> Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. . . . because, as the Nuremberg Tribunal concluded "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."
>
> The Appeals Chamber in that case had no difficulty in finding that customary law "imposes criminal liability for serious violations of Common Article 3" of the Geneva Conventions, an article that contains no reference to individual responsibility. This finding was reaffirmed by the Appeals Chamber in *Čelebići* [*Delalić case*].
>
> 169. By analogy, violations of Additional Protocol I incur individual criminal liability in the same way that violations of Common Article 3 give rise to individual criminal liability.[425]

The Trial Chamber further held that:

> 364. Article 7 [of the 1993 ICTY Statute] is clearly intended to assign individual criminal responsibility at different levels, both subordinate and superior, for the commission of crimes listed in Articles 2 to 5 of the Statute. Article 7 gives effect to a general principle of criminal law that an individual is responsible for his acts and omissions. It provides that an individual may be held criminally responsible for the direct commission of a crime, whether as an individual or jointly, or through his omissions for the crimes of his subordinates when under an obligation to act.
>
> . . .

[423] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 261.
[424] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 264.
[425] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 168–169.

371. The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1). Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).[426]

401. In its judgement in the *Krstić case* in 2001, the ICTY Trial Chamber stated that:

The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) [of the 1993 ICTY Statute] are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.[427] [emphasis in original]

With regard to General Krstic's individual criminal responsibility under Article 7(1) of the 1993 ICTY Statute, the Trial Chamber stated, *inter alia*, that:

610. In light of these facts, the Trial Chamber is of the view that the issue of General Krstic's criminal responsibility for the crimes against the civilian population of Srebrenica occurring at Potocari is most appropriately determined under Article 7(1) by considering whether he participated, along with General Mladić and key members of the VRS Main Staff and the Drina Corps, in a joint criminal enterprise to forcibly "cleanse" the Srebrenica enclave of its Muslim population and to ensure that they left the territory otherwise occupied by Serbian forces.
611. According to the Appeals Chamber in the *Tadić* Appeal Judgement, for joint criminal enterprise liability to arise, three *actus reus* elements require proof:

(i) A plurality of persons;
(ii) The existence of a common plan, which amounts to or involves the commission of a crime provided for in the Statute; . . .
(iii) Participation of the accused in the execution of the common plan, otherwise formulated as the accused's "membership" in a particular joint criminal enterprise.[428]

402. In its judgement in the *Kvočka case* in 2001, the ICTY Trial Chamber considered that:

participation in a crime under a theory of joint criminal enterprise liability is included within the scope of Article 7(1) of the [1993 ICTY] Statute . . .

[426] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 364 and 371.
[427] ICTY, *Krstić case*, Judgement, 2 August 2001, § 605.
[428] ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 610–611.

It is possible to co-perpetrate and aid or abet a joint criminal enterprise, depending primarily on whether the level of participation rises to that of sharing the intent of the criminal enterprise. An aider or abettor of a joint criminal enterprise, whose acts originally assist or otherwise facilitate the criminal endeavor, may become so involved in its operations that he may graduate to the status of a co-perpetrator of that enterprise.[429]

With regard to individual criminal responsibility for a possible participation in a joint criminal enterprise, the Trial Chamber stated that:

308. The Trial Chamber considers that persons who work in a job or participate in a system in which crimes are committed on such a large scale and systematic basis incur individual criminal responsibility if they knowingly participate in the criminal endeavor, and their acts or omissions significantly assist or facilitate the commission of the crimes.
309. The Trial Chamber wishes to stress that this does not mean that anyone who works in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise. The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes. It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity. In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any "body" could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents. The Trial Chamber notes, however, that much of the post World War II caselaw discussed above did attribute criminal liability to mere drivers or ordinary soldiers made to stand guard while others performed an execution. In addition, many of the post war cases did not entail repeated participation in a system of criminality, as the accused typically participated on an isolated occasion only. Domestic laws too hold individuals accountable for directly or indirectly participating in a single joint criminal endeavor.
310. In situations of armed conflict or mass violence, it is all too easy for individuals to get caught up in the violence or hatred. During such violent periods, law abiding citizens commit crimes they would ordinarily never have committed. Nonetheless, the presence of mass violence or conflict cannot be used to shield or excuse persons who commit, assist or facilitate or otherwise participate in crimes from incurring liability. Whether the joint criminal enterprise is broadly defined, such as the Nazi persecution of millions of Jews, or it is limited to a specific time and location, such as the three month operation of Omarska camp, a participant in the criminal enterprise must make a substantial contribution to the enterprise's functioning or endeavors before he or she may be held criminally liable.
311. The Trial Chamber finds that during periods of war or mass violence, the threshold required to impute criminal responsibility to a mid or low level

[429] ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 246 and 249.

participant in a joint criminal enterprise as an aider and abettor or co-perpetrator of such an enterprise normally requires a more substantial level of participation than simply following orders to perform some low level function in the criminal endeavor on a single occasion. The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavor, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of a crime. Perhaps the most important factor to examine is the role the accused played vis-à-vis the seriousness and scope of the crimes committed: even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape.
312. In sum, an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.[430]

403. In 1997, in its concluding observations on the report of Uganda, the CRC recommended to the government of Uganda that:

Awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention, *inter alia* with regard to children, should be made known to the parties to the armed conflict in the northern part of the State party's territory, and that violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators.[431]

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

404. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

[430] ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 308–312.
[431] CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 10 October 1997, § 34.

The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following: . . . (b) the principle of individual criminal responsibility . . . The principle of the individual criminal responsibility of the perpetrator of certain breaches of international law, including those bearing on the environment in times of armed conflict, as well as of the persons ordering the commission of such acts, is of critical importance. It is firmly rooted in both customary and treaty law, such as the [1907 HR] and the provisions of the Geneva Conventions relating to grave breaches.[432]

405. In 1995, at the 9th UN Congress on the Prevention of Crimes and the Treatment of Offenders, the ICRC expressed the view that "according to the terms of the Geneva Conventions and Additional Protocol I, international criminal responsibility for certain violations of humanitarian law . . . has been established only in respect of international armed conflict".[433]

406. In 1997, in its commentary on the definition of war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, referring to the decision of the ICTY Appeals Chamber in the *Tadić case* (Interlocutory Appeal), noted that "the emergence of *opinio juris* on a customary rule on criminal liability for violations of international humanitarian law committed in non-international armed conflicts has recently been recognised".[434]

407. In 1997, during a debate in the Sixth Committee of the UN General Assembly on the establishment of an international criminal court, the ICRC declared that:

> It was important to set up mechanisms to combat impunity for those responsible for violations of the laws . . . The establishment of an efficient, widely accepted court offering maximum guarantees of fair trial, free of any political pressure and designated to complement national justice systems would send a clear message to both the perpetrators of serious international crimes and their victims that immunity from prosecution would no longer be tolerated.

The ICRC added that the ICC "must have jurisdiction over war crimes committed in international and non-international conflicts alike" and that "the objective was clear: the atrocities must cease and those responsible for them must be held accountable".[435]

[432] ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 48.

[433] ICRC, Statement at the 9th UN Congress on the Prevention of Crimes and Treatment of Offenders, UN Doc. A/CONF.169/NGO/ICRC/1, 30 April 1995, Topic IV, p. 4.

[434] ICRC, Commentary on the definition of war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 1–12 December 1997, p. 24.

[435] ICRC, Statement before the Sixth Committee of the UN General Assembly, 24 October 1997, UN Doc. A/C.6/52/SR.15, 12 February 1998, §§ 12 and 15–16.

VI. Other Practice

408. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

> Any serious violation of international humanitarian law in armed conflicts in which non-State entities are parties entails the individual responsibility of the persons involved, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.[436]

Individual civil liability

I. Treaties and Other Instruments

Treaties

409. Article 75 of the 1998 ICC Statute, entitled "Reparations to victims", provides that:

> 1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
>
> Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

The Trust Fund referred to was established for the benefit of victims of crimes within the Court's jurisdiction and will be financed, *inter alia*, by money or other property collected through fines or forfeiture which the Court might order to be transferred to the fund.

410. Chapter 4, Section III, Subsection 4 (Rules 94–99) of the 2000 ICC Rules of Procedure and Evidence contains detailed provisions concerning reparations to be made in favour of the victim(s). Rule 94 provides that victims of violations can lodge requests for compensation directly before the Court. Rule 95 grants the Court the power to proceed with regard to the award of compensation on its own motion. Rule 97, entitled "Assessment of reparations", provides that:

[436] Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § VIII.

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
3. In all cases, the Court shall respect the rights of victims and the convicted person.

Other Instruments

411. Article 24(3) of the 1993 ICTY Statute provides that "in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners".

412. Article 23(3) of the 1994 ICTR Statute provides that "in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners".

413. Rule 105 of the 2000 ICTY Rules of Procedure and Evidence established procedures for the restoration of property:

> (A) After a judgement of conviction containing a specific finding . . . the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof.
> . . .
> (D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
> (E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.
> (F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

414. Rule 106(B) of the 2000 ICTY Rules of Procedure and Evidence provides that "pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation".

415. Paragraph 17 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and International Humanitarian Law provides that "in cases where the violation

is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim".

416. Paragraph 19 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and International Humanitarian Law provides that:

> A State shall enforce its domestic judgements for reparation against private individuals or entities responsible for the violations. States shall endeavour to enforce valid foreign judgements for reparation against private individuals or entities responsible for the violations.

417. According to Section 49(1) of the 2000 UNTAET Regulation No. 2000/30, "independent from the commencement or completion of a criminal proceeding, an alleged victim may claim compensation for damages or losses suffered or inflicted by a suspected crime by filing a civil action before a competent court". Section 49(2) states that:

> As a part of its disposition of a criminal case in which the accused is convicted of an offense as to which there are victims, and notwithstanding any separate civil action which goes forward pursuant to Section 49.1 of the present regulation, the Court may include in its disposition an order that requires the accused to pay compensation or reparations to the victim in an amount determined by the Court. Any payment made by an accused to a victim in compliance with such an order shall be credited toward satisfaction of any civil judgment also rendered in the matter.

418. Rule 105 of the 2001 ICTR's Rules of Procedure and Evidence provides that:

> (A) After a judgement of conviction containing a specific finding as provided in Rule 88 (B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof.
> ...
> (D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
> (E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.
> (F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

419. Rule 106(B) of the 2001 ICTR's Rules of Procedure and Evidence provides that "pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation".

II. National Practice

Military Manuals

420. Colombia's Basic Military Manual provides that "the nation can exact from the public servant who caused the injury the amount of the injured party's indemnification".[437]

421. France's LOAC Teaching Note, in a part dealing with "grave breaches of the rules of the law of armed conflict", states that "each violation of the law of armed conflicts . . . gives a right to reparation at the civil level".[438]

422. France's LOAC Manual restates Article 1382 of the French Civil Code on civil liability and provides that "this implies that someone who has not been held criminally liable must nevertheless provide reparation for the damage caused".[439]

National Legislation

423. Some pieces of domestic legislation, apart from granting the victim of a criminal act the possibility of filing a claim for compensation before a civil court, provide for the possibility for the victim of obtaining compensation on the occasion of the criminal proceedings against the offender. Examples include France ("*partie civile*"), Germany and US.[440]

424. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that:

> Where a breach provided for in the present Act [i.e. genocide, crimes against humanity and a list of war crimes] falls under the competence of a military court, public prosecution shall be instituted through a summons issued by the Public Prosecutor's Office for the accused to appear before the trial court or through a complaint filed by any person claiming to have suffered injury as a result of the breach and bringing a suit for damages before the president of the judicial commission at the *Conseil de Guerre* [Court Martial] under the conditions provided for in Article 66 of the Code of Criminal Investigation.[441]

425. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes states that "persons aimed at in article 24 [i.e. victims, their heirs, their representatives, every individual person or legal entity who have been injured or who have a direct interest] may become a civil party [*partie civile*] according to the provisions of the criminal procedure code".[442]

[437] Colombia, *Basic Military Manual* (1995), p. 36.
[438] France, *LOAC Teaching Note* (2000), p. 7.
[439] France, *LOAC Manual* (2001), p. 112.
[440] France, *Code of Criminal Procedure* (1994); Germany, *Criminal Procedure Code as amended* (1987); US, *Victim and Witness Protection Act* (1982).
[441] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 9(3).
[442] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 31.

426. France's Law on Cooperation with the ICTY, which allows French courts to try and punish individuals found in France and being accused of having committed the violations of IHL over which the ICTY has jurisdiction, provides that "any person claiming to have been injured by one of those offences can, by filing a complaint, bring indemnification proceedings ["*partie civile*"] in the conditions set forth in Article 85 ff. of the Code of Penal Procedure".[443] The same principle is set forth in the Law on Cooperation with the ICTR.[444]

427. Germany's Criminal Procedure Code as amended provides that:

> The aggrieved person or his heir may, in criminal proceedings, bring a property claim against the accused arising out of the criminal offence if the claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court, in proceedings before the local court irrespective of the value of the matter in dispute.[445]

428. Luxembourg's Law on the Punishment of Grave Breaches states that a civil action against the perpetrator of offences provided for in this law can only be undertaken before a civil court. However, it provides for the possibility for the (criminal) court to order the restitution of seized objects and exhibits to the entitled person if they are not to be confiscated.[446]

429. Russia's Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya provides that "persons covered by the law on the declaration of amnesty are not exempted from making reparations for the injuries caused by their unlawful acts".[447]

430. Rwanda's Law on the Prosecution of the Crime of Genocide and Crimes against Humanity provides that "the court having jurisdiction over the civil action shall rule on damages even where the accused has died during the course of the proceedings or has benefited from an amnesty".[448]

431. The UK Regulations for the Trial of War Criminals as amended provides that "in a case where the war crime consists wholly or partly of the taking, distribution or destruction of money or other property, the Court may as part of the sentence order the restitution of such money or other property".[449]

432. The US Victim and Witness Protection Act provides that:

> (a) (1)(A) The court, when sentencing a defendant convicted of an offense . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim

[443] France, *Law on Cooperation with the ICTY* (1995), Article 2.
[444] France, *Law on Cooperation with the ICTR* (1996), Article 2.
[445] Germany, *Criminal Procedure Code as amended* (1987), § 403(1).
[446] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 14.
[447] Russia, *Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), § 4.
[448] Rwanda, *Law on the Prosecution of the Crime of Genocide and Crimes against Humanity* (1996), Article 31.
[449] UK, *Regulations for the Trial of War Criminals as amended* (1945), Regulation 9.

of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense . . .

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.[450]

For cases where restitution is impossible, impractical or inadequate, especially in the case of an offence resulting in bodily injury, the Act provides for the possibility of the paying of an amount of money.[451]

433. The US Alien Tort Claims Act provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[452]

434. The US Torture Victim Protection Act, under a provision entitled "Establishment of civil action", states that:

(a) Liability. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –
  (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
  (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[453]

435. A provision of the California Code of Civil Procedure as amended dealing with compensation for slave and forced labour states that:

Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.[454]

436. Yemen's Military Criminal Code requires individuals who have been found guilty of despoiling POWs or the sick, wounded or dead to return that which they took or its equivalent.[455]

National Case-law

437. In the *Ercole case* in 2000, Italy's Tribunal of Livorno tried and sentenced a former paratrooper to 18 months' suspended imprisonment for abusing his authority during his participation in a multinational peacekeeping operation in Somalia and, pending the outcome of connected civil proceedings, made him provisionally liable to the payment of 30,000,000 Italian lire to a Somali citizen

[450] US, *Victim and Witness Protection Act* (1982), Subsection (a)(1)(A) and (3)
[451] US, *Victim and Witness Protection Act* (1982), Subsection (b).
[452] US, *Alien Tort Claims Act* (1789).
[453] US, *Torture Victim Protection Act* (1991), Section 1350(2)(a)(1) and (2).
[454] US, *California Code of Civil Procedure as amended* (1873), Section 354.6(b).
[455] Yemen, *Military Criminal Code* (1998), Article 20.

who had been tortured.[456] In 2001, the Court of Appeals at Florence confirmed the judgement in this part.[457]

438. In the *Karadžić case* in 1995, a US Court of Appeals considered a civil action brought by Bosnian victims of atrocities and their representatives against Radovan Karadžić under, *inter alia*, the US Alien Tort Claims Act. This Act "creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations" (or US treaty). The Court, considering the responsibility of Karadžić for genocide, rape, forced prostitution, torture and other cruel, inhuman and degrading treatment, summary executions and disappearances committed during the conflict in the former Yugoslavia, emphasised that individuals could be held responsible, both criminally, and, as in this case, civilly, for violations of international law. It further noted that "the liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, and remains today an important aspect of international law". It also stated that:

> The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations was early recognized by the Executive Branch in an opinion of Attorney General Bradford . . . The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law.[458]

439. In a class action verdict in the *Karadžić case* before a US District Court in 2000, Radovan Karadžić was sentenced to pay US$ 265 million in compensatory damages and US$ 480 million in punitive damages to the claimants.[459] In another verdict, he was sentenced to US$ 407 million in compensatory damages and US$ 3.8 billion in punitive damages. As acts for which the damages were owed, the Court, in the latest verdict, listed, *inter alia*, rape and gang rape, forced pregnancy, sexual slavery, beating and other torture, genocide, war crimes, crimes against humanity, assault and battery, and disappearance of relatives.[460]

440. The *FIS case* before a US District Court in 1998, in which a group of Algerian women sought compensation from a high-ranking official of the Islamic Salvation Front (FIS) for his participation in crimes against humanity, war crimes and various violations of human rights committed in Algeria, successfully relied upon the US Torture Victim Protection Act and the US Alien Tort Claims Act as a basis for the jurisdiction of US courts. With regard to the claim based on the Alien Tort Claims Act, the Court found that:

[456] Italy, Tribunal at Livorno, *Ercole case*, 13 April 2000.
[457] Italy, Court of Appeals at Florence, *Ercole case*, 22 February 2001.
[458] US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.
[459] US, District Court, Southern District of New York, *Karadžić case*, Judgement, 16 August 2000.
[460] US, District Court, Southern District of New York, *Karadžić case*, Judgement, 4 October 2000.

The alleged acts of the FIS are clearly in violation of international law as it stands today. Common Article 3 of the [1949] Geneva Conventions . . . applies to "armed conflicts not of an international character" and protects civilians not participating in the conflict by requiring that they be "treated humanely, without any adverse distinction founded on race, color, religion, faith, sex, birth or wealth, or any other similar criteria". It prohibits, among other things, "murder of all kinds, mutilation, cruel treatment and torture", kidnapping, and summary executions. The Karadžić court held that Common Article 3 applies to all parties to a conflict, not merely to official governments. This Court concludes that the acts of the FIS alleged by Plaintiffs are proscribed by international law against other state and private actors, as evidenced by Common Article 3. Accordingly plaintiffs have properly alleged subject matter jurisdiction under the ATCA.[461]

Other National Practice

441. At the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998, the Belgian Minister of Foreign Affairs stated that Belgium was in favour of inserting in the ICC Statute provisions that would permit the Court to rule on reparation claims.[462]

442. In 1993, the Committee of French Jurists set up by the French government to study the establishment of a criminal tribunal for the former Yugoslavia stated that:

It does not seem reasonable to admit civil actions before the [ICTY]. That would lead to a flood of claims, which the international court would not be in a position to process effectively. It seems preferable to proceed from the principle that it will be for the national courts to rule on claims for reparation by victims or their beneficiaries.[463]

443. At the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998, the French Minister of Foreign Affairs declared that "my country has also urged close cooperation with NGOs to ensure that the statute contains precise provisions concerning victim access at all stages of proceedings . . . and their right to reparation".[464]

444. In 1993, during a debate in the UN Security Council following the adoption of the 1993 ICTY Statute, Morocco stated that "the [ICTY] should hand down deterrent sentences both for those who commit crimes and for their accomplices, and should not ignore appropriate compensation for victims and their families".[465]

[461] US, District Court for the District of Columbia, *FIS case*, Judgement, 2 February 1998.
[462] Belgium, Statement by the Minister of Foreign Affairs at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 June 1998.
[463] France, Committee of French Jurists, Report on the setting up of a criminal tribunal for the former Yugoslavia, UN Doc. S/25266, 10 February 1993, § 100.
[464] France, Statement by the Minister of Foreign Affairs at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 June 1998.
[465] Morocco, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, pp. 27–28.

445. In 1998, during a debate in the Sixth Committee of the UN General Assembly on the establishment of an international criminal court, the UK stated that it "took particular satisfaction" at two of the aspects of the 1998 ICC Statute. One of these aspects was that:

> The Statute of the Court gave the Court power, under article 75, to order the payment of reparations to victims. Accordingly, the Court would serve not just the interests of society in repressing crime, but also those of the victims of crime. The provision would also bolster the Court's role in deterrence.[466]

446. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that "with respect to Article 24 [of the 1993 ICTY Statute], it is our understanding that compensation to victims by a convicted person may be an appropriate part of decisions on sentencing, reduction of sentences, parole or commutation".[467]

447. According to the Report on US Practice, it is the *opinio juris* of the US that "universal jurisdiction over war crimes applies not only to penal proceedings, but also to suits for damages against individual war criminals by or on behalf of their victims".[468]

III. Practice of International Organisations and Conferences

United Nations

448. In Resolution 827 of May 1993 establishing the ICTY, the UN Security Council decided that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law".[469]

449. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights recommended that:

> steps be taken to ensure full reparation for losses suffered as a consequence of aggression and religious and ethnic cleansing . . . it being understood that those responsible for causing destruction and other losses shall be held personally responsible for the repayment of the losses incurred.[470]

450. In 1998, in a report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the UN Secretary-General stated that "in order to make warring parties more accountable for their actions, I

[466] UK, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.12, 19 December 1998, § 42.
[467] US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 17.
[468] Report on US Practice, 1997, Chapter 6.12.
[469] UN Security Council, Res. 827, 25 May 1993, § 7.
[470] UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, § 8; see also Res. 1995/8, 18 August 1995, § 6.

recommend that combatants be held financially liable to their victims under international law where civilians are made the deliberate target of aggression".[471]
451. In 2000, in a report on the situation of human rights in Rwanda, which dealt, *inter alia*, with the *gacaca* trials instituted in Rwanda to try genocide suspects, the Special Representative of the UN Commission on Human Rights stated that "those convicted of crimes against property will be expected to pay restitution for the damage they caused".[472]

Other International Organisations
452. In a resolution adopted in 1993, the European Parliament declared that it believed that the ICTY "should . . . consider acts of violence against women committed in former Yugoslavia and require those who committed them to provide economic assistance for the children born as a result of rape and pay compensation to the victims of such crimes".[473]

International Conferences
453. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

454. No practice was found.

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

455. No practice was found.

VI. Other Practice

456. No practice was found.

B. Command Responsibility for Orders to Commit War Crimes

I. Treaties and Other Instruments

Treaties
457. The second paragraphs of Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV provide that "each High Contracting Party shall be under the obligation

[471] UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, UN Doc. A/52/871-S/1998/318, 13 April 1998, § 50; see also Report on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/957, 8 September 1999, § 38.
[472] UN Commission on Human Rights, Special Representative on the situation of human rights in Rwanda, Report, UN Doc. A/55/269, 4 August 2000, § 163.
[473] European Parliament, Resolution on Human Rights in the world and Community human rights policy for the years 1991/1992, 12 March 1993, §§ 7 and 8.

to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts".

458. Article 28 of the 1954 Hague Convention requires States "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who ... order to be committed a breach of the present Convention".

459. Article 9(1) of the 1998 Draft Convention on Forced Disappearance provides that "each State shall prohibit orders or instructions commanding, authorizing or encouraging a forced disappearance".

460. Article 25(3) of the 1998 ICC Statute provides that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: ... (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted".

461. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention, which also contains a list of acts considered as offences within the meaning of the Protocol, provides that:

> Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

462. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that "this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".

463. Article 6 of the 2002 Statute of the Special Court for Sierra Leone, entitled "Individual criminal responsibility", provides that:

> 1. A person who ... ordered ... the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute [i.e. crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of AP II, and other serious violations of international humanitarian law] shall be individually responsible for the crime.

Other Instruments

464. Paragraph 3 of the 1989 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provides that "Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extralegal, arbitrary or summary executions ... Training of law enforcement officials shall emphasize the above provisions."

465. Paragraph 26 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that "in any case, responsibility also rests on the superiors who gave the unlawful orders [to use force and firearms resulting in the death or serious injury of a person]".
466. Article 3(i) of the 1992 London Programme of Action on Humanitarian Issues provides that "in carrying out the Programme of Action, the parties to the conflict undertook to abide by the following provisions: . . . that persons who . . . order the commission of grave breaches [of IHL] are individually responsible".
467. Article 7(1) of the 1993 ICTY Statute provides that "a person who . . . ordered, . . . or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".
468. Article 6(1) of the 1994 ICTR Statute provides that a "person who . . . ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime".
469. Paragraph 31 of the 1994 CSCE Code of Conduct provides that:

> The participating States will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law and are made aware that they can be held individually accountable under those laws for the unlawful exercise of such authority and that orders contrary to national and international law must not be given.

470. Article 2(3) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

> An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] if that individual:
>
> . . .
>
> (b) orders the commission of such a crime which in fact occurs or is attempted.

471. Article 16 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Crime of aggression", provides that "an individual who, as leader or organizer, . . . orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression".
472. Section 14(3) of the 2000 UNTAET Regulation No. 2000/15 provides that "in accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person: . . . (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted".

II. National Practice

Military Manuals

473. Argentina's Law of War Manual provides that "the persons accused of having committed or ordered the commission of these [grave] violations, including those resulting from an omission rather than an action, must be searched for".[474]

474. Australia's Defence Force Manual states that "specifically, a commander will be held accountable if an order is given to a subordinate to commit a breach of LOAC or knows that a breach is occurring and fails to intervene".[475]

475. Belgium's Disciplinary Regulations states that "superiors . . . are liable for the orders they give".[476]

476. Cameroon's Disciplinary Regulations states that "the commander is personally responsible for the orders he gives. He looks after their execution and engages his responsibility for their consequences."[477] It adds that:

> The commander has the right and the duty to require absolute obedience from his subordinates. However, he can not require them to accomplish acts, the execution of which would engage their penal responsibility. These acts are the following: . . . acts contrary to the laws and customs of war.[478]

477. Canada's LOAC Manual provides that:

> Any person who . . . ordered . . . a war crime described in Sections 2 and 3 [crimes against peace, crimes against humanity, genocide, grave breaches of the Geneva Conventions, grave breaches of AP I, violations of the Hague Conventions and customary law] may be held criminally responsible for the crime.[479]

478. Canada's Code of Conduct provides that "the issuance of a manifestly unlawful order is a crime in itself".[480] It also states that "the importance of leadership and discipline cannot be overstated. Good leaders do not issue manifestly unlawful commands. They give clear orders which will not be misunderstood."[481]

479. Congo's Disciplinary Regulations provides that in the exercise of his authority, "the commander . . . bears full responsibility for orders given and for their execution; this responsibility can not be relieved by the responsibility borne by his subordinates . . . He cannot order the commission of acts . . . which constitute crimes."[482]

474 Argentina, *Law of War Manual* (1989), § 8.02.
475 Australia, *Defence Force Manual* (1994), § 1304; see also *Commanders' Guide* (1994), § 1204.
476 Belgium, *Disciplinary Regulations* (1991), § 402(b).
477 Cameroon, *Disciplinary Regulations* (1975), Article 16.
478 Cameroon, *Disciplinary Regulations* (1975), Article 17.
479 Canada, *LOAC Manual* (1999), p. 16-4, § 24.
480 Canada, *Code of Conduct* (2001), Rule 11, § 5.
481 Canada, *Code of Conduct* (2001), Rule 11, § 6.
482 Congo, *Disciplinary Regulations* (1986), Article 20.

480. France's Disciplinary Regulations as amended states that the commander "bears full responsibility for the orders given and for their execution, and is not relieved thereof by the responsibility borne by his subordinates".[483]
481. France's LOAC Manual provides that "each individual is responsible for the violations of the law of armed conflicts for which he/she has made himself/herself guilty, whatever the circumstances may be . . . The commanders are responsible . . . for the acts they commit [themselves] and for the orders they give."[484]
482. Germany's Military Manual provides that "superiors shall only issue orders which are in conformity with international law. A superior who issues an order contrary to international law exposes not only himself but also the subordinate obeying to the risk of being prosecuted."[485]
483. Italy's IHL Manual states that Italian law provides for individual criminal responsibility for those who order a war crime.[486]
484. New Zealand's Military Manual states that "a commander giving an order to commit a war crime or grave breach is equally guilty of that offence with the person actually committing it".[487]
485. Nigeria's Manual on the Laws of War provides that commanders are responsible for war crimes committed by their subordinates "when the acts in question have been committed in pursuance of an order of the commander".[488]
486. South Africa's LOAC Manual provides that "signatory States are required to treat as criminals under domestic law anyone who commits or orders a grave breach".[489] It further states that "an order to commit a war crime is an unlawful order . . . The person giving such an order would also be guilty of a war crime."[490]
487. Spain's LOAC Manual states that "the law of war provides that governments take all legislative measures necessary to determine the penal and disciplinary sanctions for the persons who commit or who give the order to commit violations of the laws and customs of war".[491]
488. Switzerland's Basic Military Manual provides that "if the execution of an order constitutes a crime, the commander or superior who has given this order is punishable as well as the author of the breach".[492]
489. The UK Military Manual states that the responsibility of military commanders for war crimes "arises directly when the acts in question have been committed in pursuance of an order of the commander concerned".[493]

[483] France, *Disciplinary Regulations as amended* (1975), Article 7; see also *LOAC Manual* (2001), p. 113.
[484] France, *LOAC Manual* (2001), p. 113.
[485] Germany, *Military Manual* (1992), § 141.
[486] Italy, *IHL Manual* (1991), Vol. I, § 83.
[487] New Zealand, *Military Manual* (1992), § 1706(1).
[488] Nigeria, *Manual on the Laws of War* (undated), § 8.
[489] South Africa, *LOAC Manual* (1996), § 35.
[490] South Africa, *LOAC Manual* (1996), § 44.
[491] Spain, *LOAC Manual* (1996), Vol. I, § 1.1.d.(6).
[492] Switzerland, *Basic Military Manual* (1987), Article 199(1).
[493] UK, *Military Manual* (1958), § 631.

490. The UK LOAC Manual provides that "if a soldier carries out an illegal order, both he and the person giving that order are responsible".[494]
491. The US Field Manual provides that the responsibility of military commanders for war crimes "arises directly when the acts in question have been committed in pursuance of an order of the commander concerned".[495]
492. The US Air Force Pamphlet states that "command responsibility for acts committed by subordinates arises when the specific wrongful acts in question are knowingly ordered or encouraged".[496]
493. The YPA Military Manual of the SFRY (FRY) states that "each individual is personally responsible – military personnel and civilians alike – if he commits such violation or *orders* its commission".[497] (emphasis in original)

National Legislation
494. Argentina's Decree on Trial before the Supreme Council of the Armed Forces, issued in connection with the situation in Argentina under the military juntas, states that:

> The existence of plans for orders renders the members of the military junta in office at the time, as well as the officers of the armed forces at the decision-making level, responsible in their capacity as indirect perpetrators for the criminal acts committed in compliance with the plans drawn up and overseen by the superiors (Article 514 of the Code of Military Justice) . . . [The] responsibility of these perpetrators does not exclude the responsibility that devolves upon the authors of the operative plan.[498]

Accordingly, the decree states that the members of the first three military juntas be examined by pre-trial proceedings before the Supreme Court of the Armed Forces.[499]
495. Argentina's Draft Code of Military Justice provides that:

> A soldier who, at the occasion of an armed conflict, . . . orders to be committed any other violation or act contrary to the provisions of the international treaties to which Argentina is a party and relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property in case of armed conflict, will be punished.[500]

496. Under Armenia's Penal Code, giving, during an armed conflict, an "obviously criminal order, aimed at the commission of the crimes defined in Articles 387 [Application of prohibited methods of warfare] and 390 [Serious breaches

494 UK, *LOAC Manual* (1981), Section 10, p. 38, § 1.
495 US, *Field Manual* (1956), § 501.
496 US, *Air Force Pamphlet* (1976), § 15-2(d).
497 SFRY (FRY), *YPA Military Manual* (1988), § 20.
498 Argentina, *Decree on Trial before the Supreme Council of the Armed Forces* (1983), preamble.
499 Argentina, *Decree on Trial before the Supreme Council of the Armed Forces* (1983), Article 1.
500 Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the *Code of Military Justice as amended* (1951).

of international humanitarian law during armed conflict]" constitutes a crime against the peace and security of mankind.[501]

497. Azerbaijan's Criminal Code, in a provision entitled "Negligence or giving criminal orders in time of armed conflict", provides that:

> Wilfully giving a criminal order or instruction directed to the commission of the crimes considered in Articles 115–116 of this Code ["violations of [the] laws and customs of war" and "violations of the norms of international humanitarian law in time of armed conflict"] or declaring that no quarter will be given to the subordinate persons . . . will be punished.[502]

498. Bangladesh's International Crimes (Tribunal) Act provides that:

> Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 [crimes against humanity, crimes against peace, genocide, war crimes, the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" or any other crimes under international law] or is connected with any plans and activities involving the commission of such crimes . . . is guilty of such crimes.[503]

499. The Criminal Code of Belarus provides that:

> If, in a situation of armed conflict, a superior or officer gives an order to his subordinate not to give quarter or any other order or instruction known to be criminal and which permits the commission of crimes set out in articles 134, 135 and 136 of this Code ["use of weapons of mass destruction", "violations of the laws and customs of war" and "criminal infringement of the norms of international humanitarian law during armed conflicts"] he is punishable.[504]

500. Belgium's Law on Discipline in the Armed Forces states that commanders are responsible for the orders they issue.[505]

501. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, which applies to both international and non-international conflicts, provides that: "the following shall be punishable by the penalty provided for completed breaches: an order, even where it is not carried out, to commit one of the breaches listed in Article 1 [crime of genocide, crime against humanity and grave breaches]".[506]

502. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "whosoever . . . orders [or] instigates to commit . . . one of the infringements aimed at in articles 2, 3 and 4 respectively of this law

[501] Armenia, *Penal Code* (2003), Article 391(3).
[502] Azerbaijan, *Criminal Code* (1999), Article 117(2).
[503] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 4(2).
[504] Belarus, *Criminal Code* (1999), Article 137(2).
[505] Belgium, *Law on Discipline in the Armed Forces* (1975), Article 11.
[506] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Articles 3(3) and 4.

[genocide, crimes against humanity and war crimes] is guilty of a crime of genocide, a crime against humanity [and/or] a war crime".[507]

503. Cambodia's Law on the Khmer Rouge Trial, in the provision dealing with individual responsibility, provides that "any Suspect who ... ordered ... the crimes referred to in Articles 3, 4, 5, 6, 7, and 8 of this law shall be individually responsible for the crime". The articles referred to deal with "any of the crimes set forth in the 1956 Penal Code" such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the 1973 Convention on Crimes against Internationally Protected Persons (Article 8), all of these acts being committed during the period 1975–1979.[508]

504. Costa Rica's Penal Code as amended provides for the punishment of:

whoever, in the event of an armed conflict, ... orders to be committed acts which can be qualified as grave breaches or war crimes, in conformity with the provisions of international treaties to which Costa Rica is a party, regarding the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property, [applicable] in cases of armed conflict, and under any other instrument of international humanitarian law.[509]

505. Ethiopia's Penal Code provides that:

In case of an offence under this Code committed on the express order of a person of higher rank whether administrative or military to a subordinate, the person who gave the order is responsible for the act performed by his subordinate and is liable to punishment so far as the subordinate's act did not exceed the order given.[510]

506. Germany's Law on the Legal Status of Military Personnel provides that a superior "may give orders only for official purposes and only in observance of the rules of international public law ... He bears responsibility for his orders."[511]

507. Germany's Penal Code provides that "whoever commits the crime himself or through another shall be punished as a perpetrator". As regards incomplete crimes such as an illegal order given but not carried out by the subordinate, it also states that "an attempt to commit a serious criminal offence is always punishable".[512]

[507] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 5.
[508] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.
[509] Costa Rica, *Penal Code as amended* (1970), Article 378.
[510] Ethiopia, *Penal Code* (1957), Article 69.
[511] Germany, *Law on the Legal Status of Military Personnel* (1995), § 10(4) and (5).
[512] Germany, *Penal Code* (1998), §§ 23(1) and 25(1).

508. Under Iraq's Military Penal Code, a commander is criminally responsible for orders that contemplate the commission of a crime.[513]

509. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", states that "the person who orders war crimes to be committed . . . will be punished in the same way as the author [of the war crimes] himself".[514]

510. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment for war crimes, provides that "the superior and the subordinate will both be held responsible in case of the perpetration of any of the infringements mentioned".[515]

511. Luxembourg's Law on the Punishment of Grave Breaches provides for the punishment of an individual for ordering an act which is defined as a grave breach of the Geneva Conventions, even if this order is not executed.[516]

512. Mexico's Code of Military Justice as amended provides that "anyone who orders . . . any act of murder, physical injury or damage to property outside the fighting will be held responsible".[517]

513. The Military Criminal Code as amended of the Netherlands provides that:

> (1) A soldier who intentionally gives an order to a subordinate to commit a crime will be punished as the author of that crime, if the order has been executed.
> (2) If the order as meant in paragraph (1) has not been executed, the superior is punished with imprisonment of maximum five years or a fine of the fourth category, but never with a more severe punishment than would apply to the attempt of the ordered crime, or, in case such attempt is not punishable, to the crime itself.[518]

The Report on the Practice of the Netherlands notes that this provision does not require that the order be manifestly criminal.[519]

514. The Military Discipline Act of the Netherlands provides that giving an illegal order is contrary to discipline.[520]

515. Nicaragua's Draft Penal Code, in a part dealing with "crimes against the international order", which contains a list of punishable offences, most of them being committed "at the occasion", "in times of" and/or "during" an international or internal armed conflict, also provides for the punishment of "anyone who orders the commission of any of the crimes set out under this title".[521]

516. Under Russia's Criminal Code, superiors are responsible for their orders, their consequences and their conformity with current legislation.[522]

[513] Iraq, *Military Penal Code* (1940), Articles 43 and 98.
[514] Jordan, *Draft Military Criminal Code* (2000), Article 42.
[515] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 148.
[516] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Articles 1 and 4.
[517] Mexico, *Code of Military Justice as amended* (1933), Article 222.
[518] Netherlands, *Military Criminal Code as amended* (1964), Article 150.
[519] Report on the Practice of Netherlands, 1997, Chapter 6.7.
[520] Netherlands, *Military Discipline Act* (1990), Article 28.
[521] Nicaragua, *Draft Penal Code* (1999), Article 472(1).
[522] Russia, *Criminal Code* (1996), Article 332.

517. Under Switzerland's Criminal Code as amended, if the execution of an order is a punishable act, the superior who issued the order is punishable as the perpetrator of the act.[523]

518. The Criminal Offences against the Nation and State Act of the SFRY (FRY) provides for the punishment of "any person who commits a war crime, i.e., who during the war or the enemy occupation acted as an instigator or organiser, or who ordered, assisted or otherwise was the direct executor of [a war crime]".[524]

National Case-law

519. In its judgement in the *Military Junta case* in 1985, Argentina's Court of Appeal found that the responsibility of the accused stemmed from the orders they gave, in their capacity as commanders-in-chief of the various forces, both to seize the victims and to keep the clandestine system of detention in operation, rather than from the fact that they failed to put a halt to the illegal restrictions of freedom organised by other parties. It found that subordinates of the accused arrested a large number of people, detained them clandestinely in military barracks, held them in captivity under inhumane conditions, turned them over to the Executive Branch or physically eliminated them. These procedures were undertaken in accordance with plans approved and ordered by the military commanders. Since it was proven that the acts were committed by members of the armed and security forces, which were organised in a hierarchical and disciplinary fashion, the Court ruled out the possibility that such acts could have occurred without the express orders of the supervisors. Since the members of these forces never denounced acts they must have known about, such acts could only be explained by the fact that the members knew that the acts, though illegal, had been ordered by their superiors.[525]

520. In the *Abbaye Ardenne case* before a Canadian Military Court at Aurich, Germany, in 1945, the Judge Advocate considered that all circumstances had to be taken into account in order to determine if an officer was responsible for acts committed by his subordinates. He stated that "it is not necessary for you to be convinced that a particular or formal order was given but you must be satisfied, before you convict, that some words were uttered or some clear indication was given to the accused that prisoners were put to death".[526]

521. In the *Seward case* in 1996, the Canadian Court Martial Appeal Court considered an appeal with regard to the sentence imposed by a General Court Martial on the officer commanding the 2 Commando unit of the Canadian Airborne Regiment present in Somalia as part of Operation Deliverance. The accused had been charged, *inter alia*, for having "negligently performed a military duty [imposed on him] in that he, . . . by issuing an instruction to his

[523] Switzerland, *Criminal Code as amended* (1927), Article 18.
[524] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[525] Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.
[526] Canada, Military Court at Aurich, *Abbaye Ardenne case*, Judgement, 10–28 December 1945.

subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so". The Court stated that:

This count addressed a failure in command. The evidence . . . demonstrates that this failure resulted in, at best, confusion in 2 Commando and must be taken to have led ultimately to excesses by some of the respondent's subordinates. This not only contributed to the death [of a Somali prisoner in the custody of the Command], of which the respondent was acquitted of being a party, but also contributed to several members of the Canadian Armed Forces committing serious lapses of discipline and ultimately finding themselves facing serious charges. Some have gone to prison as a result. These matters all properly related to the charge, as particularized, that the respondent "failed to properly exercise command over his subordinates".[527]

The Court decided to increase the sentence from a "severe reprimand" to three months imprisonment with dismissal. The Court stated that this sentence was merited by:

the perilous circumstances in which this relatively senior officer deliberately pronounced what was an ambiguous, and a dangerously ambiguous, order. He not only pronounced it but essentially repeated it when questioned as to his meaning. While it was found that he had no direct personal connection with the beating and death of [the prisoner], . . . [the accused] was of a much superior rank as an officer and commander of the whole of 2 Commando. His education, training, and experience and his much greater responsibilities as commanding officer put him on a higher standard of care, a standard which he did not meet . . . What the evidence did show was the existence of a difficult situation for the maintenance of morale and discipline in which the giving of orders required particular care. Any sentence must provide a deterrent to such careless conduct by commanding officers which in the final analysis is a failure in meeting their responsibilities both to their troops and to Canada.[528]

522. In the *Perišić and Others case* in 1997, the District Court of Zadar in Croatia found the accused

guilty of issuing orders . . . in 1991 . . . during the armed clashes between the former so-called Yugoslav Army and the armed forces of the Republic of Croatia (National Guard forces, members of the police forces) as the officers in the aforementioned Yugoslav Army, who were in a position to issue orders for combat, orders which violated the [1907 Hague Convention IV] and the annexed [1907 HR] (Article 25), Article 3 [GC IV] and Articles 13 and 14 [AP II] . . . [The accused] gave and transmitted the orders to the subordinate commanders . . . All the accused violated the rules of international law, and in a situation of armed conflict, gave orders for attacks . . . in a manner that cannot be explained by military necessity.[529]

523. In its judgement in the *Dover Castle case* in 1921, the German Reichsgericht held that:

[527] Canada, Court Martial Appeal Court, *Seward case*, Judgement, 27 May 1996.
[528] Canada, Court Martial Appeal Court, *Seward case*, Judgement, 27 May 1996.
[529] Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible.[530]

524. In its judgement in the *Dostler case* in 1945, in which a German commander was accused of having ordered, in March 1944, the shooting of 15 American POWs in violation of the 1907 HR, the US Military Commission at Rome held that commanders were responsible for the orders they gave and therefore if the orders were unlawful they were responsible in law as those who carried out the orders.[531]

525. In its judgement in the *Von Leeb case (The High Command Trial)* in 1945, the US Military Tribunal at Nuremberg noted that the principles established in the *Yamashita case* were not entirely applicable, since many of the alleged war crimes were committed in accordance with the policies and orders of their superiors. Noting that field commanders were soldiers and not lawyers, and that they may "presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance", the Tribunal held that:

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which is shown to have [been] known was criminal.[532]

526. In the *Ford v. García case* in 2000, a civil lawsuit dealing with acts of torture and extrajudicial killing committed in 1980 in El Salvador, the US Federal Court of Florida gave instructions to the jury as follows:

A commander may be held liable for torture and extrajudicial killing committed by troops under his command under two separate legal theories. The first applies when a commander takes a positive act, *i.e.*, he orders torture and extrajudicial killing or actually participates in it.[533]

527. In the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, a Kosovo Serb and former chief of police was convicted, *inter alia*, for having participated in crimes committed against the civilian population in 1999, acts which the District Court found had to be qualified as war crimes under Article 142 of the Penal Code of the FRY, as well as crimes against humanity. The Court also found that the acts had been committed "in time of war".[534]

[530] Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.
[531] US, Military Commission at Rome, *Dostler case*, Judgement, 8–12 October 1945.
[532] US, Military Tribunal at Nuremberg, *Von Leeb (High Command Trial) case*, 30 December 1947–28 October 1948.
[533] US, Federal Court of Florida, *Ford v. García case*, Judgement, 3 November 2000.
[534] SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.

However, on appeal, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial. The Supreme Court found, *inter alia*, that:

The state of facts was erroneously established in relation to all charges as there is no direct or conclusive evidence that the accused acted personally or gave orders leading to the alleged crimes . . . During the retrial, the court of first instance should therefore assess . . . the issue of the accused's personal responsibility for participation in the crimes alleged.[535]

528. In a written opinion in the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

This Opinion has concluded that [the accused] was not properly found guilty of any of the crimes under individual liability (the direct giving of orders to commit the crimes . . .) . . . Individual responsibility subsumes command responsibility. Because of this "subsuming rule", we must first evaluate whether individual responsibility might attach, as a finding that a defendant is individually responsible for a war crime or crime against humanity will preclude the need to analyse his culpability under command responsibility. The rule is stated in the statute and decisions of the ICTY.[536]

Other National Practice

529. The Report on the Practice of Germany states that:

By giving a criminal order, the superior violates his obligations under the [Law on the Legal Status of Military Personnel] . . . If the order is executed, the superior can be punished for having committed a war crime according to general rules on perpetration as stated in section 25 of the German Penal Code. If the order has not been followed the superior can be punished according to the concept of incomplete crimes . . . embodied in section 22 of the German Penal Code.[537]

530. According to the Report on the Practice of Pakistan, a decision of the Pakistani Federal Sharia Court "has placed a greater degree of responsibility on a Muslim commander for violations of humanitarian law after summing up various instructions of various Caliphs from Muslim history".[538]

531. In 1992, in a note verbale with respect to the implementation of UN Security Council Resolution 780 (1992), Slovenia stated that:

Not only those who have directly committed the crimes ["crimes committed against humanity and international humanitarian law"], but also those who gave orders or were otherwise engaged, should be prosecuted as perpetrators. Such consistent approach of the United Nations Commission of Experts would also include

[535] SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.
[536] SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections IV and IV(A).
[537] Report on the Practice of Germany, 1997, Chapter 6.8.
[538] Report on the Practice of Pakistan, 1998, Chapter 6.2.

the question of the criminal responsibility of numerous high military officers and politicians; this would be in accordance with international criminal law and to date practice, especially the one applied in the Nuremberg trials, following the rule that also those who had given orders should be punished for the committed crimes.[539]

532. In 1991, a UK FCO spokesperson stated that the Minister of State, FCO, had summoned the Iraqi ambassador and had reminded him "of the personal liability of those who authorised [the] use [of chemical or biological weapons] and asked that Iraq would not use them".[540]

533. In 1993, in a "Non-Paper" discussing the 1993 ICTY Statute transmitted to the UN Legal Counsel, the UK FCO stated that "under the Geneva Conventions those who order the commission of a grave breach are as responsible for it as the actual perpetrators".[541]

534. In 1992, a report on Iraqi war crimes (Desert Shield/Desert Storm) prepared under the auspices of the US Secretary of the Army noted that "criminal responsibility for violations of the law of war rests with a commander, including the national leadership, who . . . orders or permits the offenses to be committed".[542]

535. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

> Criminal responsibility for violations of the law of war rests with a commander, including the national leadership, if he (or she):
> - Orders or permits the offence to be committed . . .
>
> The crimes committed against Kuwaiti civilians and property, and against third party nationals, are offences for which Saddam Hussein, officials of the Ba'ath Party, and his subordinates bear direct responsibility. However, the principal responsibility rests with Saddam Hussein. Saddam Hussein's C2 of Iraqi military and security forces appeared to be total and unequivocal. There is substantial evidence that each act alleged was taken as a result of his orders, or was taken with his knowledge and approval, or was an act which he should have known.[543]

III. Practice of International Organisations and Conferences

United Nations

536. In a resolution adopted in 1990 in the context of the Iraqi occupation of Kuwait, the UN Security Council stated that:

[539] Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.
[540] UK, Statement by a FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.
[541] UK, FCO, Non-Paper, Former Yugoslavia: War Crimes Implementation of Resolution 808, 22 March 1993, reprinted in *BYIL*, Vol. 64, 1993, p. 700.
[542] US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, p. 13.
[543] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 633–634.

The Fourth Geneva Convention applies to Kuwait and . . . as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and, in particular, is liable under the Convention in respect of the grave breaches committed by it, as are individuals who . . . order the commission of grave breaches.[544]

537. In a resolution adopted in 1992 on violations of humanitarian law in the territory of the former Yugoslavia and in Bosnia and Herzegovina, the UN Security Council reaffirmed that "persons who . . . order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches".[545]

538. In a resolution adopted in 1992 establishing the UN Commission of Experts to examine and analyse evidence of grave breaches of the Geneva Conventions and other violations of IHL in the former Yugoslavia, the UN Security Council recalled its Resolution 764 (1992) in which it had reaffirmed that "persons who . . . order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches".[546]

539. In a resolution adopted in 1992, the UN Security Council strongly condemned "all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population" and affirmed that "those who . . . order the commission of such acts will be held individually responsible in respect of such acts".[547]

540. In a resolution adopted 1993 on the establishment of the ICTY, the UN Security Council recalled a previous resolution in which it had reaffirmed that "persons who . . . order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches" and expressed its determination "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for [violations of international humanitarian law]".[548]

541. In a resolution adopted in 1993 with respect to the former Yugoslavia, the UN Security Council reaffirmed that "those who . . . order or have ordered the commission of [massive, organized and systematic detention and rape of women] will be held individually responsible in respect of such acts".[549]

542. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council reaffirmed that "persons who . . . order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches".[550]

[544] UN Security Council, Res. 670, 25 September 1990, § 13.
[545] UN Security Council, Res. 771, 13 August 1992, § 1.
[546] UN Security Council, Res. 780, 6 October 1992, preamble; see also Res. 764, 13 July 1992, § 10.
[547] UN Security Council, Res. 794, 3 December 1992, § 5.
[548] UN Security Council, Res. 808, 22 February 1993, preamble.
[549] UN Security Council, Res. 820, 17 April 1993, § 6.
[550] UN Security Council, Res. 1193, 28 August 1998, § 12.

543. In 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council condemned all violations of GC III and IV and reaffirmed that "those who . . . order the commission of such acts will be held personally responsible".[551]

544. In July 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed "its condemnation of all violations of international humanitarian law" and reiterated "to all concerned that those who have committed or ordered the commission of such acts will be held individually responsible in respect of such acts".[552]

545. In October 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that "those who have committed or have ordered the commission of violations of international humanitarian law will be held individually responsible for them".[553]

546. In 1998, in a statement by its President on the situation in the DRC, the UN Security Council reaffirmed that "all persons who . . . order the commission of grave breaches of the [Geneva Conventions of 1949 and the Additional Protocols of 1977] are individually responsible in respect of such breaches".[554]

547. In a resolution on the former Yugoslavia adopted in 1995, the UN General Assembly, reaffirming that persons who committed violations of IHL would be held personally responsible and accountable, pointed out that:

> The leadership in territories under the control of Serbs in the Republic of Bosnia and Herzegovina and formerly Serb-held areas of the Republic of Croatia, the commanders of Serb paramilitary forces and political and military leaders in the Federal Republic of Yugoslavia (Serbia and Montenegro) bear primary responsibility for most of those violations [of human rights and IHL].[555]

548. In 1993, in his report on the draft Statute of the ICTY, the UN Secretary-General's stated that "a person in a position of superior authority should . . . be held individually responsible for giving the unlawful order to commit a crime under the [ICTY Statute]".[556]

549. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had addressed the issue of command responsibility in its first interim report as follows:

[551] UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.
[552] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/33, 20 July 1995.
[553] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/52, 12 October 1995, p. 2.
[554] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, pp. 1–2.
[555] UN General Assembly, Res. 50/193, 22 December 1995, § 3.
[556] UN Security Council, UN Doc. S/25704, Report of the UN Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, § 56.

A person who gives the order to commit a war crime or crime against humanity is equally guilty of the offence with the person actually committing it. This principle, expressed already in the Geneva Conventions of 1949, applies to both the military superiors, whether of regular or irregular armed forces, and to civilian authorities.[557]

The Commission noted with satisfaction that Article 7 of the 1993 ICTY Statute used an essentially similar formulation.[558]

550. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) noted that "it is a well-established principle of international law that a person who orders a subordinate to commit a violation for which there is individual responsibility is as responsible as the individual that actually carries it out". It referred to the 1950 Nuremberg Principles, the 1948 Genocide Convention, Article 86 AP I and the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind.[559]

Other International Organisations

551. No practice was found.

International Conferences

552. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

553. In its judgement in the *Akayesu case* in 1998, the ICTR quoted Article 6(1) of the 1994 ICTR Statute and stated that:

472. . . . Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he . . . orders them . . .
473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.
474. Article 6(1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime, especially those who ordered it, could incur individual criminal responsibility.

[557] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 55.
[558] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 56.
[559] UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, § 173.

...
483. By *ordering* the commission of one of the crimes referred to in Articles 2 to 4 of the [1994 ICTR] Statute, a person also incurs individual criminal responsibility. Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence.[560] [emphasis in original]

554. In its judgement in the *Kayishema and Ruzindana case* in 1999, the ICTR, with regard to Article 6(3) of the 1994 ICTR Statute and a possible responsibility thereunder of one of the accused, a former *prefet*, stated that:

Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to found command responsibility . . . If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.[561]

555. In the indictment in the *Mrkšić case* before the ICTY in 1996, the Prosecutor stated, with respect to the responsibility of the accused for the killing of 260 persons, that:

Each of the accused is individually responsible for the crimes alleged against him in this indictment pursuant to Article 7(1) of the [1993 ICTY] Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.[562]

556. In the review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber stated that:

20. . . . The principle of criminal responsibility, restated in Article 7(1) of the [1993 ICTY Statute], covers the person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime. International law thus permits the prosecution of individuals who acted in an official capacity, as stated in Article 7(2) of the Statute.
21. The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes . . . Since the criminal intent is formulated at a high level of the administrative hierarchy, the violation of the norm of international humanitarian law is part of a system of criminality specifically justifying the intervention of the Tribunal.[563]

[560] ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 472–474 and 483.
[561] ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, § 223.
[562] ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 23.
[563] ICTY, *Martić case*, Review of the Indictment, 8 March 1996, §§ 20–21.

557. In the review of the indictments in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber stated, with respect to the accused's possible responsibility under Article 7(1) of the 1993 ICTY Statute, that:

According to the two indictments, the offences charged were committed by the military and police personnel obeying the orders of the Bosnian Serb administration. Both indictments indicate that the perpetrators were acting under the control, command and direction of Radovan KARADŽIĆ and Ratko MLADIĆ. All of the charges would therefore involve the individual criminal responsibility of those in superior authority . . .

The evidence and testimony tendered all concur in demonstrating that Radovan KARADŽIĆ and Ratko MLADIĆ would not only have been informed of the crimes allegedly committed under their authority, but also and, in particular, that they exercised their power in order to plan, instigate, order or otherwise aid and abet in the planning, preparation or execution of the said crimes.[564]

558. In the review of the indictment in the *Rajić case* in 1996, the ICTY Trial Chamber stated that the accused "is charged with ordering" several grave breaches of the 1949 Geneva Conventions and violations of the laws and customs of war. It also noted that "in the alternative, he is charged with . . . command responsibility" for the same acts. It further stated that "there is proof [the accused] knew about the attack and actually ordered it".[565] In addition, the Trial Chamber stated that:

Based on the evidence produced and the testimony heard, the Trial Chamber is satisfied that the Prosecutor has presented reasonable grounds for believing that, on 23 October 1993, the civilian village of Stupni Do was attacked by HVO forces who were acting with [the accused's] aid and assistance or on his orders. The attack appears to have been aimed at the civilian population of the village, many of whom were killed during it. The village, which had no military significance, was devastated and the civilian property in it was destroyed.[566]

559. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber, examining individual criminal responsibility under Article 7(3) of the 1993 ICTY Statute, stated that:

333. That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. This criminal liability may arise . . . out of the positive acts of the superior (sometimes referred to as "direct" command responsibility) . . . Thus, a superior may be held criminally responsible . . . for ordering, instigating or planning criminal acts carried out by his subordinates . . .
334. . . . The criminal liability of a superior for positive acts follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) [of the 1993 ICTY Statute] above.[567]

[564] ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 65 and 83.
[565] ICTY, *Rajić case*, Review of the Indictment, 13 September 1996, §§ 1 and 59.
[566] ICTY, *Rajić case*, Review of the Indictment, 13 September 1996, § 71.
[567] ICTY, *Delalić case*, Judgement, 16 November 1998, § 333.

560. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber, commenting upon a possible responsibility of the accused under Article 7(1) of the 1993 ICTY Statute and referring to the judgement of the ICTR in the *Akayesu case*, stated that:

> It is not necessary that an order be given in writing or in any particular form. It can be explicit or implicit. The fact that an order was given can be proved through circumstantial evidence.
> ...
> The Trial Chamber agrees that an order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order. Therefore, it is irrelevant whether the illegality of the order was apparent on its face.[568]

561. In its judgement in the *Kordić and Čerkez case* in 2000, the ICTY Trail Chamber II stated that:

> Article 7(1) [of the 1993 ICTY Statute] is concerned with persons directly responsible for planning, instigating, ordering, committing, or aiding and abetting in the planning, preparation or execution of a crime. Thus, both the individual who himself carries out the unlawful conduct and his superior who is involved in the conduct not by physical participation, but for example by ordering or instigating it, are covered by Article 7(1). For instance, a superior who orders the killing of a civilian may be held responsible under Article 7(1), as might a political leader who plans that certain civilians or groups of civilians should be executed, and passes these instructions on to a military commander. The criminal responsibility of such superiors, either military or civilian, in these circumstances is personal or direct, as a result of their direct link to the physical commission of the crime. The criminal responsibility of a superior for such positive acts, except where the superior orders the crime in which case he may be more appropriately referred to as primarily responsible for its commission, may be regarded as "follow(ing) from general principles of accomplice liability".[569]

The ICTY Trial Chamber went on to say that:

> The Trial Chamber is of the view that no formal superior–subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order. The Trial Chamber agrees with the *Blaškić* finding that there is no requirement that an order be given in writing or in any particular form, and that the existence of an order may be proven through circumstantial evidence. In relation to ordering, the *Blaškić* Trial Chamber further held that the order "does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order.[570]

[568] ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 281–282.
[569] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 367.
[570] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 388.

562. In its judgement in the *Krstić case* in 2001, the ICTY Trial Chamber stated that:

The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) [of the 1993 ICTY Statute] are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.[571] [emphasis in original]

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

563. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following: . . . (b) the principle of individual criminal responsibility . . . The principle of the individual criminal responsibility of the perpetrator of certain breaches of international law, including those bearing on the environment in times of armed conflict, as well as of the persons ordering the commission of such acts, is of critical importance. It is firmly rooted in both customary and treaty law, such as the [1907 HR] and the provisions of the Geneva Conventions relating to grave breaches.[572]

VI. Other Practice

564. No practice was found.

C. Command Responsibility for Failure to Prevent, Repress or Report War Crimes

Prevention and repression of war crimes

I. Treaties and Other Instruments

Treaties

565. Article 1(1) of the 1899 HR lays down as a condition which an armed force must fulfil in order to be accorded the rights of belligerents "to be commanded by a person responsible for his subordinates".

[571] ICTY, *Krstić case*, Judgement, 2 August 2001, § 605.

[572] ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 48.

566. Article 1(1) of the 1907 HR lays down as a condition which an armed force must fulfil in order to be accorded the rights of belligerents "to be commanded by a person responsible for his subordinates".

567. Article 19 of the 1907 Hague Convention (X) provides that:

> The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

568. Article 26 of the 1929 GC provides that:

> The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

569. Article 86(2) AP I provides that:

> The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 86 AP I was adopted by consensus.[573]

570. Article 87 AP I provides that:

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
> ...
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Article 87 AP I was adopted by consensus.[574]

571. Upon ratification (or signature) of AP I, Italy, Canada, Germany, Netherlands, Spain and UK expressed their understanding of the term "feasible" used in AP I as being what is "practicable or practically possible". These statements are quoted in detail in Chapter 5, section A, and are not repeated here.

[573] CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307.
[574] CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307.

572. Article 76(2) of draft AP I (now Article 86(2)) submitted by the ICRC to the CDDH provided that:

The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal responsibility if they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach.[575]

This proposal was subject to amendments and referred to Working Group A of Committee I.[576] Working Group A of Committee I adopted draft Article 76(2) AP I with the following wording:

The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility as the case may be, if they knew or had the possibility of knowing in the circumstances at the time that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[577]

573. Article 9(3) of the 1998 Draft Convention on Forced Disappearance provides that:

Forced disappearance committed by a subordinate shall not relieve his superiors of criminal responsibility if the latter failed to exercise the powers vested in them to prevent or halt the commission of the crime, if they were in possession of information that enabled them to know that the crime was being or was about to be committed.

574. Article 28 of the 1998 ICC Statute provides that:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
  (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[575] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.
[576] CDDH, *Official Records*, Vol. X, CDDH/234/Rev.1, 21 April–11 June 1976, p. 119, § 24.
[577] CDDH, *Official Records*, Vol. X, CDDH/I/321/Rev.1, 21 April–11 June 1976, p. 153. (After the meetings some delegations informed the Chairman of Committee I that they wished to have the words "or had possibility of knowing" replaced by the words "or had information on the basis of which he should have concluded".)

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

575. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention, which also contains a list of the acts considered as offences within the meaning of the Protocol, provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

576. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that "this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".

577. Article 6(3) of the 2002 Statute of the Special Court for Sierra Leone, dealing with "Individual criminal responsibility", provides that:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the Geneva Conventions and of AP II, and other serious violations of international humanitarian law] was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Other Instruments

578. Article 22 of the 1954 Agreement on Cessation of Hostilities in Viet-Nam provides that "the Commanders of the Forces of the two parties shall ensure that persons under their respective commands who violate any provisions of the present Agreement are suitably punished".

579. Paragraph 24 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

580. Article 12 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of the superior", provides that:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

581. Article 7(3) of the 1993 ICTY Statute provides that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

582. Article 6(3) of the 1994 ICTR Statute provides that:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

583. Article 2(3) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Individual responsibility", provides that:

An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

. . .

(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6.

584. Article 6 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of the superior", provides that:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

585. Section 16 of the 2000 UNTAET Regulation No. 2000/15 provides that:

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation [i.e. genocide, crimes against humanity, war crimes and torture], the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

II. National Practice

Military Manuals

586. Argentina's Law of War Manual states that "military commanders must ensure the prevention of breaches of the [Geneva] Conventions and [AP I] and, when necessary, report them to the competent authority and repress them".[578] It further refers to Article 86 AP I and states that:

Breaches [of the Geneva Conventions or of AP I] committed by a subordinate do not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew that the subordinate was committing or was going to commit the breach and if they did not take the measures within their power to prevent or repress the breach.[579]

587. Australia's Defence Force Manual refers to the "Yamashita principles" and states that:

The principles of this doctrine are that the commander will be held responsible if the commander:

a. knows subordinates are going to commit war crimes and does not prevent them,
b. knows subordinates have committed war crimes and does not punish them,
c. should know subordinates are going to commit war crimes and does not prevent them, or
d. should know subordinates have committed war crimes and does not punish them.[580]

The manual further states that "specifically, a commander will be held accountable if [he] knows that a breach is occurring and fails to intervene. A commander is also liable for prosecution if the commander fails to act to prevent a breach of LOAC of which the commander should have known."[581]

588. Belgium's Disciplinary Regulations states that "superiors may be criminally or disciplinarily liable if they knew or should have known that a

[578] Argentina, *Law of War Manual* (1989), § 8.02.
[579] Argentina, *Law of War Manual* (1989), § 8.07.
[580] Australia, *Defence Force Manual* (1994), § 1303; see also *Commanders' Guide* (1994), § 1203.
[581] Australia, *Defence Force Manual* (1994), § 1304; see also *Commanders' Guide* (1994), § 1204.

subordinate was committing or going to commit an offence and failed to take all measures to prevent, suppress or punish this offence".[582]

589. Benin's Military Manual provides that "each military commander is responsible for respect for the law of war in his sphere of command".[583] It adds that:

> In case of breach of the law of war, [the military commander] shall ensure that the breach ceases and that a disciplinary or criminal action is engaged. In any case, the responsibility of the military commander regarding violations committed by his subordinates is total if it is established that he has not taken any measure to prevent or repress these violations.[584]

590. Cameroon's Instructors' Manual provides that "any act contrary to respect for the Law of War must be punished. Any commander who shows weakness or indulgence in that field shoulders the responsibility."[585]

591. Canada's LOAC Manual states that the "commanders may be held personally and criminally liable in respect of illegal acts committed by those under their command, especially if they knew or should have known that such acts were being committed or were likely to be committed".[586] It also states that "heads of state as well as members of the administration may be held personally and criminally responsible for illegalities committed . . . by persons under their authority if they knew, should have known or acquiesced in such behaviour".[587] The manual further states that:

> The fact that any such crime [i.e. a war crime] was committed by a subordinate does not relieve a superior of criminal responsibility if the superior knew or had reason to believe that the subordinate was about to commit a war crime, and the superior failed to take the necessary and reasonable measures to prevent or to punish the crime.[588]

According to the manual:

> A commander who is aware that subordinates or other persons under his control are about to commit or have committed a breach of the LOAC is required to initiate such steps as are necessary to prevent violations of the LOAC and, where appropriate, to initiate disciplinary or penal action against these persons.[589]

The manual also states that:

> The fact that a subordinate committed a breach of the LOAC does not absolve superiors from penal or disciplinary responsibility. Superiors are guilty of an offence if they knew, or had information which should have enabled them to conclude, in

[582] Belgium, *Disciplinary Regulations* (1991), § 404, see also § 402.
[583] Benin, *Military Manual* (1995), Fascicule II, p. 14.
[584] Benin, *Military Manual* (1995), Fascicule II, p. 15.
[585] Cameroon, *Instructors' Manual* (1992), p. 25, § 121(1).
[586] Canada, *LOAC Manual* (1999), p. 15-1, § 7.
[587] Canada, *LOAC Manual* (1999), p. 15-2, § 10.
[588] Canada, *LOAC Manual* (1999), p. 16-4, § 27.
[589] Canada, *LOAC Manual* (1999), p. 16-7, § 51.

the circumstances ruling at the time, that the subordinate was committing or about to commit a breach of the LOAC, and they did not take all feasible measures within their power to prevent or repress the breach.[590]

592. Croatia's Commanders' Manual provides that "the commander makes sure that violations of the law of war cease and ensures that disciplinary action is taken".[591]

593. France's LOAC Summary Note provides that "the commander shall ensure, by exerting his control, that violations of the law of war cease and that disciplinary or penal action is initiated when necessary".[592]

594. France's LOAC Manual provides that:

> Each individual is responsible for the violations of the law of armed conflicts for which he/she is guilty, whatever the circumstances may be... The commanders are responsible both for the acts they commit [themselves] and for the orders they give, as well as for the breaches which they allow their subordinates to perform, knowingly, for lack of control or for not having taken the necessary measures to oppose them.[593]

595. Hungary's Military Manual provides that it is the "responsibility of every commander [to] ensure knowledge of the law of war". It adds that "in cases of breaches [the commander] shall ensure that they cease and take disciplinary or penal action".[594]

596. Italy's LOAC Elementary Rules Manual provides that "the commander makes sure that violations of the law of war cease and ensures that disciplinary action is taken".[595]

597. South Korea's Military Operations Law of War Compliance Regulation states that commanders of UNC/CFC are responsible for securing respect for the laws of war.[596]

598. Madagascar's Military Manual provides that "the commander shall ensure that breaches of the law of war cease and that disciplinary or penal action is initiated".[597]

599. The Military Manual of the Netherlands refers to Article 86 AP I and states that "a superior is not automatically criminally liable for every criminal behaviour of his subordinates. He must have known about it or at least have had the necessary information about it and he must have neglected to do all in his power to prevent or suppress the criminal behaviour".[598] Referring to Article 87 AP I, it further states that:

[590] Canada, *LOAC Manual* (1999), p. 16-7, § 53.
[591] Croatia, *Commanders' Manual* (1992), § 20.
[592] France, *LOAC Summary Note* (1992), § 5.1.
[593] France, *LOAC Manual* (2001), p. 113.
[594] Hungary, *Military Manual* (1992), p. 40.
[595] Italy, *LOAC Elementary Rules Manual* (1991), § 20.
[596] South Korea, *Military Operations Law of War Compliance Regulation* (1988), p. 230, § E.
[597] Madagascar, *Military Manual* (1994), Fiche No. 4-O, § 20.
[598] Netherlands, *Military Manual* (1993), p. IX-6.

Commanders are also obliged to take measures in order to prevent their subordinates from committing war crimes. They must take measures to stop the committing of war crimes . . . This can involve criminal or disciplinary proceedings against the acts committed, but also administrative measures (for example suspension or transfer).[599]

600. The Military Handbook of the Netherlands states that:

Commanders . . . are obliged to take measures to prevent that their subordinates commit war crimes. Every soldier has the duty to prevent the commission of war crimes, to stop them and to report them.[600]

601. New Zealand's Military Manual provides that:

The commander is personally liable in respect of illegal acts committed by those under his command if he knew or should have known that such acts were being committed or were likely to be committed, and it is part of his responsibility to ensure that the troops under his command are aware of their obligations.[601]

The manual further states that:

[The commander] is also liable to punishment if he knew or had information which should have enabled him to conclude, in the circumstances at the time, that a subordinate was committing or going to commit a breach of the law, and failed to take all feasible steps to prevent or repress that breach.[602]

602. Nigeria's Military Manual provides that "Article 87 [AP I] thereby enjoins the parties and the parties to the conflict to request Commanders of their troops under control to prevent, and where necessary, to suppress and to report to competent authorities breaches of the conventions and the Protocols".[603] The manual further states that commanders "should initiate such steps as are necessary to prevent any violations and, where appropriate, to initiate disciplinary or penal action against violators thereof".[604]

603. Nigeria's Manual on the Laws of War provides that:

In some cases, commanders are responsible for war-crimes committed by their subordinates. For example, when soldiers commit acts of massacre against the civilian population of an occupied territory or against prisoners of war the responsibility for such acts may rest not only with the actual perpetrators but also with the commander. Such responsibility arises when the acts in question have been committed in pursuance of an order of the commander, when the act is done with the commander's knowledge or when the commander ought to have known about the act and failed to use all necessary means at his disposal to ensure compliance with the Laws of War.[605]

[599] Netherlands, *Military Manual* (1993), p. IX-7.
[600] Netherlands, *Military Handbook* (1995), p. 7-44.
[601] New Zealand, *Military Manual* (1992), § 1603(2).
[602] New Zealand, *Military Manual* (1992), § 1706(1).
[603] Nigeria, *Military Manual* (1994), p. 30, § 3.
[604] Nigeria, *Military Manual* (1994), p. 30, § 3.
[605] Nigeria, *Manual on the Laws of War* (undated), § 8.

604. The Handbook on Discipline of the Philippines states that:

The immediate CO of errant military personnel is held accountable either as conduct unbecoming pursuant to AW 96, or as accessory after the fact in cases where he refuses to act, delays or otherwise aids or abets the wrong doing of his subordinates which is the subject of a valid complaint or duly issued warrant of arrest.[606]

605. The Code of Ethics of the Philippines provides that "commanders shall exercise their authority over their subordinates with prudence and shall accept responsibility for their actions".[607]

606. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that:

a. Commanders shall be responsible for the conduct and behavior of AFP and PNP personnel under their control and supervision. They will be held accountable under pertinent provisions of the Articles of War in the case of military personnel and PNP Rules and Regulations and the Revised Penal Code for PNP personnel, or as accessory after the fact in cases where they refuse to act, delay or otherwise aid or abet the wrongdoing of their subordinate, the subject of a valid complaint or warrant of arrest.
b. Commanders shall ensure that all participants in security/police operations shall be briefed and de-briefed before and after every operation to insure proper behavior of personnel and understanding of their mission as well as to assess the over-all impact of the operation to AFP/PNP goals and objectives and whenever necessary immediately undertake corrective legal measures on any misconduct committed by AFP/PNP personnel.[608]

607. Russia's Military Manual provides that, during an armed conflict, a commander is obliged "to put an end to any violation of the rules of IHL; to prosecute persons having committed a violation of the rules of IHL".[609]

608. South Africa's Medical Services Military Manual refers to Article 87 AP I, providing that "commanders will prevent [and] suppress ... breaches of humanitarian law".[610]

609. Spain's LOAC Manual provides that "the commander must ensure that the violations cease and that disciplinary or penal action is taken".[611] It further imposes on commanding officers the obligation "not to order or tolerate breaches of the humanitarian rules of war".[612]

610. Sweden's IHL Manual provides that:

The fact that a breach of the [Geneva] Conventions or of [AP I] was committed by a subordinate does not absolve his superior from penal or disciplinary responsibility. This applies, however, only if the superiors knew, or had received intelligence enabling them to deduce, that the subordinate had committed or was about to commit

606 Philippines, *Handbook on Discipline* (1989), Part IV, p. 7.
607 Philippines, *Code of Ethics* (1991), Section 2.3.
608 Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(a)–(b).
609 Russia, *Military Manual* (1990), § 14(b).
610 South Africa, *Medical Services Military Manual* (undated), p. 5.
611 Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(1).
612 Spain, *LOAC Manual* (1996), Vol. I, § 11.4.b.

such a breach, and if they had not taken all feasible steps in their power to prevent or punish the breach.

The Additional Protocol further clearly states that military commanders shall prevent breaches and if necessary punish and report such cases.[613]

611. Switzerland's Basic Military Manual provides that commanders "are responsible to ensure that their troops respect the Conventions as well as for the punishment of possible breaches".[614]

612. Togo's Military Manual states that "each military commander is responsible for respect for the law of war in his sphere of command".[615] It adds that:

In case of breach of the law of war [the military commander] shall ensure that the breach ceases; that a disciplinary or criminal action is engaged. In any case, the responsibility of the military commander regarding violations committed by his subordinates is total if it is established that he has not taken any measure to prevent or repress these violations.[616]

613. The UK Military Manual provides that:

In some cases military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control. Thus, for example, when troops commit, or assist in the commission of, massacres and atrocities against the civilian inhabitants of occupied territory, or against prisoners of war, the responsibility may rest not only with the actual perpetrator but also with the commander.

...

The commander is also responsible, if he has actual knowledge or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.[617]

614. The US Field Manual states that:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander . . . The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.[618]

[613] Sweden, *IHL Manual* (1991), Section 4.2, p. 94.
[614] Switzerland, *Basic Military Manual* (1987), Article 196(2).
[615] Togo, *Military Manual* (1995), Fascicule II, p. 14.
[616] Togo, *Military Manual* (1995), Fascicule II, p. 15.
[617] UK, *Military Manual* (1958), § 631.
[618] US, *Field Manual* (1956), § 501.

615. The US Air Force Pamphlet states that:

An important illustration of the *mens rea* requirement relates to a commander's responsibility to maintain discipline and preclude violations by members of his command ...

Command responsibility for acts committed by subordinates arises when the specific wrongful acts in question are knowingly ordered or encouraged. In addition, the Commander is responsible if he has the actual knowledge, or should have had knowledge through reports received by him or through other means, that combatants under his control have or are about to commit criminal violations, and he culpably fails to take reasonably necessary steps to ensure compliance with the law and punish violators thereof.[619]

616. The US Air Force Pamphlet provides that "an important illustration of the *mens rea* requirement relates to a commander's responsibility to maintain discipline and preclude violations by members of his command".[620]

617. The US Naval Handbook provides that:

Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict; they are also responsible for the proper performance of their subordinates. While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands. The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate will not relieve him of responsibility for its occurrence if it is established that he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur.[621]

The Handbook further states that "all members of the naval service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others".[622]

618. The Annotated Supplement to the US Naval Handbook states that:

A commander at any level is personally responsible for the criminal acts of warfare committed by a subordinate if the commander knew in advance of the breach about to be committed and had the ability to prevent it, but failed to take the appropriate action to do so. In determining the personal responsibility of the commander, the element of knowledge may be presumed if the commander had information which should have enabled him or her to conclude under the circumstances that such a breach was to be expected. Officers in command are also personally responsible for unlawful acts of warfare performed by subordinates when such acts are committed by order, authorization, or acquiescence of a superior. Those acts will each be determined objectively.[623]

The Annotated Supplement also states that:

[619] US, *Air Force Pamphlet* (1976), § 15-2(d). [620] US, *Air Force Pamphlet* (1976), § 15-2(d).
[621] US, *Naval Handbook* (1995), § 6.1.3. [622] US, *Naval Handbook* (1995), § 6.1.4.
[623] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.1.3, footnote 13.

Where U.S. personnel are involved, military personnel with supervisory authority have a duty to prevent criminal acts. Any person in the naval service who sees a criminal act about to be committed must act to prevent it to the utmost of his or her ability and to the extent of his or her authority . . . Possible actions include moral arguments to dissuade, threatening to report the criminal act, repeating orders of superiors, stating personal disagreement, and asking the senior individual on scene to intervene as a means of preventing the criminal act. In the event the criminal act directly and imminently endangers a person's life (including the life of another person lawfully under his or her custody), force may be used to the extent necessary to prevent the crime. However, the use of deadly force is rarely justified; it may be used only to protect life and only under conditions of extreme necessity as a last resort when lesser means are clearly inadequate to protect life.[624]

619. Uruguay's Disciplinary Regulations states that "no superior shall be absolved of his responsibility by his subordinates' omission or carelessness in matters that he must and can supervise himself".[625]

620. The YPA Military Manual of the SFRY (FRY) states that a superior who was aware of preparations for acts that would violate certain norms and did not prevent their occurrence or carry out appropriate disciplinary measures is personally responsible. A superior officer shall especially be responsible as an accomplice or instigator in case of repeated violations by subordinates.[626]

National Legislation

621. Argentina's Draft Code of Military Justice provides that a superior shall not be relieved of responsibility "if he knew or possessed information leading him to conclude, in the circumstances at the time, that a subordinate had committed, or was about to commit, an offence and did not take the feasible means at his disposal to prevent or repress the offence".[627]

622. Under Armenia's Penal Code, a commander or an official commits a crime against the peace and security of mankind

if he knew, or had information which should have enabled him to conclude in the circumstances at the time, that his subordinate was committing or was going to commit an offence [the use of a prohibited method of warfare or a serious breach of international humanitarian law, as defined in Articles 387 and 390 of the Code] and if he did not take all feasible measures within his power to prevent or repress the offence.[628]

623. Azerbaijan's Criminal Code, in a provision entitled "Negligence or giving criminal orders in time of armed conflict", states that:

[624] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.1.4, footnote 14.
[625] Uruguay, *Disciplinary Regulations* (1980), Article 26.
[626] SFRY (FRY), *YPA Military Manual* (1988), § 20.
[627] Argentina, *Draft Code of Military Justice* (1998), Article 193, introducing a new Article 514 *bis* in the *Code of Military Justice as amended* (1951).
[628] Armenia, *Penal Code* (2003), Article 391(1).

Failure to use in time of armed conflict all the opportunities by the commander or the person in charge in the framework of their responsibilities in order to prevent that persons under their command commit crimes considered in articles 115–116 of the present Code [i.e. "violations of [the] laws and customs of war" and "violations of the norms of international humanitarian law in time of armed conflict"] . . . will be punished.[629]

624. Bangladesh's International Crimes (Tribunal) Act provides that:

The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely: –

. . .

(h) . . . failure to prevent commission of any such crimes [i.e. crimes against humanity, crimes against peace, genocide, war crimes, "violations of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949" or any other crimes under international law].[630]

625. Bangladesh's International Crimes (Tribunal) Act provides that:

Any commander or superior officer . . . who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes [crimes against humanity, crimes against peace, genocide, war crimes, "violations of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949" or any other crimes under international law], or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.[631]

626. The Criminal Code of Belarus provides that:

If, in a situation of armed conflict, a superior or officer intentionally does not take all the measures possible in his power in order to prevent or repress the commission by his subordinates of the crimes set out in articles 134, 135 and 136 of this Code [i.e. "use of weapons of mass destruction", "violations of the laws and customs of war" and "criminal infringement of the norms of international humanitarian law during armed conflicts"] he is punishable . . .[632]

627. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, which applies to both international and non-international armed conflicts, provides that:

The following shall be punishable by the penalty provided for completed breaches:

. . .

– failure to act to the extent available to them by persons who had knowledge of the orders given to commit such a breach or of acts initiating the commission thereof and who were able to prevent or put an end to such breach.[633]

629 Azerbaijan, *Criminal Code* (1999), Articles 117(1).
630 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2).
631 Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 4(2).
632 Belarus, *Criminal Code* (1999), Article 137(1).
633 Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Articles 3(3) and 4.

628. Cambodia's Law on the Khmer Rouge Trial, in the provision dealing with individual responsibility, states that:

> The fact that any of the acts referred to in Articles 3 through 8 of this law was committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The articles referred to deal with "any of the crimes set forth in the 1956 Penal Code" such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the 1973 Convention on Crimes against Internationally Protected Persons (Article 8), all of these acts being committed during the period 1975–1979.[634]

629. Canada's Crimes against Humanity and War Crimes Act provides that military commanders and "superiors" may commit indictable offences if they meet all of the following conditions: (a) fail to "exercise control properly over a person under their effective command and control" and as a result that person commits a war crime; (b) know or are "criminally negligent in failing to know, that the person is about to commit or is committing such an offence"; and (c) subsequently fail to take "as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences" or fail "to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution".[635]

630. Under Egypt's Military Criminal Code, commanders have the duty to investigate allegations of military offences.[636]

631. The Draft Amendments to the Penal Code of El Salvador provide that:

> In the case in which a subordinate has committed any of the crimes set out in this title [i.e. title XIX on "Crimes against humanity" and therein genocide and war crimes], his superiors are not relieved from penal responsibility if they knew or had information that permitted them to conclude, in the circumstances of the time, that the subordinate was committing or was about to commit such crimes and did not take all possible measures which were at their disposal in order to prevent or repress the said act.[637]

[634] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.
[635] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 7(1) and (2).
[636] Egypt, *Military Criminal Code* (1966), Article 23.
[637] El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Punibilidad de la comisión por acción y por omisión en delitos contra la humanidad".

632. Estonia's Penal Code provides that:

> Besides the author of one of the crimes set out in this chapter [i.e. crimes against humanity, crimes against peace and war crimes], the representative of the public administration or the military commander who has issued the order to commit such crime, with the consent of whom it has been committed or who has failed to prevent it although it was in his or her power to do so, shall also be punished.[638]

633. France's Code of Military Justice provides that "when a subordinate is tried as the chief actor in an offence . . . and his hierarchical superiors cannot be sought as co-actors, they are considered to be accessories in that they organized or tolerated the criminal acts of their subordinate".[639]

634. Germany's Law Introducing the International Crimes Code contains a provision entitled "Responsibility of military commanders and other superiors" which states that:

> (1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Law [*inter alia*, genocide, crimes against humanity and war crimes] shall be punished in the same way as a perpetrator of the offence committed by that subordinate . . .
> (2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.[640]

The Law contains a further provision entitled "Violation of the duty of supervision" which states that:

> (1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Law, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.
> (2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Law, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it.
> (3) [Article 1, § 4(2)] shall apply mutatis mutandis.[641]

[638] Estonia, *Penal Code* (2001), § 88(1).
[639] France, *Code of Military Justice* (1982), Article 71.
[640] Germany, *Law Introducing the International Crimes Code* (2002), Article 1(4).
[641] Germany, *Law Introducing the International Crimes Code* (2002), Article 1(13).

635. Under Italy's Penal Code, a person who fails to prevent someone from committing an act that he or she had the duty to prevent may incur criminal responsibility.[642]

636. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", provides that "the person who orders war crimes to be committed or who is involved therein will be punished in the same way as the author [of the war crimes] himself".[643]

637. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment for war crimes, provide that "the superior and the subordinate will both be held responsible in case of the perpetration of any of the infringements mentioned".[644]

638. Luxembourg's Law on the Repression of War Crimes provides that:

Without prejudice to the provisions of Articles 66 and 67 of the Penal Code, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and offences set out in Article 1 of the present law [i.e. war crimes]: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being superiors in rank of the principal authors, have aided those crimes or offences.[645]

639. Luxembourg's Law on the Punishment of Grave Breaches provides that:

Without prejudice to the provisions of Articles 66 and 67 of the Penal Code, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes set out in Articles 1 and 3 of the present law [i.e. grave breaches of the 1949 Geneva Conventions and acts related thereto]: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being superiors in rank of the principal authors, have aided those crimes.[646]

It further provides for the punishment of persons

who, having knowledge of orders given with regard to the commission of crimes set out in Articles 1 and 3 [i.e. grave breaches of the 1949 Geneva Conventions and acts related thereto] or of facts being at the beginning of the commission thereof, and who could have prevented the completion or could have terminated it, did not act within their scope of action.[647]

640. The Military Criminal Code as amended of the Netherlands provides that:

Art. 148. A soldier who intentionally allows a subordinate to commit a crime, or who witnesses a crime committed by a subordinate and intentionally omits to take measures, to the extent they are necessary and required from him, will be punished as an accomplice.

642 Italy, *Penal Code* (1930), Article 40.
643 Jordan, *Draft Military Criminal Code* (2000), Article 42.
644 Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 148.
645 Luxembourg, *Law on the Repression of War Crimes* (1947), Article 3.
646 Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 5.
647 Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 6.

Art. 149. A soldier who intentionally omits to take measures, to the extent they are necessary and required from him, [will be punished] when his subordinate commits, or plans to commit a crime, which he reasonably must have presumed.[648]

641. The International Crimes Act of the Netherlands provides that:

1. A superior shall be liable to the penalties prescribed for the offences referred to in [Article] 2 [genocide, crimes against humanity, war crimes and torture] if he:
   (a) intentionally permits the commission of such an offence by a subordinate;
   (b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence.
2. Anyone who culpably neglects to take measures, in so far as these are necessary and can be expected of him, where he has reasonable grounds for suspecting that a subordinate has committed or intends to commit such an offence, shall be liable to no more than two-thirds of the maximum of the principal sentences prescribed for the offences referred to in [Article] 2.[649]

642. Rwanda's Law Setting up Gacaca Jurisdictions aims:

to organize the putting on trial of persons prosecuted for having, between 1 October 1990 and 31 December 1994, committed acts qualified and punished by the Penal Code and which constitute: a) . . . crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by the [1949 GC IV and the Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity].[650]

It provides that:

The fact that any of the acts aimed at by this organic law has been committed by a subordinate does not free his superior from his criminal responsibility if he knew or could know that his subordinate was getting ready to commit this act or had done it and that the superior has not taken necessary and reasonable measures to punish the authors or prevent that the mentioned act be not committed when he had means.[651]

643. Spain's Military Criminal Code imposes a prison sentence on any military officer who does not maintain due discipline in the forces under his command, who tolerates any abuse of authority or power in his subordinates, or who does not take the necessary steps to prevent a military offence among those listed under "Offences against the Laws and Customs of War".[652]

644. According to the Report on the Practice of Spain, Article 11 of Spain's Penal Code, which provides for responsibility by omission, would be

[648] Netherlands, *Military Criminal Code as amended* (1964), Articles 148–149.
[649] Netherlands, *International Crimes Act* (2003), Article 9.
[650] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1.
[651] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 53(2).
[652] Spain, *Military Criminal Code* (1985), Article 137.

applicable in regard to the commander's duty to prevent breaches of the Geneva Conventions and AP I.[653]

645. Sweden's Penal Code as amended provides that "if a crime against international law has been committed by a member of the armed forces, his lawful superior shall also be sentenced in so far as he was able to foresee the crime but failed to perform his duty to prevent it".[654]

646. Ukraine's Criminal Code provides for a fine or imprisonment for the "intentional non-stopping of a crime committed by a subordinate", as well as for the failure by a military service official, who is an investigation authority, of carrying out investigations against a subordinate for alleged crimes.[655]

647. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I, establishing provisions for the punishment of a list of more specific offences and also of "all other offences against the laws or customs of war", provided for the punishment of "participation in a common plan or conspiracy to accomplish any of [these acts]" and stated that "leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy.[656]

648. Yemen's Military Criminal Code states that:

> In the case of the commission of any of the crimes set out under this chapter [i.e. war crimes], the commander . . . will be held responsible for the crime and will not be released from the punishment provided for, except if the acts have been committed against [his] choice, or without [his] knowledge, or if [he] did not have the possibility to prevent them.[657]

National Case-law

649. In the appeal in the *Military Junta case* in 1985, Argentina's Court of Appeal drew attention to the lack of investigations into and punishment of numerous proven acts, even though such acts had been the object of claims. Referring to the Geneva Conventions, the Court further pointed out that it was the responsibility of the commanders-in-chief of each party to ensure observance of the Conventions.[658]

650. In the *Boland case* in 1995 involving the beating and killing of a Somali detainee by two Canadian soldiers, a Canadian Court Martial Appeal Court, increasing the sentence upon the accused who had been the superior of the soldiers who directly committed the acts, stated that:

653 Report on the Practice of Spain, 1998, Chapter 6.7, referring to *Penal Code* (1995), Article 11.
654 Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.
655 Ukraine, *Criminal Code* (2001), Article 426.
656 US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.
657 Yemen, *Military Criminal Code* (1998), Article 23.
658 Argentina, Court of Appeal, *Military Junta case* (Appeal), 9 December 1985.

In his own examination in chief [the accused] confirmed on several occasions that he had been negligent. The sad but unalterable fact is that negligence led to the death of a prisoner. Even taking the view of the evidence most favorable to the respondent, the panel was bound to conclude that [the accused] had strong reason to be concerned about the conduct of [his subordinates] in respect of a helpless prisoner. Even if the panel believed he did not see [one of the subordinates] strike the prisoner on the first occasion and even if it concluded that [the accused] disbelieved [the] statement [of one of the subordinates] that [the other subordinate] had struck the prisoner after he, [the accused], had left, [the accused] had admitted that he considered [one of the subordinates] to be a "weak" soldier who could surely not be counted on to resist the initiatives [of the other subordinate]. He admitted having seen [one of the subordinates] do life-threatening acts to the prisoner by covering his nose and pouring water on him. He had subsequently heard [one of the subordinates] speak of intending to burn the prisoners with cigarettes. He thus had good grounds for apprehension as to [the] conduct [of one of the subordinates]. There was also evidence from even some defence witnesses that [the] reputation [of one of the subordinates] was well known. Yet, it was clear that [the accused] had said at least once and probably twice in the presence of [one of the subordinates]: "I don't care what you do, just don't kill the guy". He gave no proper order to [one of the subordinates] as to safeguarding the prisoner and left him unsupervised. Nor was it in dispute that it was [the accused's] responsibility to take all reasonable steps to see that the prisoner was held in a proper manner. [The accused] failed in the duty, with grave consequences.

I see nothing in the instructions of the Judge Advocate, nor in the sentence, to indicate the General Court Martial had a proper regard to the fundamental public policy which underlies the duty of a senior non-commissioned officer to safeguard the person or life of a civilian who is a prisoner of Canadian Forces, particularly from apprehended brutality or torture at the hands of our own troops. That is this case . . . No one can dispute the difficult and sometimes hazardous circumstances under which Canadian Forces were operating in Somalia in general, nor the physical problems which [the accused] himself was experiencing at this time. Nevertheless these circumstances call for the exercise of greater rather than less discipline particularly on the part of those in command of others.[659]

651. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 involving the question of criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for having negligently performed a military duty, the majority of the Court of Appeal stated that:

The standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation. An emergency, or the heightened state of apprehension or urgency caused by the threats to the security of Canadian Armed Forces personnel or their material might mandate a more flexible standard than that expected in relatively non-threatening

[659] Canada, Court Martial Appeal Court, *Boland case*, Judgement, 16 May 1995.

scenarios. Furthermore, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to the same exacting standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer.
...
In closing, I would remark that ... it remains open to the chief of defence staff to define in more explicit terms the standards of conduct expected of soldiers in respect of prisoners who are in Canadian Forces custody. It is open to the chief of defence staff to ... impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge ... This might prove a useful undertaking.[660]

652. In its judgement in the *Superior Orders case* in 1953, the German Federal Supreme Court held that the superior giving an illegal order would be primarily responsible for it.[661]

653. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Colonel Mengistu Haile Mariam and former members of the Derg for allegedly committing crimes against humanity and war crimes during the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply to the objection filed by counsels for the defendants, referred, *inter alia*, to the 1919 Treaty of Versailles, to the 1945 IMT Charter (Nuremberg) and Nuremberg trials and to the 1993 ICTY Statute. He stated that:

Heads of State and other higher responsible government officials in any form of government are all required and obliged to know international crimes thereunder. They are also obliged to prevent the commission of these acts [i.e. of international crimes] and to ensure the observance of the international norms.[662]

654. In the indictment in the *Abilio Soares case* in 2002 dealing with events that occurred in East Timor in 1999 before the creation of the Ad Hoc Human Rights Tribunal for East Timor in Indonesia, the defendant, the former governor of East Timor, was charged with knowing about or deliberately ignoring

information that obviously showed that his subordinates ... were committing or had just committed serious human rights abuses in the form of murder committed in a widespread or systematic fashion, and directed against pro-independence civilians. In this case, the defendant, as Governor and Head of Government in East Timor Province ... who was responsible for all aspects of social, political, economic, and cultural life as well as for upholding law and maintaining order, did not conduct or did not take any appropriate steps such as to coordinate with security forces in preventing or quelling the actions of his subordinates, nor did he turn them over to

[660] Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.
[661] Germany, Federal Supreme Court, *Superior Orders case*, Judgement, 19 March 1953.
[662] Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 1.6.

responsible authorities to be investigated, questioned, and prosecuted, which then resulted in attack against civilians.[663]

In its sentencing judgement, the Tribunal, assuming that "in East Timor there was an internal armed conflict so [that] the rules regarding war crimes as stipulated in common article 3 of the Geneva Conventions can be applied", stated that:

Having considered that according to Article 86 [AP I] a superior is obliged to make an effective reporting system to ensure that his/her subordinate is conducting his/her duties in accordance with the international humanitarian law rules, and if he/she knows that there is a potential violation, or if there is an actual violation that just had been committed by the subordinate, so the superior should be held responsible for gross violations of Human Rights that are committed by his/her subordinate, if:
- the superior knows that his/her subordinate has committed or is going to commit gross violations of human rights; or
- the superior had the information which enabled him/her to conclude that his/her subordinate has committed or was going to commit gross violations of human rights; or
- the superior did not take action under his/her authority to prevent the said gross violations of human rights.[664]

655. In its judgement in the *Schintlholzer case* in 1988, Italy's Military Tribunal at Verona, with regard to the accused's responsibility for the acts committed by soldiers under his command, stated that these acts were in conformity with:

systematic activity which cannot as such be explained as the unusual and unforeseeable outcome of spontaneous actions by the combatants, but only as the expression of acts which specifically comply with (and put into effect) orders issued by the Commander [the accused] of the combat unit.

It should therefore be considered that in this case the person of the Commander who has operational and not hierarchical responsibility is a necessary point of reference and reflects the ad hoc organizational structure of composite combat units which, like the "Schintlholzer" combat unit, appear to be formed, used and intended solely for the purpose of a single military operation. This is perfectly consistent with the conviction that evidence of the effective causal contribution which can be attributed to Schintlholzer, at least on the conceptual level, has been obtained, as regards the undoubted contribution of the accused to the decision as to how the distressing facts to which the case relates should be put into effect ...

It is ... hardly necessary to point out even in this connection that if it was ever possible to establish any collateral responsibility by known or unknown SS officials at an operating level, this would not in any way raise any questions about the responsibility of Schintlholzer, which has been proven at this level and in the context which has to be assessed here and now. Thus, as far as criminal intent is

[663] Indonesia, Ad Hoc Tribunal on Human Rights for East Timor, *Abilio Soares case*, Indictment, 19 February 2002.
[664] Indonesia, Ad Hoc Tribunal on Human Rights for East Timor, *Abilio Soares case*, Judgement, 14 August 2002.

concerned, evidence of awareness of the unlawful nature of the conduct involved in the barbaric images described in the preliminary reconstruction of the facts would appear to have been acquired.[665]

656. In the *Rauer case* in 1946, the British Military Court at Wuppertal found that none of the accused, among which were Major Rauer and other commanding officers, could be tried for having given an order to kill POWs for lack of evidence. However, it tried the accused for being guilty of "being concerned in the killing of the prisoners".[666]

657. In its judgement in the *Von Leeb (The High Command Trial) case* in 1947/48 relative to the duty of commanders in occupied territory, the US Military Tribunal at Nuremberg, under the heading "Responsibility of a Commanding Officer for Acts not Ordered by Him", stated that:

Criminality does not attach to every individual in [the] chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to [the commander] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.[667]

However, the Tribunal also noted that:

It is the opinion of this Tribunal that a State can, as to certain matters, under International Law, limit the exercise of sovereign powers by a military commander in an occupied area, but we are also of the opinion that under International Law and accepted usages of civilized nations, that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area . . . The situation is somewhat analogous to the accepted principle of International Law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.[668]

658. In its judgement in the *List (Hostages Trial) case* in 1947/48, the US Military Tribunal at Nuremberg stated that:

We have herein before pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crimes and protect lives and property. This duty extends not only to inhabitants of the occupied territory but to his own troops and auxiliaries as well . . . The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence . . . Those responsible for such crimes [i.e. violations of the 1907 HR] by ordering or authorising

[665] Italy, Military Tribunal at Verona, *Schintlholzer case*, Judgement, 15 November 1988.
[666] UK, Military Court at Wuppertal, *Rauer case*, Judgement, 18 February 1946.
[667] US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 30 December 1947–28 October 1948.
[668] US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 30 December 1947–28 October 1948.

their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if International Law is to be anything more than an ethical code, barren of any practical coercive deterrent.[669]

With regard to the accused, a high-ranking officer charged with murder and deportation of civilians, the Tribunal stated that:

Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility . . . [A] commanding general of occupied territory cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators.[670]

659. In the *Yamashita case* in 1946 involving the trial of the military governor and commanding general of Japan in the Philippines between 9 October 1944 and 2 September 1945, the US Supreme Court was called upon to decide whether the accused could be held responsible for the violations of IHL committed by the troops under his command. The charge alleged that the accused, even though he did not commit or direct the commission of the acts,

while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war.[671]

The Court, in upholding the finding of guilt by the Military Commission in Manila, emphasised that:

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence, the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.[672]

669 US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.
670 US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.
671 US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.
672 US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.

The Court based its decision on Article 1 of the 1907 HR, Article 19 of the 1907 Hague Convention (X), Article 26 of the 1929 GC and Article 43 of the 1907 HR and stated that:

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.[673]

One of the judges, in his dissenting opinion, discussed the problem of finding upon a commander's guilt in the case where the troops of a commander commit war crimes while under heavily adverse battle conditions. The judge stated that:

There are numerous instances, especially with reference to the Philippines insurrection in 1900 and 1901, where commanding officers were found to have violated the laws of war by specifically ordering members of their command to commit atrocities and other war crimes . . . And in other cases officers have been held liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power . . . In no recorded instance, however, has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war . . . No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different . . . The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice.[674]

Another judge, in his dissenting opinion, referred to the first dissenting opinion and stated that he had "discussed the charge with respect to the substance of the crime. With his conclusions in this respect I agree." He further stressed that the findings on evidence did not suffice legal requirements:

There is no suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents . . . Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the commission so found, are in the statement that "crimes alleged to have been permitted by the accused in violation of the laws of war may be grouped into three categories" set out below. In the further statement that "the prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by" him; and in the conclusions of guilt and the sentence. Indeed, the

673 US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.
674 US, Supreme Court, *Yamashita case*, Dissenting opinion of Mr. Justice Murphy, 4 February 1946.

commission's ultimate findings draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner "failed to provide effective control . . . as was required by the circumstances" . . . In the state of things petitioner has been convicted of a crime in which knowledge is an essential element.[675]

660. In its judgement in the *Karadžić case* in 1995, the US Court of Appeals for the Second Circuit, recalling the judgement in the *Yamashita case*, stated that "international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities [i.e. war crimes]".[676]

661. In the *Ford v. García case* in 2000, a civil lawsuit dealing with acts of torture and extrajudicial killing committed in 1980 in El Salvador, the US Federal Court of Florida gave instructions to the jury on the issue of the responsibility of commanders which read as follows:

A commander may be held liable for torture and extrajudicial killing committed by troops under his command under two separate legal theories. The first applies when a commander takes a positive act, *i.e.*, he orders torture and extrajudicial killing or actually participates in it. The second legal theory applies when a commander fails to take appropriate action to control his troops. This is called the doctrine of command responsibility . . . The doctrine of command responsibility is founded on the principle that a military commander is obligated, under international law and United States law, to take appropriate measures within his power to control the troops under his command and prevent them from committing torture and extrajudicial killing . . .

To hold a specific defendant/commander liable under the doctrine of command responsibility, each plaintiff must prove all of the following elements by a preponderance of the evidence.

(1) That persons under defendant's effective command *had committed*, were committing, or were about to commit torture and extrajudicial killing, and
(2) The defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command *had committed*, were committing, or were about to commit torture and extrajudicial killing; and
(3) The defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing, or failed to investigate the events in an effort to punish the perpetrators.

"Effective command" means the commander has the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control.

A commander may be relieved of the duty to investigate or to punish wrongdoers if a higher military or civilian authority establishes a mechanism to identify and punish the wrongdoers. In such a situation, the commander must do nothing to impede nor frustrate the investigation.

675 US, Supreme Court, *Yamashita case*, Dissenting opinion of Mr. Justice Rutledge, 4 February 1946.
676 US, Court of Appeals for the Second Circuit, *Karadžić case*, Judgement, 13 October 1995.

A commander may fulfil his duty to investigate and punish wrongdoers if he delegates this duty to a responsible subordinate. A commander has the right to assume that assignments entrusted to a responsible subordinate will be properly executed. On the other hand, the duty to investigate and punish will not be fulfilled if the commander knows or reasonably should know that the subordinate will not carry out his assignment in good faith, or if the commander impedes or frustrates the investigation.[677] [emphasis in original]

662. In the *Trajković case* in 2001, a Kosovo Serb and former chief of police was convicted, *inter alia*, of war crimes "against the civilian population and within a concerted plan aiming at systematic atrocities of which he had a complete knowledge". The Court based its judgement on Article 142 of the Penal Code of the SFRY (FRY) and noted that the acts had been committed "in time of war".[678] However, on appeal of the accused, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial. The Supreme Court found that:

The state of facts was erroneously established in relation to all charges as there is no direct or conclusive evidence that the accused acted personally or gave orders leading to the alleged crimes or that he should be held liable under command responsibility duties concerning the above-mentioned crimes . . . During the retrial, the court of first instance should therefore assess . . . the issue of the accused['s] personal responsibility [for] participation in the crimes alleged.[679]

In a written opinion concerning this case, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

Trajković's war crimes conviction [at the District Court of Gnjilan] based upon murder was apparently through his command responsibility, since there was no credible evidence based on any factual basis that he gave direct orders to do, or personally participated in, these acts . . . Trajković could be found guilty of war crimes under international law through his command responsibility. [Furthermore,] Trajković could have been found guilty through the doctrine of command influence of violating international law for the "grave" injuries to . . . non-combatants . . . [Furthermore,] the trial court found Trajković guilty of a war crime for arson [as a direct result of the police and military attack on the village] committed against the home . . . and bus of . . . but again it must be implied that the liability was from command responsibility . . .

The issue of command responsibility must be dealt with alongside that of individual/personal responsibility ("The Subsuming Rule") . . . This Opinion assumes the court below relied on the command responsibility coming directly from being at the top of a hierarchy of police officers, even if the giving of orders to murder and shoot did not occur. This Opinion then concludes that as to his being responsible under the type of command responsibility – based on evidence of control over subordinates, knowledge of their crimes, and ability and failure to prevent

[677] US, Federal Court of Florida, *Ford v. García case*, Judgement, 3 November 2000.
[678] SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.
[679] SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.

or punish them – Momcilo Trajković may be liable under such command responsibility. His official position of authority over subordinate . . . policemen, buttressed by evidence of his actual authority over them and in the community in general; his possible knowledge of subordinates' crimes; and his obvious failure to prevent and punish them bolster a finding of command responsibility for the acts of policemen under him.[680]

The International Prosecutor for the Office of the Public Prosecutor of Kosovo further pointed out the relation between individual responsibility and command responsibility and set forth, in a detailed way, the "requirements for findings of some individual responsibility in the context of determining command responsibility".[681]

Other National Practice

663. At the CDDH, Argentina stated that "a superior, indeed, should always have knowledge of any breach committed by his subordinates, in order to repress it" and that "if a superior knew of preparations for an act liable to constitute a breach, he was obviously responsible".[682]

664. The Report on the Practice of Argentina notes that in the trial of the commanders which was brought to determine responsibility for the 1982 events in the Falkland/Malvinas Islands, the National Court for Criminal and Correctional Cases "emphasized that the powers accorded to the command by the Code of Military Justice to enhance organisation within the military, including the authority to decide when immediate punishment for crimes is necessary, are [optional] in nature".[683]

665. In 1984, in an assessment of the military implications of the Additional Protocols, Australia's Joint Military Operations and Plans Division, stated that Article 87(1) AP I:

imposes upon commanders the additional responsibility to prevent and, where necessary, to suppress and to report all breaches of the Geneva Conventions and its Protocols. This requires that the constraints imposed by the Protocols and the law of armed conflict generally are understood and reflected in the conduct of operations by every level of military authority.[684]

[680] SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections III(B)(2)(a), (b) and (c) and IV.

[681] SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Section IV.

[682] Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.50, 4 May 1976, §§ 56 and 57.

[683] Report on the Practice of Argentina, 1997, Chapter 6.7, referring to the action brought by Decree 2971/83 for Presumed Infractions, as stipulated by the *Code of Military Justice* and described in the legal proceedings and report by the Commission for the analysis and evaluation of the political responsibilities and military strategy of the armed conflict in the South Atlantic, National Court for Criminal and Correctional Cases in full session, 4 November 1988, Sheet 11.360.

[684] Australia, Joint Military Operations and Plans Division, Assessment of the Military Implications of the Protocols Additional to the Geneva Conventions of 1949, Series No. AA-A1838/376, File No. AA-1710/10/3/1 Pt 2, September 1984, § 10.

666. A Belgian manual containing directives for commanders notes that military discipline "grants respect for human rights and especially for the obligations required by the Geneva Convention".[685]

667. The Report on the Practice of Bosnia and Herzegovina states that "the superior officer is obliged to instigate proceedings for taking legal sanctions against the persons violating the rules of the international law of war".[686]

668. According to Ethiopia's Office of the Special Public Prosecutor (SPO), which is in charge of prosecuting persons who allegedly committed crimes of genocide, crimes against humanity and war crimes between 1974 and 1991, since its establishment in 1992 by Proclamation 22/1992 of the transitional government of Ethiopia, by 1997 a total of 5,198 persons had been charged, of whom 2,433 were field commanders, "those who transmitted the orders of the [policy- and decision-makers] and also originated fresh orders of their own". The charges were based on Ethiopia's Penal Code.[687]

669. In 1997, the final report of the Italian Government Commission of Inquiry into the events in Somalia referred to a provision of the Italian Penal Code in recalling that an officer who failed to control dutifully his subordinates could be responsible not only under disciplinary law, but also under criminal law.[688]

670. According to the Report on the Practice of Jordan, under Jordanian law, "no sanctions are envisaged against a commander who neglects to give the necessary instruction or permits shortcomings in the required supervisions, if grave breaches occur in his area of command".[689]

671. At the CDDH, the Netherlands stated that:

> Recognition in written international law of individual responsibility of superiors who, without excuse, failed to do all in their power to prevent the commission of war crimes by their subordinates supplemented the principle contained in article 77 [of draft AP I], according to which subordinates were individually responsible for war crimes which they had committed, even when acting under superior orders.
> ...
> The principle set out in article 76 [of draft AP I] was not a new one. Although it did not appear in the Charter and the Judgement of the Nürnberg tribunal it had nevertheless played an important part in post-war jurisprudence.
> ...
> Nevertheless, it was difficult to specify the limits of responsibility in cases of failure to act, and the courts would reach their decision in each case only after taking into account all the relevant facts, even though the principle of individual responsibility was now recognized by a great number of States.[690]

685 Belgium, Etat-major Général, *L'exercice du commandement. Directives pour un leadership moderne dans les forces armées*, 1998, p. 41.
686 Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.6.
687 Ethiopia, Office of the Special Public Prosecutor, Statement of the Chief Special Public Prosecutor, Addis Ababa, 13 February 1997.
688 Italy, Government Commission of Inquiry, Final report into the events in Somalia, 8 August 1997, p. 34.
689 Report on the Practice of Jordan, 1997, Chapter 6.7.
690 Netherlands, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.50, 4 May 1976, §§ 31–32 and 35.

672. In 1988, in a memorandum on "Respect for Human Rights and Improvement of Discipline in the AFP" addressed to the AFP Chief of Staff, the Department of National Defence of the Philippines reiterated that:

The [Department of National Defence's] long standing directive to take the necessary bold steps to weed out and punish, as warranted by proper investigation, not only the military personnel who directly commit the acts complained, but also, with equal vigor, the commanders who countenance such abuse by way of summarily dropping the case, intimidating the complainant and his witnesses "cover-up" of the incidents, failure to report to superior authorities, and/or sheer inaction on the complaint. I would also like to re-stress the instruction that "the commanding officer of an erring military personnel shall be similarly held accountable either as conduct unbecoming an officer or as accessory after the fact in cases where he refuses to act, delays action or otherwise aids and abets the wrongdoing of his subordinate which is the subject of a valid complaint.[691]

673. The Guidelines on Human Rights and Improvement of Discipline in the AFP, issued in 1989 by the Office of the Chief of Staff of the armed forces of the Philippines, provides that:

Commanders who are proven through due process to have countenanced human rights abuses by way of summarily dropping complaints, intimidating the complainant and/or witnesses, "cover-up" of the incidents, failure to report to superiors, and/or shows inaction on the complaint, shall be held accountable either as conduct unbecoming an officer or as accessory.

Commanders of Major Services, Area Commanders and AFPWSSUS shall devise a system which offers investigators and prosecutors convenient means of identifying and prosecuting personnel engaged in gun-for-hire or protection racket, extortion, condonation of vices, and other felonious activities designed to discredit the government in general and the AFP in particular.[692]

674. The Philippine press has reported several cases in which commanding officers were relieved of their duties or accused on the basis of command responsibility.[693]

[691] Philippines, Department of National Defence, Secretary, Memorandum to the AFP Chief of Staff on Respect for Human Rights and Improvement of Discipline in the AFP, 1 December 1988.

[692] Philippines, Ministry of National Defence, Office of the Chief of Staff, Guidelines on Human Rights and Improvement of Discipline in the AFP, 2 January 1989, § 2(1) and (2).

[693] *Manila Bulletin*, "Basilan Officer Relieved", 29 September 1995; *Today*, "Cotabato Folk Denounce Slay of Non-combatants", 20 March 1997; *Today*, "Prosecution of Army Brass Involved in Shelling Urged", 30 March 1997; *Today*, "Relieve Buldon Officers", 2 April 1997 (as a result of the CHR's investigation, a Vice Governor demanded the relief of military commanders responsible for the death of 11 civilians); *Today*, "Military Washes its Hands of Buldon Carnage: CHR Stung by AFP Rejection", 12 April 1997, p. 12. (The report on the incident by the Philippine Commission on Human Rights (CHR) blamed the military for the bombing of a school. The armed forces, however, rejected these findings. To finally resolve the issue, the CHR and the AFP agreed to form an independent body to conduct an investigation.)

675. In 1992, in a note verbale with respect to the implementation of Security Council Resolution 780 (1992), Slovenia stated that:

Not only those who have directly committed the crimes [i.e. "crimes committed against humanity and international humanitarian law"], but also those who gave orders or were otherwise engaged, should be prosecuted as perpetrators. Such consistent approach of the United Nations Commission of Experts would also include the question of the criminal responsibility of numerous high military officers and politicians; this would be in accordance with international criminal law and to date practice, especially the one applied in the Nuremberg trials.[694]

676. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Criminal responsibility for violations of the law of war rests with a commander, including the national leadership, if he (or she):

- Orders or permits the offence to be committed, or
- Knew or should have known of the offence(s), had the means to prevent or halt them, and failed to do all which he was capable of doing to prevent the offences or their recurrence.

...

The crimes committed against Kuwaiti civilians and property, and against third party nationals, are offences for which Saddam Hussein, officials of the Ba'ath Party, and his subordinates bear direct responsibility. However, the principal responsibility rests with Saddam Hussein. Saddam Hussein's C2 of Iraqi military and security forces appeared to be total and unequivocal. There is substantial evidence that each act alleged was taken as a result of his orders, or was taken with his knowledge and approval, or was an act which he should have known.[695]

677. In 1992, the US report on Iraqi war crimes (Desert Shield/Desert Storm), prepared under the auspices of the US Secretary of the Army, noted that "criminal responsibility for violations of the law of war rests with a commander, including the national leadership, who ... knew or should have known of the offences, had the means to prevent or halt them, and failed to do all which he or she was capable of doing to prevent the offences or their recurrence".[696]

678. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that:

With respect to paragraph 1 of Article 7 [of the 1993 ICTY Statute], it is our understanding that individual responsibility arises in the case of ... the failure of a

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

[695] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 633–634.

[696] US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, p. 13.

superior – whether political or military – to take reasonable steps to prevent or punish [violations of IHL] by persons under his or her authority.[697]

III. Practice of International Organisations and Conferences

United Nations

679. In 1995, in a statement by its President regarding the conflict in Bosnia and Herzegovina, the UN Security Council reaffirmed "its condemnation of all violations of international humanitarian law" and reiterated "to all concerned that those who have committed or ordered the commission of such acts will be held individually responsible in respect of such acts". It reminded "the military and political leaders of the Bosnian Serb party that this responsibility extends to any such acts committed by forces under their command".[698]

680. In a resolution adopted in 1993 with respect to the former Yugoslavia, the UN General Assembly stated that "those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable together with the perpetrators".[699] In subsequent resolutions on the same subject adopted in 1995 and 1996, the UN General Assembly reiterated this view.[700]

681. In a resolution adopted in 1994 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that:

> All persons who perpetrate or authorize crimes against humanity or other violations of international law are individually responsible for those violations and . . . those in positions of authority who have failed to ensure that persons under their control comply with the relevant international instruments are accountable, together with the perpetrators.[701]

682. In a resolution on civil defence forces adopted in 1994, the UN Commission on Human Rights recommended that:

> whenever armed civil defence forces are created to protect the civilian population, Governments establish, where appropriate, minimum legal requirements for them, within the framework of domestic law, including the following:
>
> . . .
>
> (d) Commanders shall have clear responsibility for their activities;
>
> (e) Civil defence forces and their commanders shall be clearly accountable for their activities.[702]

[697] US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 16.
[698] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/33, 20 July 1995.
[699] UN General Assembly, Res. 48/143, 20 December 1993, § 5.
[700] UN General Assembly, Res. 50/192, 22 December 1995, § 4; Res. 51/115, 12 December 1996, § 4.
[701] UN General Assembly, Res. 49/205, 23 December 1994, § 6.
[702] UN Commission on Human Rights, Res. 1994/67, 9 March 1994, § 2.

683. In a resolution adopted in 1994 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that:

All persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and . . . those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable together with the perpetrators.[703]

684. In a resolution adopted in 1993 on punishment of the crime of genocide, the UN Sub-Commission on Human Rights affirmed that:

All persons who perpetrate or authorize the commission of genocide and related crimes are individually responsible for such actions and . . . those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant principles of international law are accountable along with the perpetrators.[704]

685. In 1993, in his report on the draft Statute of the ICTY, the UN Secretary-General's stated that a person in a position of superior authority

should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit crimes or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[705]

686. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General noted, on the issue of the personal jurisdiction of the Court, that:

While those "most responsible" obviously include the political and military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.[706]

687. In 1997, in the recommendations of his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights called upon the *de facto* authorities in Burundi:

[703] UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 5.
[704] UN Sub-Commission on Human Rights, Res. 1993/8, 20 August 1993, § 1.
[705] UN Secretary-General, Report pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, § 56.
[706] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 30.

to establish a firm chain of command within the army and the security forces, so that senior officers bear real responsibility for abusive acts committed by their subordinates. Military personnel, whether commissioned or noncommissioned officers, should be stripped of their rank when their involvement in such acts has been proved.[707]

688. In 1998, in her final report submitted to the UN Sub-Commission on Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Commission on Human Rights concluded that:

Individual perpetrators of slavery, crimes against humanity, genocide, torture and war crimes – whether State or non-State actors – must be held responsible for their crimes at the international level, depending on the circumstances of the case and on the capacity and availability of forums to adjudicate fairly and dispense justice adequately. A strict application of the international legal standards for command responsibility, which apply to all authorities within a given chain of command, may prevent future sexual or gender violence in conflict situations and will serve the goals of protection, enforcement and deterrence.[708]

689. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had addressed the issue of command responsibility in its first interim report as follows:

Superiors are . . . individually responsible for a war crime or crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act.[709]

The Commission noted with satisfaction that Article 7 of the 1993 ICTY Statute used an essentially similar formulation.[710] It further stated that:

> 58. It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein . . .

[707] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 93.
[708] UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 113.
[709] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 55.
[710] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 56.

59. The military commander is not absolutely responsible for all offences committed by his subordinates. Isolated offences may be committed of which he has no knowledge or control whatsoever . . . The arguments that a commander has a weak personality or that the troops assigned to him are uncontrollable are invalid. In particular, a military commander who is assigned command and control over armed combatant groups which have engaged in war crimes in the past should refrain from employing such groups in combat, until they clearly demonstrate their intention and capability to comply with the law in the future.
60. Lastly, a military commander has the duty to punish or discipline those under his command whom he knows or has reasonable grounds to know committed a violation.[711]

With respect to practices of "ethnic cleansing", sexual assault and rape during the conflict in the former Yugoslavia which, according to the Commission, would seem to have been carried out by some parties to the conflict "so systematically that they strongly appear to be the product of a policy", the Commission noted that:

313. . . . The consistent failure to prevent the commission of such crimes and the consistent failure to prosecute and punish the perpetrators of these crimes, clearly evidences the existence of a policy by omission. The consequence of this conclusion is that command responsibility can be established.
314. Knowledge of these grave breaches and violations of international humanitarian law can reasonably be inferred from consistent and repeated practices.[712]

690. In its 1993 report, the UN Commission on the Truth for El Salvador examined a case involving the execution of ten detained persons. The Commission found that:

7. There is sufficient evidence that [the superiors] knew about the order to execute the detainees and did nothing to prevent their execution.
8. There is substantial evidence that the Honour Commission of the armed forces, the Commission for the Investigation of Criminal Acts and the judge of the Criminal Court of First Instance of the city of San Sebastián failed to take steps to determine the responsibility of [the superiors].[713]

Other International Organisations

691. In a resolution adopted in 1992, the OIC Conference of Ministers of Foreign Affairs stated that it held

the Serb leaders, those in Belgrade as well as those in the Republic of Bosnia-Herzegovina, responsible for the atrocities committed by the Yugoslav

[711] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 58–59.
[712] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 313–314.
[713] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 86.

National Army and Serb irregular forces against Muslims and Croats of Bosnia-Herzegovina . . . and recalls that they will be considered guilty of war crimes.[714]

International Conferences

692. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on "all States to remind military commanders that they are required . . . to make every effort to ensure that no violations [of IHL] are committed and, where necessary, to punish or report any violations to the authorities".[715]

IV. Practice of International Judicial and Quasi-judicial Bodies

693. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), with respect to responsibility for war crimes against prisoners, stated that:

Responsibility for the care of prisoners of war and of civilians internees (all of whom we will refer to as "prisoners") . . . is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the Government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general, the responsibility for prisoners held by Japan may be stated to have rested upon:

(1) Members of the Government;
(2) Military or Naval Officers in command of formations having prisoners in their possession;
(3) Officials in those departments which were concerned with the well-being of prisoners;
(4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the

[714] OIC, Conference of Ministers of Foreign Affairs, Fifth Extraordinary Session, 17–18 June 1992, Res. 1/5-EX, § 15.

[715] 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(e).

continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners, if:

(1) They fail to establish such a system.
(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
(2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further inquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes . . . and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.[716]

[716] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter II(b).

In the part of the judgement dealing with "conventional war crimes (atrocities)", the IMT (Tokyo) stated that:

The Japanese Government condoned ill-treatment of prisoners of war and civilian internees by failing and neglecting to punish those guilty of ill-treating them or by prescribing trifling and inadequate penalties for the offence. [Various examples] are evidence that the War Ministry knew there was ill-treatment of prisoners. The trifling nature of the punishments imposed implies condonation. The Government actively concealed the ill-treatment to which prisoners of war and civilian internees were subjected by refusing visits by representatives of the Protecting Power designated by the Allies.[717]

694. In the *case of the Major War Criminals* before the IMT (Tokyo) in 1948, the then Japanese Foreign Minister, Koki Hirota, was held criminally responsible in relation to the so-called "Rape of Nanking" or "Nanking massacre" which had occurred in 1937/1938. The IMT stated that:

As Foreign Minister [Hirota] received reports of these atrocities immediately after the entry of Japanese forces into Nanking. According to the Defence evidence credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that the atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. The Tribunal is of the opinion that HIROTA was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.[718]

695. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on a Japanese commander during the Second World War, Heitaro Kimura, stated that:

With knowledge of the extent of the atrocities committed by Japanese troops in all theatres of war, in August 1994 KIMURA took over command of the Burma Area Army. From the date of his arrival at his Rangoon Headquarters and later . . . the atrocities continued to be committed on an undiminished scale. He took no disciplinary measures or other steps to prevent the commission of atrocities by the troops under his command.

It has been urged in KIMURA's defence that when he arrived in Burma he issued orders to his troops to conduct themselves in a proper soldierly manner and to refrain from ill-treating prisoners. In view of the nature and extent of the ill-treatment of prisoners, in many cases on a large scale within a few miles of his headquarters, the Tribunal finds that KIMURA was negligent in his duty to enforce the Rules of

[717] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter VIII.

[718] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

War. The duty of an Army commander in such circumstances is not discharged by the mere issue of routine orders, if indeed such orders were issued. His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.[719]

696. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on a Japanese Prime Minister during the Second World War, Kuniaki Koiso, stated that:

When KOISO became Prime Minister in 1944 atrocities and other war crimes being committed by the Japanese troops in every theatre of war had become so notorious that it is improbable that a man in KOISO's position would not have been well-informed either by reason of their notoriety or from interdepartmental communications. The matter is put beyond doubt by the fact that in October 1944 the Foreign Minister reported to a meeting of the Supreme Council for the Direction of War, which KOISO attended, that according to recent information from enemy sources it was reported that the Japanese treatment of prisoners of war "left much to be desired". He further stated that this was a matter of importance from the point of view of Japan's international reputation and future relations. He asked that directions be issued to the competent authorities so that the matters might be fully discussed. Thereafter KOISO remained Prime Minister for six months during which the Japanese treatment of prisoners and internees showed no improvement whatever. This amounted to a deliberate disregard of duty.[720]

697. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on the Japanese Commander-in-Chief of the Central China Area Army, Iwane Matsui during the "Rape of Nanking" or "Nanking massacres", stated that:

From his own observations and from the reports of his staff he must have been aware of what was happening. He admits he was told of some degree of misbehaviour of his Army . . . Daily reports of these atrocities were made to Japanese diplomatic representatives in Nanking who, in turn, reported them to Tokyo. The tribunal is satisfied that MATSUI knew what was happening. He did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known, and as he must have known. It was pleaded on his behalf that at this time he was ill. His illness was not sufficient to prevent his conducting the military operations of his command nor to prevent his visiting the City for days while these atrocities were occurring. He was in command of the Army responsible for these happenings. He knew of them. He had the power, as he had the duty, to control his troops and to protect

[719] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).
[720] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge his duty.[721]

698. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on an officer of staff of the Japanese Commander-in-Chief of the Central China Area Army during the "Rape of Nanking" or "Nanking massacres", Akira Muto, stated that:

It was during [his period as an officer of staff of MATSUI] that shocking atrocities were committed by the Army of MATSUI in and about Nanking. We have no doubt that MUTO knew, as MATSUI knew, that these atrocities were being committed over a period of many weeks. His superior did take no adequate steps to stop them. MUTO is not responsible for this dreadful affair.

[Later] MUTO commanded the Second Imperial Guards Division in Northern Sumatra. During this period in the area occupied by his troops widespread atrocities were committed for which MUTO shares responsibility. Prisoners of war and civilian internees were starved, neglected, tortured and murdered and civilians were massacred.

[Later], MUTO became Chief-of-Staff to Yamashita in the Philippines . . . His position was now very different from that which he held during the so-called "Rape of Nanking". He was now in a position to influence policy. During his tenure of office as such Chief-of-Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population, and prisoners of war and civilian internees were starved, tortured and murdered. MUTO shares responsibility for these gross breaches of the Laws of War. We reject his defense that he knew nothing of these occurrences.[722]

699. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on one of the Japanese Foreign Ministers during the Second World War, Mamoru Shigemitsu, stated that:

We do no injustice to SHIGEMITSU when we hold that the circumstances, as he knew them made him suspicious that the treatment of the prisoners was not as it should have been. Indeed a witness gave evidence for him to that effect. Thereupon he took no adequate steps to have the matter investigated, although he, as a member of the government, bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.[723]

700. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on one of the Japanese Prime Ministers during the Second World War, Hideki Tojo, stated, *inter alia*, that:

The barbarous treatment of prisoners and internees was well known to TOJO. He took no adequate steps to punish offenders and to prevent the commission of similar

[721] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).
[722] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4-12 November 1948, Chapter X (Verdicts).
[723] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

offences in the future. His attitude towards the Bataan Death March gives the key to his conduct towards these captives. He knew in 1942 something of the conditions of the march and that many prisoners had died as a result of these conditions. He did not call for a report on the incident. When in the Philippines in 1943 he made perfunctory inquiries about the march but took no action. No one was punished. His explanation is that the commander of a Japanese Army in the field is given a mission in the performance of which he is not subject to specific orders from Tokyo. Thus the head of the Government of Japan knowingly and wilfully refused to perform the duty which lay upon that Government of enforcing performance of the Laws of War.[724]

701. In the *Toyoda case* in 1949, an International Military Tribunal at Tokyo considered the essential elements of command responsibility to be:

1. That offenses, commonly recognized as atrocities, were committed by troops of his command;
2. The ordering of such atrocities.

In the absence of proof beyond reasonable doubt of the issuance of orders then the essential elements of command responsibility are:

1. As before, that atrocities were actually committed;
2. Notice of the commission thereof. This notice may be either:
   a. Actual, . . .
   b. Constructive . . .
3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.
4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war.
5. Failure to punish offenders.

In the simplest language, it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.[725]

702. In its judgement in the *Akayesu case* in 1998, the ICTR Trial Chamber stated that:

Article 6 (3) [of the 1994 ICTR Statute] . . . does not necessarily require that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such

[724] IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).
[725] International Military Tribunal at Tokyo, *Toyoda case*, Judgement, 6 September 1949.

acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention.[726]

The Trial Chamber further stated that:

Article 6 (3) of the [1994 ICTR] Statute deals with the responsibility of the superior, or command responsibility. This principle, which derives from the principle of individual criminal responsibility as applied in the Nuremberg and Tokyo trials, was subsequently codified in Article 86 of the Additional Protocol I to the Geneva Conventions of 8 June 1977.[727]

With regard to Article 6(3) of the 1994 ICTR Statute and referring to the ICRC Commentary on the Additional Protocols, the judgement of the IMT (Tokyo) in the *case of the Major War Criminals* (verdict against the Japanese Foreign Minister Koki Hirota) and the dissenting opinion of one of the judges in the same case, the Trial Chamber held that:

488. There are varying views regarding the *Mens rea* required for command responsibility. According to one view it derives from a legal rule of strict liability, that is, the superior is criminally responsible for acts committed by his subordinate, without it being necessary to prove the criminal intent of the superior. Another view holds that negligence which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement . . .
489. The Chamber holds that it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.
490. As to whether the form of individual criminal responsibility referred to Article 6 (3) of the Statute applies to persons in positions of both military and civilian authority, it should be noted that during the Tokyo trials, certain civilian authorities were convicted of war crimes under this principle . . .
491. The Chamber . . . finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6 (3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.[728]

703. In its judgement in the *Kayishema and Ruzindana case* in 1999, the ICTR Trial Chamber stated that:

[726] ICTR, *Akayesu case*, Judgement, 2 September 1998, § 479.
[727] ICTR, *Akayesu case*, Judgement, 2 September 1998, § 486.
[728] ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 488–491.

The question of responsibility arising from a duty to act, and any corresponding failure to execute such a duty is a question that is inextricably linked with the issue of command responsibility. This is because under Article 6(3) [of the 1994 ICTR Statute] a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime.[729]

With regard to Article 6(3) of the 1994 ICTR Statute and a possible responsibility thereunder of one of the accused, a former *prefet*, the Trial Chamber further stated that:

209. The principle of command responsibility is firmly established in international law, and its position as a principle of customary international law has recently been delineated by the ICTY in the [Judgement of 16 November 1998 in the *Delalić case*]. The clear recognition of this doctrine is now reflected in Article 28 of the [1998 ICC Statute].
210. The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive . . .
Responsibility of a Non-Military Commander
. . .
216. . . . The Chamber accepts the submission made by the Prosecution that a civilian in a position of authority may be liable under the doctrine of command responsibility. The Chamber will turn, therefore, to consider in what instances a civilian can be considered a superior for the purposes of Article 6(3), and the requisite "degree of authority" necessary to establish individual criminal culpability pursuant to this doctrine of superior responsibility.
Concept of Superior: de Jure and de Facto Control
217. This superior–subordinate relationship lies at the heart of the concept of command responsibility. The basis under which he assumes responsibility is that, if he knew or had reason to know that a crime may or had been committed, then he must take all measures necessary to prevent the crime or punish the perpetrators. If he does not take such actions that are within his power then, accordingly, he is culpable for those crimes committed . . .
218. In order to "pierce the veils of formalism" therefore, the Chamber must be prepared to look beyond the *de jure* powers enjoyed by the accused and consider the *de facto* authority he exercised within Kibuye during April to July 1994. The position expounded by the ILC that an individual should only be responsible for those crimes that were within his legitimate legal powers to prevent, does not assist the Trial Chamber in tackling the "realities of any given situation". Therefore, in view of the chaotic situation that which prevailed in Rwanda in these pivotal months of 1994, the Chamber must be free to consider whether Kayishema had the requisite control over those committing the atrocities to establish individual criminal liability under Article 6(3), whether by *de jure* or *de facto* command.
. . .
222. Article 6 of this Tribunal's Statute is formulated in a broad manner. By including responsibility of all government officials, all superiors and all those acting pursuant to orders, it is clearly designed to ensure that those who are culpable for

[729] ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, § 202.

the commission of a crime under Articles 2 to 4 of the Statute cannot escape responsibility through legalistic formalities. Therefore, the Chamber is under a duty, pursuant to Article 6(3), to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*.
223. Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to found command responsibility. The Chamber need only consider whether he knew or had reason to know and failed to prevent or punish the commission of the crimes if he did not in fact order them. If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.
224. However, in all other circumstances, the Chamber must give full consideration to the elements of "knowledge" and "failure to prevent and punish" that are set out in Article 6(3) of the Statute.
Knowledge of Subordinates' Actions
225. The *mens rea* in Article 6(3) requires that for a superior to be held criminally responsible for the conduct of his subordinates he must have known, or had reason to know, of their criminal activities . . .
. . .
228. The Trial Chamber agrees with this view insofar that it does not demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control. In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to the Geneva Conventions and [AP II], the Chamber finds that the Prosecution must prove that the accused in this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute.
Effective Control: Failure to Prevent or Punish a Crime
229. The principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3) . . .
. . .
231. . . . The ability to prevent and punish a crime is a question that is inherently linked with the given factual situation. Thus, only in light of the findings which follow and an examination of the overall conditions in which Kayishema had to operate as Prefect, can the Chamber consider who were the subordinates to Kayishema from April to July 1994 and whether he exercised the requisite degree of control over them in order to conclude whether he is individually criminally responsible for the atrocities committed by them.[730]

704. In the indictment in the *Mrkšić case* before the ICTY in 1995, the Prosecutor stated, with respect to the responsibility of the accused for the killing of 260 persons, that:

[730] ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, §§ 209–231.

Each of the accused is also or alternatively criminally responsible as a commander for the acts of his subordinates pursuant to Article 7(3) of the [1993 ICTY] Statute. Command criminal responsibility is the responsibility of a superior officer for the acts of his subordinate if he knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[731]

705. In the review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber stated that:

The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes.[732]

706. In the review of the indictments in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber found, in the light of the analysis of the institutional functions and the effective exercise of power by the two accused, that:

The conditions for the responsibility of superiors under Article 7(3) of the Statute, that is those constituting criminal negligence of superiors, have unquestionably been fulfilled:

- the Bosnian Serb military and police forces committing the offences alleged were under the control, command and direction of Radovan KARADŽIĆ and Ratko MLADIĆ during the whole period covered in the indictment;
- through their position in the Bosnian Serb Administration, Radovan KARADŽIĆ and Ratko MLADIĆ knew or had reasons to know that their subordinates committed or were about to commit the offences in question;
- lastly, it has established that Radovan KARADŽIĆ and Ratko MLADIĆ failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[733]

707. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that:

333. Military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. This criminal liability may arise either out of the positive acts of the superior (sometimes referred to as "direct" command responsibility) or from his culpable omissions ("indirect" command responsibility or command responsibility *strictu sensu*). Thus, a superior may be held criminally responsible . . . also for failing to take measures to prevent or repress the unlawful conduct of his subordinates.
334. The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) above, the criminal responsibility of superiors for failing to take measures to prevent

[731] ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 24.
[732] ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 21.
[733] ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 81–82.

or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act. As is most clearly evidenced in the case of military commanders by article 87 [AP I], international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.

335. Although historically not without recognition in domestic military law, it is often suggested that the roots of the modern doctrine of command responsibility may be found in the Hague Conventions of 1907 . . .

. . .

340. In the period following the Second World War until the present time, the doctrine of command responsibility has not been applied by any international judicial organ. Nonetheless, there can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law. Thus, article 87 [AP I] gives expression to the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol. The concomitant principle under which a superior may be held criminally responsible for the crimes committed by his subordinates where the superior has failed to properly exercise this duty is formulated in article 86 [AP I]. A survey of the *travaux préparatoires* of these provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that the principles expressed therein were in conformity with pre-existing law . . .

. . .

343. On the basis of the foregoing, the Trial Chamber concludes that the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.[734]

As to the elements of individual criminal responsibility of commanders under Article 7(3) of the 1993 ICTY Statute, the Trial Chamber stated that:

From the text of Article 7(3) it is thus possible to identify the essential elements of command responsibility for failure to act as follows:

(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[735]

Affirming the responsibility of non-military superiors under Article 7(3) of the 1993 ICTY Statute, the Trial Chamber noted that:

[734] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 333–335, 340 and 343.
[735] ICTY, *Delalić case*, Judgement, 16 November 1998, § 346.

357. This interpretation of the scope of Article 7(3) is in accordance with the customary law doctrine of command responsibility . . .
. . .
363. Thus, it must be concluded that the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority.[736]

Turning to "the concept of superior", the Trial Chamber stated that:

370. While the matter is, thus, not undisputed, it is the Trial Chamber's opinion that a position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander.
371. . . . It is clear that the term "superior" is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control . . .
. . .
377. While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute . . . [However,] great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.
378. Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[737]

[736] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 357 and 363.
[737] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 370–371 and 377–378.

Discussing the mental element necessary for the establishment of criminal responsibility of commanders, the ICTY Trial Chamber stated that:

383. The doctrine of superior responsibility does not establish a standard of strict liability for superiors for failing to prevent or punish the crimes committed by their subordinates. Instead, Article 7(3) [of the 1993 ICTY Statute] provides that a superior may be held responsible only where he knew or had reason to know that his subordinates were about to or had committed the acts referred to under Articles 2 to 5 of the Statute. A construction of this provision in light of the content of the doctrine under customary law leads the Trial Chamber to conclude that a superior may possess the *mens rea* required to incur criminal liability where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Article 2 to 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.
...
393. An interpretation of the terms of [Article 86 AP I] in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3).[738]

With regard to the "necessary and reasonable measures" to be taken by a commander, the Trial Chamber stated that:

394. The legal duty which rests upon all individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof. It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.
395. It must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC on this point,

[738] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 383 and 393.

and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior.[739]

708. In its judgement in the *Aleksovski case* in 1999, the ICTY Trial Chamber stated that:

> 67. The doctrine of superior responsibility makes a superior responsible not for his acts sanctioned by Article 7(1) of the [1993 ICTY] Statute but for his failure to act. A superior is held responsible for the acts of his subordinates if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.
> 68. The responsibility for failure to act, sometimes known as "indirect superior responsibility" is provided for in Article 7(3) of the [1993 ICTY] Statute . . .
> 69. Article 7 makes clear that superior responsibility may be invoked if three concurrent elements are proved:
> (i) a superior–subordinate relationship between the person against whom the claim is directed and the perpetrators of the offence;
> (ii) the superior knew or had reason to know that a crime was about to be committed or had been committed;
> (iii) the superior did not take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.
> 70. The three constituent elements which are evident from the wording of Article 7(3) clearly draw from Article 86, paragraph 2, of [AP I] and Article 6 of the [1996 ILC Draft Code of Crimes against the Peace and Security of Mankind]. They are repeated in Article 28 of the [1998 ICC Statute].
> . . .
> 72. . . . Superior responsibility covered in Article 7(3) of the [1993 ICTY] Statute must not be seen as responsibility for the act of another person. Superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation . . . Within the meaning of Article 7(3), a person is obliged to act only if it has been established that he was a superior of the perpetrators of the offence and also knew or had reasons to know that a crime was about to be committed or had been committed. Should such be the case, the person against whom the claim is directed is obliged to take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.
> a) The superior-subordinate relationship
> . . .
> 75. . . . The generic term "superior" in Article 7(3) of the [1993 ICTY] Statute can be interpreted only to mean that superior responsibility is not limited to military commanders but may apply to the civilian authorities as well.
> 76. Superior responsibility is thus not reserved for official authorities. Any person acting *de facto* as a superior may be held responsible under Article 7(3). The decisive criterion in determining who is a superior according to customary international law is not only the accused's formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control . . .

[739] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 394–395.

78. . . . Hierarchical power constitutes the very foundation of responsibility under the terms of Article 7(3) of the [1993 ICTY] Statute. In order to entail his responsibility under Article 7(3), whatever his status, the accused must first have superior authority . . . In the opinion of the Trial Chamber, a civilian must be characterised as a superior pursuant to Article 7(3) if he has the ability *de jure* or *de facto* to issue orders to prevent an offence and to sanction the perpetrators thereof. A civilian's sanctioning power must however be interpreted broadly. It should be stated that the doctrine of superior responsibility was originally intended only for the military authorities. Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy, it does not apply to the civilian authorities. It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position. To require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities. The Trial Chamber therefore considers that the superior's ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.

b) The superior knew or had reason to know that a crime was about to be committed or had been committed

. . .

80. . . . Admittedly, as regards "indirect" responsibility, the Trial Chamber is reluctant to consider that a "presumption" of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed.

(c) Necessary and reasonable measures

81. The [ICRC] Commentary on Additional Protocol I and the [1996 ILC Draft Code of Crimes against the Peace and Security of Mankind] limit the notion of "necessary and reasonable measures" to the measures which the superior can actually take . . . Such a material possibility must not be considered abstractly but must be evaluated on a case by case basis depending on the circumstances.[740]

[740] ICTY, *Aleksovski case*, Judgement, 25 June 1999, §§ 67–81.

709. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber drew a clear distinction between Article 7(1) and Article 7(3) of the 1993 ICTY Statute, noting that:

> Whilst Article 7(1) deals with the commander's participation in the commission of a crime, Article 7(3) enshrines the principle of command responsibility in the strict sense which entails the commander's individual criminal responsibility if he did not prevent crimes from being committed by his subordinates or, where applicable, punish them.[741]

With regard to Article 7(3) of the 1993 ICTY Statute, the Trial Chamber first held that "the principle of command responsibility *strictu sensu* forms part of customary international law".[742] It went on to say that:

> 294. . . . For a conviction under Article 7(3) of the [1993 ICTY] Statute in the present case, proof is required that:
> (1) there existed a superior–subordinate relationship between the commander (the accused) and the perpetrator of the crime;
> (2) the accused knew or had reason to know that the crime was about to be or had been committed; and
> (3) the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.
>
> . . .
> 300. . . . This principle [that in order for Article 7(3) of the 1993 ICTY Statute to apply, the accused must be in a position of command] is not limited to individuals formally designated commander but also encompasses both *de facto* and *de jure* command . . .
> 301. . . . A commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them.
> 302. . . . The commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.[743]

As regards the *mens rea* ("knew or had reason to know") of the accused, the Trial Chamber agreed that knowledge "may be proved through either direct or circumstantial evidence". With regard to circumstantial evidence, the Trial Chamber held that

> in determining whether in fact a superior must have had the requisite knowledge it may consider *inter alia* the following indicia enumerated by the Commission of Experts in its Final Report: the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar

[741] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 261.
[742] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 290.
[743] ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 294 and 300–302.

illegal acts; the officers and staff involved; and the location of the commander at the time.[744]

Referring to numerous instances of case-law and quoting a writer's opinion, the Trial Chamber stated that:

322. From this analysis of jurisprudence, the Trial Chamber concludes that after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if "he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction".
...
324. The Trial Chamber now turns to codification at the international level, namely the adoption of Additional Protocol I in 1977. The pertinent question is this: was customary international law altered with the adoption of Additional Protocol I, in the sense that a commander can be held accountable for failure to act in response to crimes by his subordinates only if some specific information was in fact available to him which would provide notice of such offences? Based on the following analysis, the Trial Chamber is of the view that this is not so.
...
328. In the Trial Chamber's view, the words "had information" in Article 86(2) [AP I] must be interpreted broadly...
329.... Given the essential responsibilities of military commanders under international humanitarian law, the Trial Chamber holds,... in the words of the [ICRC Commentary on the Additional Protocols], that "their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose".
...
332.... In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the [1993 ICTY] Statute.[745]

With regard to "necessary and reasonable measures to prevent or punish", the Trail Chamber held that:

335. The Trial Chamber has already characterised a "superior" as a person exercising "effective control" over his subordinates. In other words, the Trial Chamber holds that where a person has the material ability to prevent or punish crimes committed by others, that person must be considered a superior. Accordingly, it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator. As stated above in

[744] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 307.
[745] ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 322, 324, 328–329 and 332.

the discussion of the definition of "superior", this implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.
336. Lastly, the Trial Chamber stresses that the obligation to "prevent or punish" does not provide the accused with two alternative and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.[746]

With respect to the concurrent application of Article 7(1) and 7(3) of the 1993 ICTY Statute, the Trial Chamber stated that:

337. It would be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them. However, as submitted by the Prosecution, the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes.
. . .
339. As stated earlier in this Judgement, in the case of instigation, proof is required of a causal connection between the instigation, which may entail an omission, and the perpetration of the act. In the scenario under discussion, this means it must be proved that the subordinates would not have committed the subsequent crimes if the commander had not failed to punish the earlier ones. However, with respect to the Defence's submission that under Article 7(3) of the [1993 ICTY] Statute proof is required that the commander's omission caused the commission of the crime by the subordinate, the Trial Chamber is of the view that such a causal link may be considered inherent in the requirement that the superior failed to prevent the crimes which were committed by the subordinate.[747] [emphasis in original]

710. In its judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber upheld the interpretation of Article 7(3) of the 1993 ICTY Statute given by the Trial Chamber to the standard "had reason to know" and stated that:

A superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the indictment.[748]

711. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber, under the heading "Command responsibility under Article 7(3) of the [1993 ICTY] Statute", stated that:

395. . . . The following three conditions must be met before a commander can be held responsible for the acts of his or her subordinates:

[746] ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 335–336.
[747] ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 337 and 339.
[748] ICTY, *Delalić case*, Judgement of Appeal, 20 February 2001, § 241.

(i) the existence of a superior–subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

396. Because of the findings of the Trial Chamber, it need only deal with the first of those elements. A superior-subordinate relationship must exist for the recognition of this kind of responsibility. However, such a relationship cannot be determined by reference to formal status alone. Accordingly, formal designation as a commander is not necessary for establishing command responsibility, as such responsibility may be recognised by virtue of a person's *de facto*, as well as *de jure*, position as a commander. What must be established is that the superior had effective control over subordinates. That means that he must have had the material ability to exercise his powers to prevent and punish the commission of the subordinates' offences.
397. The relationship between the commander and his subordinates need not have been formalized; a tacit or implicit understanding between them as to their positioning *vis-à-vis* one another is sufficient. The giving of orders or the exercise of powers generally attached to a military command are strong indications that an individual is indeed a commander. But these are not the sole relevant factors.
...
399. Both those permanently under an individual's command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, *at the time when the acts charged in the Indictment were committed*, these persons were under the effective control of that particular individual.[749] [emphasis in original]

712. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber held that:

Article 7 [of the 1993 ICTY Statute] is clearly intended to assign individual criminal responsibility at different levels, both subordinate and superior, for the commission of crimes listed in Articles 2 to 5 of the Statute. Article 7 gives effect to a general principle of criminal law that an individual is responsible for his acts and omissions. It provides that an individual may be held criminally responsible for the direct commission of a crime, whether as an individual or jointly, or through his omissions for the crimes of his subordinates when under an obligation to act. Article 7(3) of the Statute sets forth the principle governing the responsibility of superiors commonly referred to as "command responsibility".[750]

The Trial Chamber also noted that:

369. The type of responsibility provided for in Article 7(3) [of the 1993 ICTY Statute] may be described as "indirect" as it does not stem from a "direct" involvement by the superior in the commission of a crime but rather from his omission to prevent or punish such offence, i.e., of his failure to act in spite of knowledge. This

[749] ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 395–399.
[750] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 364.

responsibility arises only where the superior is under a legal obligation to act . . . The duty that rests on military commanders properly to supervise their subordinates is for instance expressed in Article 87 of Additional Protocol I, entitled "Duty of commanders", which imposes an affirmative duty on them to prevent persons under their control from committing violations of international humanitarian law, and to punish the perpetrators if violations occur. Liability under Article 7(3) is based on an omission as opposed to positive conduct. It should be emphasised that the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he "knew or had reason to know" of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability.

. . .

371. The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1) [of the 1993 ICTY Statute]. Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).[751]

713. In its judgement in the *Krstić case* in 2001, the ICTY Trial Chamber stated that:

604. According to the case law, the following three conditions must be met before a person can be held responsible for the acts of another person under Article 7(3) of the [1993 ICTY] Statute:

- The existence of a superior–subordinate relationship;
- The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

605. The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) [of the 1993 ICTY Statute] are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.[752] [emphasis in original]

As to General Krstic's possible individual criminal responsibility, the Trial Chamber stated, *inter alia*, that:

[751] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 369 and 371.
[752] ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 604–605.

647. The evidence also satisfies the three-pronged test established by the jurisprudence for General Krstic to incur command responsibility under Article 7(3) [of the 1993 ICTY Statute] for the participation of Drina Corps personnel in the killing campaign.
648. First, General Krstic exercised effective control over Drina Corps troops involved in the killings. Second, in terms of *mens rea*, not only was General Krstic fully aware of the ongoing killing campaign and of its impact on the survival of the Bosnian Muslim group at Srebrenica, as well as the fact that it was related to a widespread or systematic attack against Srebrenica's Bosnian Muslim civilian population, but the Drina Corps (and Main Staff) officers and troops involved in conducting the executions had to have been aware of the genocidal objectives. Third, General Krstic failed to prevent his Drina Corps subordinates from participating in the crimes or to punish them thereafter.[753]

714. In its judgement in the *Kvočka case* in 2001, the ICTY Trial Chamber considered that:

313. Article 7(3) of the [1993 ICTY] Statute imposes liability upon a superior for the criminal acts of his subordinates if the superior had reason to know that the subordinate was about to commit a crime and failed to prevent it or, knowing that a crime had been committed, failed to take steps to punish the subordinate for the crime. Fulfilling the first obligation does not preclude incurring liability for failing to fulfil the second. The superior is also responsible if he or she fails to halt or suppress crimes that are being committed if the superior knew or had reason to know of their commission.
314. The caselaw of the Tribunal establishes that three elements must be proved before a person may be held responsible as a superior for the crimes committed by subordinates: (1) the existence of a superior-subordinate relationship between the accused and perpetrator(s) of the underlying offence; (2) knowledge of the superior that his or her subordinate had committed, was committing, or was about to commit, a crime; and (3) failure of the superior to prevent or halt the commission of the crime and to punish the perpetrators.[754]

Referring to the judgement of the ICTY Appeals Chamber in the *Delalić case*, the Trial Chamber further stated that:

315. . . . This Judgement [i.e. the judgement of the Appeals Chamber in the *Delalić case*] accepted that a civilian leader may incur responsibility in the same way as a military commander, provided that the civilian has effective control over subordinates. Effective control necessarily involves "the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed." Effective control means "the material ability to prevent or punish criminal conduct, however that control is exercised." The requirement that control must be effective makes clear that *de jure* authority alone is insufficient. The Prosecution must show that the superior had the ability to prevent, halt, or punish the crime.
316. The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process . . .

[753] ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 647–648.
[754] ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 313–314.

317. Action is required on the part of the superior from the point at which he "knew or had reason to know" of the crimes committed or about to be committed by subordinates. The [judgement of the Appeals Chamber in the *Delalić case*] found that Article 7(3) [of the 1993 ICTY Statute] does not impose a duty upon a superior to go out of his way to obtain information about crimes committed by subordinates, unless he is in some way put on notice that criminal activity is afoot.
318. The [judgement of the Appeals Chamber in the *Delalić case*] upheld the Trial Chamber's interpretation of "had reason to know", concluding that the superior is responsible if information was available which would have put the superior on notice of crimes committed by subordinates. The information available to the superior may be written or oral. It need not be explicit or specific, but it must be information – or the absence of information – that would suggest the need to inquire further. Information that would make a superior suspicious that crimes might be committed includes past behavior of subordinates or a history of mistreatment: "For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge." Similarly, if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.[755]

715. In the amended indictment in the *Hadžihasanović and Others case* before the ICTY in 2002, the Prosecutor stated with respect to one of the accused that:

> 58. [The accused] is also criminally responsible in relation to those crimes [i.e. violations of the laws or customs of war] that were committed by troops of the ABiH . . . Brigade prior to his assignment . . . as the substitute for [the then commanding officer]. [He] knew or had reason to know about these crimes. After he assumed command, he was under the duty to punish the perpetrators.
> . . .
> 60. [The accused] knew or had reason to know that ABiH forces under their command and control were about to commit such acts [i.e. violations of the laws or customs of war] or had done so, in the following villages on or about the dates indicated, and they failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[756]

716. In its decision on a joint challenge to jurisdiction in the *Hadžihasanović and Others case* in 2002, the ICTY Trial Chamber stated that "the doctrine of command responsibility already in – and since – 1991 was applicable in the context of an internal armed conflict under customary international law. Article 7(3) [of the Statute of the International Criminal Tribunal for the Former Yugoslavia] constitutes a declaration of existing law under customary international law and does not constitute new law."[757]

[755] ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 315–318.
[756] ICTY, *Hadžihasanović and Others case*, Amended Indictment, 11 January 2002, §§ 58 and 60, see also §§ 61, 65 and 66.
[757] ICTY, *Hadžihasanović and Others case*, Decision on Joint Challenge to Jurisdiction, 12 November 2002, § 179.

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

717. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The commander of all forces engaged in a military operation has the general responsibility for ensuring respect for the law of war.
...
Respect for the law of war is a matter of order and discipline.
As with order and discipline, the law of war must be respected and enforced in all circumstances.
...
The commander himself must ensure that:
...
b) the necessary measures are taken to prevent violations of the law of war.

The commander himself must ensure that his subordinates respect the law of war.
The commander must ensure that in case of a breach of the law of war:
a) the breach ceases;
b) disciplinary or penal action is taken.

The commander's responsibility extends to breaches of the law of war resulting from a failure to act when under a duty to do so.[758]

Delegates also teach that:

Every commander who is aware that subordinates or other persons under his control/command are going to commit or have committed a breach of the law of war, shall initiate:
a) the necessary steps to prevent such a breach; and/or
b) disciplinary or penal action against the authors of the breach.[759]

718. In a press release issued in 1992 in the context of the conflict in Nagorno-Karabakh, the ICRC stated that "it is the responsibility of the region's political leaders and military commanders to ensure ... respect [for the red cross and red crescent emblem] and prevent misuse of the emblem".[760]

VI. Other Practice

719. In 1990, an armed opposition group undertook to refrain from torturing prisoners and stressed that commanders responsible for such actions had been sanctioned.[761]

[758] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 263 and 269–273.
[759] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 781.
[760] ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.
[761] ICRC archive document.

720. In 1993, in a communication on violations of IHL in Somalia during UNOSOM operations, MSF stated that the UN Security Council, the UN military commander and the commanders of the various national contingents are to be held responsible for an attack by UNOSOM II troops on the MSF compound in Somalia.[762]

Reporting of war crimes

I. Treaties and Other Instruments

Treaties

721. Article 87(1) AP I provides that:

> The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

Article 87 AP I was adopted by consensus.[763]

722. Article 9(2) of the 1998 Draft Convention on Forced Disappearance provides that "law enforcement officials who have reason to believe that a forced disappearance has occurred or is about to occur shall communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power".

Other Instruments

723. Section 20 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

> In the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches. Military commanders are required to prevent and, where necessary, to suppress and to report to competent authorities breaches of these rules.

II. National Practice

Military Manuals

724. Argentina's Law of War Manual states that "military commanders must ensure the prevention of breaches of the [Geneva] Conventions and [AP I] and, when necessary, report them to the competent authority and repress them".[764]

725. Australia's Commanders' Guide states that:

[762] MSF, Communication on the violations of humanitarian law in Somalia during UNOSOM operations, 20 July 1993, Part II.
[763] CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307.
[764] Argentina, *Law of War Manual* (1989), § 8.02.

ADF members are obliged to report LOAC breaches to their superior commanders and, where available, ADF legal advisers. Commanders must ensure that processes for reporting LOAC breaches are detailed in standing operating procedures. ADF members who receive reports about alleged breaches are responsible for ensuring that the suspected breach is properly recorded, documented, investigated and any relevant evidence preserved.[765]

726. Australia's Defence Force Manual states that:

Each ADF member is also responsible for ensuring that breaches are properly reported and documented. Reporting of LOAC breaches, whether committed by the enemy or ADF members, should be made to superiors. Commanders must ensure that processes for reporting LOAC breaches are detailed in standard operating procedures.[766]

727. Benin's Military Manual instructs soldiers to "prevent any breach of these instructions. Report to your superior any violation [of IHL] of which your are aware. Any breach of the laws of war is punishable."[767]

728. Canada's LOAC Manual provides that "commanders are responsible, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities, breaches of the LOAC".[768]

729. Canada's Code of Conduct contains the rule: "Report and take appropriate steps to stop breaches of the Law of Armed Conflict and these rules. Disobedience of the Law of Armed Conflict is a crime."[769] It goes on to say that "it is also of the utmost importance that any breach of the Code of Conduct or other provision of the Law of Armed Conflict be reported without delay. A failure to comply with the Code of Conduct represents a failure in the 'habit of obedience', the cornerstone of discipline."[770] It adds that:

If a CF member believes that the Law of Armed Conflict or these rules are being breached, the member must take the appropriate steps to stop the illegal action. If the CF member is not in a position to stop the breach, then the member shall report to the nearest military authority who can take appropriate action. It is recognized that it may sometimes be difficult to report a breach, for example when a junior believes a breach has been committed by a higher ranking member. However, there is always a way to report a breach. The member can report to his or her superiors in the chain of command, the military police, a chaplain, a legal officer or any other person in authority. If a breach of the Law of Armed Conflict or these rules has already occurred, the member shall report that breach. The old adage "bad news doesn't get better with time" definitely applies to these types of breaches. Any attempt to cover up a breach of the Law of Armed Conflict or these rules is in itself

[765] Australia, *Commanders' Guide* (1994), § 1301.
[766] Australia, *Defence Force Manual* (1994), § 1307; see also *Commanders' Guide* (1994), § 1208.
[767] Benin, *Military Manual* (1995), Fascicule II, p. 19.
[768] Canada, *LOAC Manual* (1999), p. 16-7, § 49.
[769] Canada, *Code of Conduct* (2001), Rule 11.
[770] Canada, *Code of Conduct* (2001), Rule 11, § 1.

an offence under the Code of Service Discipline. Experience has shown that isolated breaches committed by a few members of the force, even a momentary lapse in one's duty, could dishonour the country and adversely affect the accomplishment of the overall mission.

...

It is essential that any alleged breaches of these rules and the Law of Armed Conflict be investigated rapidly in as impartial a manner as possible. An impartial investigation will not only assist in bringing violators to justice, thereby maintaining discipline, but will also provide the best opportunity to clear anyone who has not acted improperly. In most cases that investigation will be carried out by the military police or National Investigation Service.[771]

730. Colombia's Instructors' Manual states that to prevent violations of human rights, it is necessary "to report to the superior any irregularity which may constitute a violation of Human Rights [and] to report violations of Human Rights to the superior".[772]

731. The Military Manual of the Dominican Republic tells soldiers that:

You must report crimes immediately through your chain of command. If the crime involves your immediate superiors, report to their superior. You may also report violations of the laws of war to the inspector general, provost marshal, chaplain or judge advocate. In any case, the law requires that you report actual or suspected violations immediately so that evidence will not be misplaced or disappear.[773]

732. El Salvador's Human Rights Charter of the Armed Forces provides that "all violations must be reported to the immediate superior".[774]

733. Germany's Military Manual states that the superior "is obliged to prevent and, where necessary, to suppress or to report to competent authorities breaches of international law".[775] It further states that:

When a disciplinary superior learns about incidents substantiating suspicion that international humanitarian law has been violated, he shall clear up the facts and consider as to whether disciplinary measures are to be taken. If the disciplinary offence constitutes a criminal offence, he shall refer the case to the appropriate criminal prosecution authority when criminal prosecution seems to be indicated.[776]

734. The Military Manual of the Netherlands, referring to Article 87 AP I, states that:

Commanders... must take measures to stop the committing of war crimes and report them for action to the competent authorities. This can involve criminal or disciplinary proceedings against the acts committed, but also administrative measures (for example suspension or transfer).[777]

[771] Canada, *Code of Conduct* (2001), Rule 11, §§ 2–3.
[772] Colombia, *Instructors' Manual* (1999), p. 13.
[773] Dominican Republic, *Military Manual* (1980), p. 12.
[774] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 16.
[775] Germany, *Military Manual* (1992), § 138. [776] Germany, *Military Manual* (1992), § 1213.
[777] Netherlands, *Military Manual* (1993), p. IX-7.

735. The Military Handbook of the Netherlands stipulates that:

> Every soldier has the duty to prevent the commission of war crimes, to stop them and to report them. The report shall be made to the Royal Military Police. In addition, report should be made to the commander.[778]

736. Nigeria's Military Manual provides that "Article 87 [AP I] thereby enjoins the parties and the parties to the conflict to request Commanders of their troops under control to prevent, and where necessary, to suppress and to report to competent authorities breaches of the conventions and the Protocols".[779]

737. Peru's Human Rights Charter of the Security Forces provides that "all alleged violations must immediately be reported to the superior".[780]

738. The Soldier's Rules of the Philippines, providing a list of the most basic principles of behaviour for soldiers, states that a soldier must "endeavour to prevent any breach of the above rules. Report any violations to your superior."[781]

739. South Africa's LOAC Manual states that "all soldiers must be aware of their responsibility to report war crimes which are breaches of the LOAC. Normally the report should be made to the next superior in the chain of command. A report may also be made to the Military Police, a Legal Officer or a Chaplain."[782]

740. South Africa's Medical Services Military Manual refers to Article 87 AP I, providing that "commanders will ... report breaches of humanitarian law".[783]

741. Sweden's IHL Manual refers to AP I and provides that "military commanders shall prevent breaches and if necessary punish and report such cases ... Naturally, it is also very important that both commanders and men discover and report transgressions committed by units of the adversary."[784]

742. Togo's Military Manual instructs soldiers to "prevent any breach of these instructions. Report to your superior any violation [of IHL] of which your are aware. Any breach of the laws of war is punishable."[785]

743. The US Soldier's Manual tells soldiers that:

> You must report crimes immediately though your chain of command. If the crime involves your immediate superiors, report to their superior. You may also report violations of the laws of war to the inspector general, provost marshal, chaplain, or judge advocate. In any case, the law requires that you report actual or suspected violations immediately so that evidence will not be misplaced or disappear.[786]

744. The US Naval Handbook states that:

[778] Netherlands, *Military Handbook* (1995), p. 7-44.
[779] Nigeria, *Military Manual* (1994), p. 30, § 3.
[780] Peru, *Human Rights Charter of the Security Forces* (1991), p. 21.
[781] Philippines, *Soldier's Rules* (1989), § 12.
[782] South Africa, *LOAC Manual* (1996), § 43.
[783] South Africa, *Medical Services Military Manual* (undated), p. 5.
[784] Sweden, *IHL Manual* (1991), Section 4.2, p. 94.
[785] Togo, *Military Manual* (1995), Fascicule II, p. 19.
[786] US, *Soldier's Manual* (1984), p. 27, see also p. 25.

It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps to ensure that:

...

3. alleged violations of the law of armed conflict, whether committed by or against United States or enemy personnel, are promptly reported, thoroughly investigated, and where appropriate, remedied by corrective actions.[787]

The manual further states that "all members of the naval service ... have an affirmative obligation to report promptly violations of which they become aware."[788]

National Legislation

745. Germany's Law Introducing the International Crimes Code contains a provision entitled "Omission to report a crime" which provides that:

(1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Law [*inter alia*, genocide, crimes against humanity and war crimes], to such an offence committed by a subordinate, shall be punished ...
(2) [Article 1(4)(2)] shall apply mutatis mutandis.[789]

746. India's Army Act provides that it is an offence for a commander "receiving a complaint that any one under his command has beaten or otherwise maltreated or oppressed any person ... [to] fail to have due reparation made to the injured person or to report the case to the proper authority".[790]

National Case-law

747. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 involving the question of criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for having negligently performed a military duty, the Court of Appeal (majority) stated that:

I agree with the prosecution ... that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner consistent with Canada's international obligations, the rule of law and simply humanity. There was evidence in this case to suggest that the respondent could readily have reported the misdeeds of his comrades. However, absent specific wording in the relevant international conventions and more specifically, the [*Unit Guide (1990)*], I simply cannot conclude that a member of the Canadian Forces has a penally enforceable obligation to intervene whenever he witnesses mistreatment of a prisoner who is not in his custody.

...

[787] US, *Naval Handbook* (1995), § 6.1.2.
[788] US, *Naval Handbook* (1995), § 6.1.4.
[789] Germany, *Law Introducing the International Crimes Code* (2002), Article 1(14).
[790] India, *Army Act* (1950), Section 64(a).

In closing, I would remark that . . . it remains open to the chief of defence staff to define in more explicit terms the standards of conduct expected of soldiers in respect of prisoners who are in Canadian Forces custody. It is open to the chief of defence staff to . . . impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge . . . This might prove a useful undertaking.[791]

Other National Practice

748. In 1984, in an assessment of the military implications of the Additional Protocols, Australia's Joint Military Operations and Plans Division, stated that Article 87(1) AP I:

imposes upon commanders the additional responsibility to prevent and, where necessary, to suppress and to report all breaches of the Geneva Conventions and its Protocols. This requires that the constraints imposed by the Protocols and the law of armed conflict generally are understood and reflected in the conduct of operations by every level of military authority.[792]

749. The Guidelines on Human Rights and Improvement of Discipline in the AFP, issued in 1989 by the Office of the Chief of Staff of the armed forces of the Philippines, provides that:

Commanders who are proven through due process to have countenanced human rights abuses by way of summarily dropping complaints, intimidating the complainant and/or witnesses, "cover-up" of the incidents, failure to report to superiors, and/or shows inaction on the complaint, shall be held accountable either as conduct unbecoming an officer or as accessory.[793]

750. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that:

It is the policy of the Department of Defense to ensure that:
. . .
3. Alleged violations of the law of war, whether committed by or against U.S. or enemy personnel, are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.
4. Violations of the law of war alleged to have been committed by or against allied military or civilian personnel shall be reported through appropriate command channels for ultimate transmission to appropriate agencies of allied governments.[794]

[791] Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.
[792] Australia, Joint Military Operations and Plans Division, Assessment of the Military Implications of the Protocols Additional to the Geneva Conventions of 1949, Series No. AA-A1838/376, File No. AA-1710/10/3/1 Pt 2, September 1984, § 10.
[793] Philippines, Ministry of National Defence, Office of the Chief of Staff, Guidelines on Human Rights and Improvement of Discipline in the AFP, 2 January 1989, § 2(1) and (2).
[794] US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section C(3) and (4).

751. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

[Department of Defense Directive on the Law of War Program No. 5100.77] is the foundation for the US military law of war program. It contains four policies:

...

- Alleged violations of the law of war, whether committed by or against US or enemy personnel, ... [will/shall be] promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.
- Violations of the law of war alleged to have been committed by or against allied military or civilian personnel shall be reported through appropriate military command channels for ultimate transmission to appropriate agencies of allied governments.

...

Army Chief of Staff Regulation 11-2 assigns to the Army Judge Advocate General (JAG) responsibility for investigating, collecting, collating, evaluating, and reporting in connection with war crimes alleged to have been committed against US personnel.[795]

752. The 1998 version of the US Department of Defense Directive on the Law of War Program stated that:

It is DoD policy to ensure that:

...

4.3. All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, when appropriate, remedied by corrective action.

4.4. All reportable incidents committed by or against allied persons, or by or against other persons during a conflict to which the U.S. is not a party, are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities.[796]

A "reportable incident" is defined as "a possible, suspected, or alleged violation of the law of war".[797] As to responsibilities, the Directive provides that:

The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD Law of War Program to: ... [p]rovide for the prompt reporting and investigation of reportable incidents committed by or against members of their respective Military Departments, or persons accompanying them.[798]

The Directive further states that the Commanders of the Combatant Commands shall "issue directives to ensure that reportable incidents involving

[795] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

[796] US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 4(4)(3) and (4)(4).

[797] US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 3(2).

[798] US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(5)(3).

U.S. or enemy persons are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities".[799] Under a provision entitled "Reports of incidents", the Directive states that:

All military and civilian personnel assigned to or accompanying a DoD Component shall report reportable incidents through their chain of command. Such reports . . . may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. Reports that are made to officials other than those specified in this subsection shall, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.[800]

753. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that "command structures and units have the duty to inform immediately their commanding officers on any violation of international law of warfare. Any information in this regard that may appear should be forwarded to the General Staff in regular reports."[801]

III. Practice of International Organisations and Conferences

United Nations

754. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had addressed the issue of command responsibility in its first interim report as follows: "Military commanders are under a special obligation, with respect to members of the armed forces under their command or other persons under their control, to prevent and, where necessary, to suppress such acts and to report them to competent authorities."[802] The Commission noted with satisfaction that Article 7 of the 1993 ICTY Statute used an essentially similar formulation.[803]

Other International Organisations

755. No practice was found.

[799] US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(8)(4).
[800] US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 6(1).
[801] SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 4.
[802] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 55.
[803] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 56.

International Conferences
756. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

757. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber held that:

> 335. . . . Where a person has the material ability to prevent or punish crimes committed by others, that person must be considered a superior. Accordingly, it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator . . . This implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.[804]

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

758. No practice was found.

VI. Other Practice

759. No practice was found.

D. Obedience to Superior Orders

I. Treaties and Other Instruments

Treaties
760. Article 77(1) of draft AP I submitted by the ICRC to the CDDH provided that "no person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol".[805] This proposal was subject to amendments and referred to Working Group A of Committee I where it was adopted by 38 votes in favour, 22 against and 15 abstentions.[806] The approved text provided that "the High Contracting Parties undertake to ensure that their internal law penalizing disobedience to orders shall not apply to orders that would constitute grave breaches of the Conventions and this Protocol".[807] Eventually, however, it was deleted in the plenary, because it

[804] ICTY, *Blaškić case*, Judgement, 3 March 2000, § 335.
[805] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.
[806] CDDH, *Official Records*, Vol. X, CDDH/234/Rev.1, 21 April–11 June 1976, p. 120, §§ 26–27; *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 188, § 38, and p. 262; *Official Records*, Vol. IX, CDDH/I/SR.65, 9 June 1976, p. 332, § 30.
[807] CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 262.

failed to obtain the necessary two-thirds majority (36 in favour, 25 against and 25 abstentions).[808]

761. Article VIII of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that "all persons who receive [orders or instructions that stipulate, authorize, or encourage forced disappearance] have the right and duty not to obey them". However, Article XV excludes its application in international armed conflicts governed by the 1949 Geneva Conventions and their Additional Protocols.

762. Article 9(1) of the 1998 Draft Convention on Forced Disappearance provides that "no order or instruction of any public authority – civilian, military or other – may be invoked to justify a forced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it".

Other Instruments

763. Paragraph 3 of the 1989 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provides that:

> Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extralegal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.

764. Paragraph 25 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

> Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

765. Article 6(1) of the 1992 UN Declaration on Enforced Disappearance stresses that "no order or instruction from any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it."

II. National Practice

Military Manuals

766. Australia's Defence Force Manual provides that "if an order is ambiguous, clarification should be sought. If clarification is unavailable, any action taken must comply with LOAC."[809]

[808] CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 308.
[809] Australia, *Defence Force Manual* (1994), § 1306; see also *Commanders' Guide* (1994), § 1207.

767. Belgium's Disciplinary Regulations provides that "soldiers must loyally execute . . . orders given by their superiors in the interest of the service".[810] However, it adds that "an order must not be executed if this execution can manifestly lead to the perpetration of a crime or an offence".[811]

768. Burkina Faso's Disciplinary Regulations provides that "the subordinate loyally executes orders he receives". It also states that "the subordinate is responsible for the execution of the order received. He is liable to penal and/or disciplinary sanctions for refusing to obey when he wrongly invokes a motive of any sort."[812]

769. Cameroon's Disciplinary Regulations provides that "obedience is the first duty of the subordinate and he shall loyally execute the orders he receives".[813] However, the manual also states that:

The subordinate [is released from] his penal responsibility when he obeys orders of his superior . . .

If the order is manifestly illegal or stipulates the commission of an illegal act [in the meaning of Article 17 of the Disciplinary Regulations which provides for criminal responsibility, *inter alia*, for acts in violation of the laws and customs of war], the subordinate engages his penal responsibility . . .

The subordinate who believes he is being confronted with an illegal order has the duty to communicate his objections to the authority which gives them . . . If the order is maintained . . . concerning acts contrary to the laws and customs of war, the subordinate has the absolute right not to execute the order.[814]

770. Cameroon's Instructors' Manual provides that "it is forbidden for a soldier to obey orders constituting a crime".[815]

771. Canada's Code of Conduct tells soldiers that:

Orders must be followed. Military effectiveness depends on the prompt obedience to orders. Virtually all orders you will receive from your superiors will be lawful, straightforward and require little clarification. What happens, however, if you receive an order that you believe to be questionable? Your first step of course must be to seek clarification. Then, if after doing so the order still appears to be questionable, in accordance with military custom you should still obey and execute the order – unless – the order is manifestly unlawful.[816]

The Code of Conduct further states that:

It is recognized that the lower you are in rank, the more difficult it will be to question orders. However, every member of the CF has an obligation to disobey a manifestly unlawful order regardless of rank or position. A manifestly unlawful order is one which shocks the conscience of every reasonable, right-thinking person.

[810] Belgium, *Disciplinary Regulations* (1991), § 304(a), see also § 403(d).
[811] Belgium, *Disciplinary Regulations* (1991), § 304(b).
[812] Burkina Faso, *Disciplinary Regulations* (1994), Article 20(3) and (4).
[813] Cameroon, *Disciplinary Regulations* (1975), Article 19.
[814] Cameroon, *Disciplinary Regulations* (1975), Article 21.
[815] Cameroon, *Instructors' Manual* (1992), p. 26, § 121(3).
[816] Canada, *Code of Conduct* (2001), Rule 11, § 4.

For example, mistreating someone who has surrendered or beating a detainee is manifestly unlawful.[817]

772. Congo's Disciplinary Regulations provides that "obedience is the first duty of the subordinate. He loyally executes orders he receives." However, it adds that "the subordinate must not execute an order to commit an act manifestly . . . contrary to the customs of war and to the international conventions".[818]

773. The Military Manual of the Dominican Republic tells soldiers that although "you are responsible for promptly obeying all legal orders issued by your leader . . . you are obligated to disobey an order to commit a crime".[819]

774. El Salvador's Human Rights Charter of the Armed Forces instructs members of military forces to "execute orders as far as possible in the scope of the law. If orders are a crime against human rights, do not execute them because they violate the law".[820]

775. France's Disciplinary Regulations as amended states that members of the military "have the duty to obey lawful orders".[821] It further provides that "the subordinate shall not carry out an order to do something that is manifestly unlawful or contrary to the customs of war, the rules of international law applicable in armed conflicts, or duly ratified or approved international treaties".[822]

776. Germany's Military Manual provides that:

According to German law an order is not binding if:
- it violates the human dignity of the third party concerned or the recipient of the order;
- it is not of any use for service; or
- in a definite situation, the soldier cannot reasonably be expected to execute it.

Orders which are not binding need not be executed by the soldier.[823]

The manual further stresses that "moreover, it is expressly prohibited to obey orders whose execution would be a crime" and that "punishment for disobedience or refusal to obey shall be impossible if the order is not binding (§ 22 of the Military Penal Code)".[824]

777. Italy's IHL Manual states that:

Concerning the norm and the consequent disciplinary rule, "the soldier who is requested to obey an order which manifestly violates State institutions or an order whose execution would anyway constitute a manifest crime, is under the obligation not to execute that order and inform his superiors as soon as possible.[825]

[817] Canada, *Code of Conduct* (2001), Rule 11, § 5.
[818] Congo, *Disciplinary Regulations* (1986), Article 21.
[819] Dominican Republic, *Military Manual* (1980), p. 12.
[820] El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 11.
[821] France, *Disciplinary Regulations as amended* (1975), Article 6.
[822] France, *Disciplinary Regulations as amended* (1975), Article 8(3).
[823] Germany, *Military Manual* (1992), § 142.
[824] Germany, *Military Manual* (1992), §§ 143 and 145.
[825] Italy, *IHL Manual* (1991), Vol. I, § 83.

778. According to the Military Handbook of the Netherlands, an order issued in time of war that would lead to a war crime if complied with should be refused. It explains that soldiers have a duty to refuse to obey an order if they know or if it is manifest, given the facts known to them, that it constitutes a war crime.[826]

779. New Zealand's Military Manual provides that "one such obligation, and the one which clearly sets a member of a military force apart from his civilian counterparts, is the obligation to obey lawful commands of a superior officer".[827] It adds, however, that, "if a command is unlawful and is obeyed, the person who obeys it could find himself charged with a criminal offence or a war crime".[828] The manual also states that:

> If it is obvious that an order is unlawful, then it should not be obeyed. Orders which are obviously unlawful are extremely rare. An order to torture or kill prisoners of war or innocent civilians or to loot civilian property would be obviously unlawful. This kind of order should never be obeyed and it should never be assumed that it will provide a defence if a charge results from its obedience.[829]

The manual further points out that:

> If . . . an unclear order is received, and especially if one of the possible meanings of the order appears to be unlawful, then clarification should be sought immediately. Blind obedience, in such cases, is not what is required. In . . . cases of unclear orders, blind obedience could lead to unfortunate and perhaps unforeseen results. In our example, both the sergeant and the superior whom we infer meant to convey nothing in any way illegal, could find themselves the subject of serious charges, simply because an unclear order was not clarified or questioned.[830]

780. Peru's Human Rights Charter of the Security Forces provides that, if they believe an order violates human rights, members of the armed and police forces are required to seek more justifications for its execution.[831]

781. The Code of Ethics of the Philippines provides that "every officer and soldier shall obey the lawful orders of his immediate superior. Anyone who shall refuse or fail to carry out a lawful order from the military chain of command shall be subject to military discipline."[832]

782. Rwanda's Disciplinary Regulations provides that a subordinate may not execute a manifestly unlawful order.[833]

783. South Africa's LOAC Manual states that:

> Every soldier has a duty to obey lawful orders of superiors. Failure to do so is a serious offence. However, an order to commit a war crime is an unlawful order. A

[826] Netherlands, *Military Handbook* (1995), p. 7-45.
[827] New Zealand, *Military Manual* (1992), Annex C, § C14(1).
[828] New Zealand, *Military Manual* (1992), Annex C, § C14(2).
[829] New Zealand, *Military Manual* (1992), Annex C, § C14(4).
[830] New Zealand, *Military Manual* (1992), Annex C, § C14(5).
[831] Peru, *Human Rights Charter of the Security Forces* (1991), p. 13.
[832] Philippines, *Code of Ethics* (1991), Section 2.3, pp. 16–17.
[833] Rwanda, *Disciplinary Regulations* (undated), Article 15.

person who commits a war crime pursuant to an order is guilty of a war crime if that person knew or should have known that the order was unlawful.[834]

The manual further recalls that "the Constitution of the Republic of South Africa, 1996, provides that 'no member of any security service may obey a manifestly illegal order' [Section 199(6)]".[835]

784. South Africa's Medical Services Military Manual provides that "when an order is manifestly illegal the subordinate has the duty to refuse to obey".[836]

785. The UK LOAC Manual provides that "military personnel are required to obey lawful commands but must not obey unlawful commands".[837] It further states that "illegal orders are not to be given nor carried out".[838]

786. The US Field Manual states that "members of the armed forces are bound to obey only lawful orders".[839]

787. The US Air Force Pamphlet states that "members of the armed forces are bound to obey only lawful orders".[840]

788. The US Soldier's Manual tells the soldier that "although you are responsible for promptly obeying all legal orders issued by your leader, you are obligated to disobey an order to commit a crime".[841]

789. The US Naval Handbook provides that:

> Members of the naval service, like military members of all nations, must obey readily and strictly all *lawful* orders issued by a superior. Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict.[842] [emphasis in original]

790. Uruguay's Disciplinary Regulations provides that "no subordinate shall hesitate to challenge the orders of his commanding officer when he deems it necessary".[843]

National Legislation

791. Argentina's Code of Military Justice as amended applies disciplinary sanctions to military personnel who refuse to obey a military order given by a superior (insubordination). Similarly, it defines the crime of disobedience, which includes actions by military personnel who, while not ostensibly or expressly refusing to obey, fail without any just cause to carry out a military order. It adds

[834] South Africa, *LOAC Manual* (1996), § 44.
[835] South Africa, *LOAC Manual* (1996), § 44.
[836] South Africa, *Medical Services Military Manual* (undated), p. 5.
[837] UK, *LOAC Manual* (1981), Section 10, p. 38, § 1.
[838] UK, *LOAC Manual* (1981), Annex A, p. 46, § 2.
[839] US, *Field Manual* (1956), § 509(b).
[840] US, *Air Force Pamphlet* (1976), § 15-4(d).
[841] US, *Soldier's Manual* (1984), p. 26.
[842] US, *Naval Handbook* (1995), § 6.1.4.
[843] Uruguay, *Disciplinary Regulations* (1980), Article 40.

that no excuse shall justify disobedience or the failure to carry out a military order.[844]

792. Under Armenia's Penal Code, failing to carry out in time of war a "properly given legitimate order" is a punishable offence.[845] However, "refusal to execute an obviously illegal order or instruction is an exemption from criminal liability".[846]

793. Under Australia's Defence Force Discipline Act, disobedience to a "lawful command" is a punishable military offence.[847]

794. Austria's Military Penal Code as amended provides for the punishment, in principle, of the non-execution of orders.[848] However, it also provides that a soldier is not punishable if he/she does not execute an order which consists in the commission of a punishable offence.[849]

795. Under the Criminal Code of Belarus, the failure to execute an order is a punishable offence.[850]

796. Belgium's Law on Discipline in the Armed Forces provides that "soldiers must faithfully execute the orders given to them by their superiors in the interest of service. However, an order must not be executed if its execution could clearly result in the perpetration of a crime or an offence".[851]

797. Under Brazil's Military Penal Code, disobedience to a lawful order is a punishable offence.[852]

798. Chile's Code of Military Justice provides that:

> All military personnel are obliged to obey an operational order given them by a superior in the exercise of his legitimate powers . . . The right to demand that the acts of a superior yield to the statutes or regulations does not exempt the subordinate from obedience nor does it suspend the fulfilment of an operational order.[853]

The Code further provides that:

> Where the order is clearly conducive to the perpetration of an offence, then the subordinate may suspend the performance of the said order and, in urgent cases, modify it, immediately reporting this to the superior . . . If the superior insists on maintaining the order, it shall be carried out under the terms of the previous article.[854]

[844] Argentina, *Code of Military Justice as amended* (1951), Articles 667, 674 and 675.
[845] Armenia, *Penal Code* (2003), Article 356(1) and (3).
[846] Armenia, *Penal Code* (2003), Article 47(3).
[847] Australia, *Defence Force Discipline Act* (1982), Section 27.
[848] Austria, *Military Penal Code as amended* (1970), Articles 12–16.
[849] Austria, *Military Penal Code as amended* (1970), Articles 17.
[850] Belarus, *Criminal Code* (1999), Article 439.
[851] Belgium, *Law on Discipline in the Armed Forces* (1975), Article 11(2).
[852] Brazil, *Military Penal Code* (1969), Article 163.
[853] Chile, *Code of Military Justice* (1925), Article 334.
[854] Chile, *Code of Military Justice* (1925), Article 335.

799. Under Croatian law, soldiers have the duty to obey orders, unless an order would lead to a war crime or any other serious crime. Members of the armed forces are required to report unlawful orders they may have received.[855]
800. Under Cuba's Military Criminal Code, disobedience or failure to obey an order is a punishable offence, but if the order is regarded as an excessive requirement, the court may apply special mitigation of the sanction.[856]
801. Under Egypt's Military Criminal Code, failure to execute orders is punishable if the order in question is "legal". However, it also provides for the punishment of persons who do not obey "military orders".[857]
802. El Salvador's Law on the Armed Forces provides that "the duty to obey is limited to those orders that do not transgress statutory or regulatory provisions in force".[858]
803. Germany's Law on the Legal Status of Military Personnel stipulates that it is not to be regarded as disobedience if the subordinate does not carry out an order which would violate human dignity.[859] It also provides that "an order may not be complied with if, by that, a criminal act would be committed".[860]
804. Under India's Army Act and under other laws applicable to coast guards and border police forces, disobedience to a lawful order is an offence.[861]
805. Under Jordan's Military Criminal Code, disobedience to a lawful order is a punishable offence.[862]
806. Under Kenya's Armed Forces Act, disobedience to a lawful command is an offence.[863]
807. Malaysia's Armed Forces Act provides that:

> Every person subject to service law under this Act who in such manner as to show wilful defiance of authority disobeys any lawful command of his superior officer shall on conviction by court-martial be liable [to punishment].
>
> Every person subject to service law under this Act who, whether wilfully or through neglect, disobeys any lawful command of his superior officer shall on conviction by court-martial be liable [to punishment].[864]

However, in a footnote related to the foregoing provision, the Act states with respect to "lawful command" that "the command must not be contrary to Malaysian or international law . . . If a command is manifestly illegal the person

[855] Croatia, *Code of Criminal Procedure* (1993), Article 190; *Law on Military Service* (1995), Article 27(1); *Criminal Code* (1997), Article 388.
[856] Cuba, *Military Criminal Code* (1979), Article 5.
[857] Egypt, *Military Criminal Code* (1966), Articles 151, 152 and 153.
[858] El Salvador, *Law on the Armed Forces* (1998), Article 25.
[859] Germany, *Law on the Legal Status of Military Personnel* (1995), § 11(1).
[860] Germany, *Law on the Legal Status of Military Personnel* (1995), § 11(2)(1).
[861] India, *Army Act* (1950), Section 41; *Coast Guards Act* (1978), Section 20; *Indo-Tibetan Border Police Force Act* (1992), Section 23.
[862] Jordan, *Military Criminal Code* (1952), Article 17.
[863] Kenya, *Armed Forces Act* (1968), Article 28.
[864] Malaysia, *Armed Forces Act* (1972), Section 50.

to whom it is given would be justified in questioning and even refusing to execute it."[865]

808. Nigeria's Army Act and Armed Forces Decree 105 as amended provide that military personnel have the duty to obey lawful orders.[866]

809. Under Pakistan's Army Act, a soldier is liable to punishment if he disobeys a "lawful command".[867]

810. Pakistan's Frontier Corps Ordinance provides for the punishment of "every member of the Frontier Corps who –... while on active service –... disobeys the lawful command of his superior officer".[868]

811. Under Peru's Code of Military Justice, refusal or failure to execute a military order in wartime constitutes a punishable offence. Failure to carry out an order in the course of duty without justifiable cause constitutes disobedience.[869]

812. Poland's Penal Code provides that "a soldier who does not execute or refuses to execute an order or executed an order in a way inconsistent with its contents, shall be punished".[870] However, it also states that:

1. A soldier who refuses to execute an order consisting in committing an offence or does not execute it, does not commit an offence described in Art. 343.
2. In case of the execution of an order mentioned in § 1 in a way inconsistent with its contents in order to diminish the harmfulness of the acts, the court may apply an extraordinary mitigation of punishment or desist from inflicting it.[871]

813. Under Russia's Criminal Code, failure to execute an order is a punishable offence.[872]

814. South Africa's Code of Military Discipline as amended, in a provision entitled "Disobeying lawful commands or orders", provides that "any person who in wilful defiance of authority disobeys any lawful command given personally by his superior officer in execution of his duty, whether orally, in writing or by signal, shall be guilty of an offence and liable on conviction".[873]

815. South Africa's Constitution provides that "no member of any security service [i.e. defence force, police force and intelligence services] may obey a manifestly illegal order".[874]

816. Spain's Royal Ordinance for the Armed Forces provides that "where an order would entail the execution of acts which are manifestly contrary to the

[865] Malaysia, *Armed Forces Act* (1972), Section 50, footnote 4.
[866] Nigeria, *Army Act* (1960), Section 40; *Armed Forces Decree 105 as amended* (1993), Sections 56 and 57.
[867] Pakistan, *Army Act* (1952), Section 33.
[868] Pakistan, *Frontier Corps Ordinance* (1959), Section 8(e)(i).
[869] Peru, *Code of Military Justice* (1980), Articles 78(24), 158, 159, 161, 162 and 172.
[870] Poland, *Penal Code* (1997), Article 343(1).
[871] Poland, *Penal Code* (1997), Article 344.
[872] Russia, *Criminal Code* (1996), Article 332.
[873] South Africa, *Code of Military Discipline as amended* (1957), § 19(1).
[874] South Africa, *Constitution* (1996) Section 199(1) and (6).

laws and customs of war or constitute a crime . . . no soldier is bound to obey it".[875]

817. Spain's Penal Code provides that criminal liability is not incurred by authorities or public employees who do not comply with an order constituting a clear, manifest and definite breach of a precept of law or any other general provision.[876]

818. Tajikistan's Criminal Code provides that "non-execution of a knowingly unlawful order or instruction excludes criminal responsibility".[877]

819. Uruguay's Organisational Law of Armed Forces states that military status imposes a fundamental "duty of obedience, respect, and subordination to the superior at all times and in all places, in accordance with the laws and regulations in force".[878]

National Case-law

820. In the *Sergeant W. case* in 1966, Belgium's Court-Martial of Brussels sentenced a sub-officer to three years' imprisonment for the wilful killing of a civilian. The accused, who at the time of the event was chasing rebels, was serving in the Congolese army within the framework of military technical co-operation between Congo (DRC) and Belgium. The Court held that, the accused's interpretation of the order he had received, i.e. to kill an unarmed person in his power, was manifestly unlawful; the accused therefore had a duty to disobey this order.[879]

821. In his dissenting opinion in the *Finta case* before the Canadian Supreme Court in 1994, one of the judges recognised that "military orders can and must be obeyed unless they are manifestly unlawful". He added that an order was manifestly unlawful when it "offends the conscience of every reasonable, right thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong."[880]

822. In its judgement in the *Guzmán and Others case* in 1974, Chile's Santiago Council of War stated that:

> The provisions of Article 335 of the Code of Military Justice [which provides for the right to disobey an unlawful order] require that: a) an order be received from a hierarchical superior; b) that this order be related to the military service; and c) that the subordinate has explained the illegality of the order to the superior, and that the latter has insisted on the order's performance.[881]

[875] Spain, *Royal Ordinance for the Armed Forces* (1978), Article 34.
[876] Spain, *Penal Code* (1995), Article 410.2.
[877] Tajikistan, *Criminal Code* (1998), Article 45(3).
[878] Uruguay, *Organisational Law of Armed Forces* (1974), Article 61.
[879] Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.
[880] Canada, Supreme Court, *Finta case*, Dissenting opinion of one of the judges, 24 March 1994.
[881] Chile, Santiago Council of War (FACH), *Guzmán and Others case*, Judgement, 30 July 1974.

823. In a case relating to conscientious objection in 1992, the Colombian Constitutional Court considered that a superior's order that would consist of occasioning death outside combat would clearly lead to a violation of human rights and of the Constitution. As such it should be disobeyed.[882] In another case in 1995, in which the Court was examining the constitutionality of a military regulation that provided that a subaltern was obliged to obey a superior's order that he/she thought unlawful, if the order was confirmed in writing, the Court took the same approach.[883]

824. In its judgement in the *Dover Castle case* in 1921, Germany's Reichsgericht held that "it is a military principle that the subordinate is bound to obey the orders of his superiors".[884]

825. In the *Ofer, Malinki and Others case* in 1958, Israel's District Military Court for the Central Judicial District ruled that "the rule is that a soldier *must* obey every order (subject to the exception) given him by his commander while fulfilling his duty . . . The exception is that he need not execute an order that is manifestly illegal." As to the term "manifestly illegal", the Court went on to explain that:

> The identifying mark of a "manifestly unlawful" order must wave like a black flag above the order given, as a warning saying: "forbidden". It is not formal unlawfulness, hidden or halfhidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of "manifest" illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.[885]

The Military Court of Appeal adopted these words and added that the legislator's solution to the problem of conflict between law and obedience is, as it were, a golden mean between giving complete preference to one of those factors over the other, because it recognised

> the impossibility of reconciling these two values through purely formal law, and therefore foregoes the attempt to resolve the problem by these means alone; it bursts out of the confines, as it were, of the purely judicial categories, calling for help on the sense of lawfulness that lies deep within the conscience of every human being as such, even if he is not expert in the law.[886]

[882] Colombia, Constitutional Court, *Constitutional Case No. T-409*, Judgement, 8 June 1992.
[883] Colombia, Constitutional Court, *Constitutional Case No. C-578*, Judgement, 4 December 1995.
[884] Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.
[885] Israel, District Military Court for the Central Judicial District, *Ofer, Malinki and Others case*, Judgement, 13 October 1958.
[886] Israel, Military Court of Appeal, *Ofer, Malinki and Others case*, Judgement, 3 April 1959.

826. In its judgement in the *Hass and Priebke case* in 1997, Italy's Military Tribunal of Rome stated that the duty to disobey an openly criminal order was independent from the fact that the subordinate could or could not prevent the event. The Tribunal further stated that "it is evident, indeed, that a member of the armed forces must not obey an unlawful order given to him even if he is aware that other persons may be willing to carry it out".[887] In its relevant parts, this judgement was confirmed by the Military Appeals Court and the Supreme Court of Cassation.[888]

827. In its judgement in the *Zühlke case* in 1948, a Special Court in Amsterdam (Netherlands), with regard to the accused's plea of superior orders, stated that:

The Court rejects this plea. Indeed . . . there was no need for him in the given circumstances to carry out such orders. An order to commit actions forbidden by international law may not be carried out, and a mistaken idea as to the validity or existence of such prohibitive provisions does not carry with it exclusion from penal liability. The detention in prison of persons who were incarcerated on the ground of their origin, or the ill-treatment and humiliation of prisoners, does not belong to the sphere of military subordination. The accused, who was not only a prison warder by occupation but had also been trained as a non-commissioned officer, must have known this.[889]

828. In its judgement in the *Margen case* in 1950, the Supreme Court of the Philippines held that "obedience to an order of a superior gives rise to exemption from criminal liability only when the order is for some lawful purpose . . . [In this case] the order was illegal, and appellant was not bound to obey it."[890]

829. In the *Calley case* in 1973, the US Army Court of Military Appeals approved the following instructions given to the panel by the trial judge in a case where the accused invoked an order to kill unresisting detainees:

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.[891]

The Court cited a writer's opinion to the effect that:

For the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination,

[887] Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997.
[888] Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.
[889] Netherlands, Special Court in Amsterdam, *Zühlke case*, Judgement, 3 August 1948.
[890] Philippines, Supreme Court, *Margen case*, Judgement, 30 March 1950.
[891] US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973.

and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and *lawful on its face*, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, *the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness* . . .

Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court.[892] [emphasis in original]

Other National Practice

830. According to a statement by Argentina's Chief of Staff of the Army in 1995, nobody is obliged to carry out an order which is unethical or which contravenes military laws and regulations.[893]

831. At the CDDH, Australia stated that it "supported the objectives sought in the ICRC text of article 77 [of draft AP I]. Since the article should relate solely to grave breaches, paragraph 1 could be approved without reservation."[894]

832. According to the Report on the Practice of Chile, "Chile adheres to the principle of reasoned obedience".[895]

833. The Report on the Practice of Cuba states that:

> In practice, there is no record of military personnel giving orders violating international humanitarian law, but in accordance with the interpretation of [Article 25(3) of the Penal Code providing for mitigation in case of excessive order], obeying an illegal order is comparable with excessive requirement to obey, and the possibility of not obeying can therefore be envisaged.[896]

834. The Report on the Practice of Egypt, referring to an explanatory memorandum relative to Article 15 of Egypt's Military Criminal Code which provides for the punishment of not executing legal orders, notes "the fact that the order of a superior should be a 'legal one'". The report further states that "clearly, this may open the door for a defence of non-execution of an order to commit a violation of IHL".[897]

835. The Report on the Practice of India, referring to provisions of the Army Act, Coast Guard Act and Indo-Tibetan Boarder Police Force Act, states that it is "possible to deduce from these provisions a right to disobey unlawful orders given by superior officials/authorities because the relevant provisions

[892] US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973, referring to Col. William Winthrop, *Military Law and Precedents*, pp. 296–297, 2nd edition 1920 (reprint).

[893] Argentina, Chief of Staff of the Army, Statement of 25 April 1995, *Revista de la Escuela Superior de Guerra*, July–September 1995, p. V; see also Chief of Staff of the Army, Statement of 29 May 1995, *Revista de la Escuela Superior de Guerra*, April–June 1995, p. I.

[894] Australia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.51, 5 May 1976, p. 128, § 26.

[895] Report on the Practice of Chile, 1997, Chapter 6.8.

[896] Report on the Practice of Cuba, 1998, Chapter 6.8.

[897] Report on the Practice of Egypt, 1997, Chapter 6.8.

very clearly provide that a person is not supposed to wilfully defy 'lawful' orders or commands given by the superiors".[898]

836. At the CDDH, Israel stated that it had voted in favour of Article 77 of draft AP I and that:

> The article is a reflection of existing customary international law clearly enunciated in the Nürnberg principles and embodied in [Israeli law].
>
> We regret that Article 77 was not adopted... and wish to state that the rule [initially providing, *inter alia*, that "no person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol"] continues to be governed by customary international law.[899]

837. The Report on the Practice of Israel states that:

> Under general Israeli law and IDF internal regulations, there exists a differentiation between an "unlawful order" and a "manifestly unlawful order". Based on the understanding that clarity of command is a required element in any military organization, all IDF soldiers are required to comply with "unlawful orders"... As regards "manifestly unlawful orders"... IDF soldiers are required by law to refuse any such order.[900]

838. On the basis of the decisions of the Military Tribunal of Rome in the *Priebke case* and in the *Hass and Priebke case*, the Report on the Practice of Italy concludes that "the *opinio juris* of Italy is that a soldier has the duty to disobey an order to commit a violation of international humanitarian law".[901]

839. According to the Report on the Practice of Jordan, Article 17 of the Military Criminal Code of Jordan, which provides for the imposition of a penalty upon a subordinate who disobeys a lawful order, "means that if a subordinate knows that the order given by a superior would result in a breach of the law he must disobey it".[902]

840. In an article published in a military review, a member of the Kuwaiti armed forces stated that:

> If a soldier receives an illegal order, he should draw the attention of his commander to the illegality of the same. If the commander insists on his opinion, the soldier should abide by the order and implement it, unless the illegality is clear, and the order forms a crime, e.g. if the military commander orders to forge papers, embezzle funds, murder a human being or torture him. Here the duty of obedience is turned into the duty of refusal.[903]

[898] Report on the Practice of India, 1997, Chapter 6.8.
[899] Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 336.
[900] Report on the Practice of Israel, 1997, Chapter 6.8.
[901] Report on the Practice of Italy, 1997, Chapter 6.8.
[902] Report on the Practice of Jordan, 1997, Chapter 6.8.
[903] Fellah Awad Al-Anzi, "The accomplishment of duties and the execution of military orders, their limits and constraints", *Homat Al-Watan*, No. 149, p. 61.

841. According to the Report on the Practice of Kuwait, under Kuwait's military laws, soldiers take the oath to obey rightful orders.[904]

842. The Report on the Practice of Pakistan states that:

> Although the text of the oath [for soldiers] merely refers to obedience to "all commands", still it is to be understood that the text of the oath . . . cannot be read beyond the provisions of [section 33 of the Army Act (1952) which provides that a soldier is liable to punishment if he disobeys a "lawful command"]. It is to be noted that although there is no provision explicitly stating that unlawful command should be disobeyed, still the section 33 can be interpreted to mean that there will be no punishment under the Army Act if the soldier has disobeyed the command which is illegal . . . Thus the *opinio juris* and the practice in Pakistan is that unlawful command can be refused.[905]

843. The Report on the Practice of the Philippines, referring to a provision of the Revised Penal Code which provides that "any person who acts in obedience to an order issued by a superior for some lawful purpose" does not incur any criminal liability, states that "however, if the order is obviously illegal, the person has the duty to disobey it".[906]

844. According to the Report on the Practice of Russia, "no document of the CIS countries [contains] a provision that a superior's order can be omitted if it would mean a violation of the rules of IHL". However, the report also notes that "the right of a subordinate to disobey a superior's order violating the rules of IHL can be inferred from the provision that a violation of the rules of IHL is considered to be a war crime and is prosecuted as a penal offence".[907]

845. The Report on the Practice of Spain states that "since the subordinate is not protected [from penal responsibility under the Military Criminal Code] by the defence of hierarchical obedience, he is bound to disobey any order manifestly contrary to the laws and customs of war, a phrase that covers breaches of international humanitarian law".[908]

846. According to the Report on US Practice, it is the *opinio juris* of the US that the law of war obliges all persons not to commit war crimes. The duty to obey the law of war prevails over the duty to obey a manifestly unlawful order.[909]

847. During a debate in Committee I of the CDDH, Uruguay, although criticising Article 77 of draft AP I submitted by the ICRC, stated that it "supported the principles underlying Article 77, which undoubtedly had its place in the section of draft Protocol I dealing with the repression of breaches".[910]

[904] Report on the Practice of Kuwait, 1997, Chapter 6.8.
[905] Report on the Practice of Pakistan, 1998, Chapter 6.8.
[906] Report on the Practice of Philippines, 1997, Chapter 6.9, referring to *Revised Penal Code* (1930), Article 11(6).
[907] Report on the Practice of Russia, 1997, Chapter 6.8.
[908] Report on the Practice of Spain, 1998, Chapter 6.8.
[909] Report on US Practice, 1997, Chapter 6.8.
[910] Uruguay, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.52, 6 May 1976, p. 144, § 45.

III. Practice of International Organisations and Conferences

United Nations
848. In 1997, in the recommendations of his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights stated that "the members of the armed forces should know that they have the right to refuse to carry out orders that will result in slaughter".[911]

Other International Organisations
849. No practice was found.

International Conferences
850. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

851. No practice was found.

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

852. No practice was found.

VI. Other Practice

853. The SPLM Human Rights Charter provides that "all persons have the right and duty to refuse to carry out orders that would involve them abusing the above principles, without fear of punishment".[912]
854. The Penal and Disciplinary Laws of the SPLM/A state that:

> The following offences shall be punishable under this Law and shall pertain only to members of the Sudan People's Liberation Army and its affiliated organizations.
> ...
> d) Disobedience of Lawful Orders from a Superior.[913]

E. Defence of Superior Orders

I. Treaties and Other Instruments

Treaties
855. Article 8 of the 1945 IMT Charter (Nuremberg) provides that "the fact that the Defendant acted pursuant to order of his Government or of a superior

[911] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 93.
[912] SPLM, Human Rights Charter, May 1996, § 11.
[913] SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 26(d).

shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

856. Article 77(2) of draft AP I submitted by the ICRC to the CDDH provided that "the fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order".[914] This proposal was subject to amendments and referred to Working Group A of Committee I where it was adopted by 38 votes in favour, 22 against and 15 abstentions.[915] The approved text provided that:

> The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment.[916]

Eventually, however, the whole Article was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 25 against and 25 abstentions).[917]

857. Article 2 of the 1984 Convention against Torture provides that "an order from a superior officer or a public authority may not be invoked as a justification of torture".

858. Article VIII of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that "the defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted". However, Article XV excludes its application in international armed conflicts governed by the 1949 Geneva Conventions and their Additional Protocols.

859. Article 9(1) of the 1998 Draft Convention on Forced Disappearance provides that "no order or instruction of any public authority – civilian, military or other – may be invoked to justify a forced disappearance".

860. Article 33 of the 1998 ICC Statute provides that:

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>   (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

[914] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.
[915] CDDH, *Official Records*, Vol. X, CDDH/234/Rev.1, 21 April–11 June 1976, p. 120, §§ 26–27; *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 188, § 38, and p. 262; *Official Records*, Vol. IX, CDDH/I/SR.65, 9 June 1976, p. 332, § 30.
[916] CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 262.
[917] CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 308.

(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

861. Article 6(4) of the 2002 Statute of the Special Court for Sierra Leone, dealing with "Individual criminal responsibility", provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires".

Other Instruments

862. Article II, Section 4(b), of the 1945 Allied Control Council Law No. 10 provides that "the fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation".

863. Article 6 of the 1946 IMT Charter (Tokyo), entitled "Responsibility of Accused", provides that:

> Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

864. Principle IV of the 1950 Nuremberg Principles provides that "the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him".

865. Article 4 of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind provides that "the fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order".

866. Article 5 of the 1979 Code of Conduct for Law Enforcement Officials provides that:

> No law enforcement official may invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

867. Paragraph 26 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that "obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and

firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it".

868. Article 11 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Order of a Government or a superior", provides that "the fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order".

869. Article 7(4) of the 1993 ICTY Statute provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires".

870. Article 6(4) of the 1994 ICTR Statute provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires".

871. Paragraph 31 of the 1994 CSCE Code of Conduct states that "the responsibility of superiors does not exempt subordinates from any of their individual responsibilities".

872. Article 5 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Order of a Government or a superior", provides that "the fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires".

873. Section 21 of the 2000 UNTAET Regulation No. 2000/15 provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires".

II. National Practice

Military Manuals

874. Australia's Defence Force Manual provides that:

> ADF members are open to prosecution for breaches of LOAC. Individual responsibility for compliance cannot be avoided and ignorance is not a justifiable excuse. ADF members will be held to account for any unlawful action that leads to a serious breach of LOAC. If such acts are committed, compliance with unlawful orders of a superior officer is not a justifiable excuse.[918]

[918] Australia, *Defence Force Manual* (1994), § 1306; see also *Commanders' Guide* (1994), § 1207.

875. Cameroon's Disciplinary Regulations provides that "the subordinate is relieved from his penal responsibility when he obeys his commander's orders and in conformity with the provisions of Article 83-1 of the Penal Code".[919] It adds, however, that "if the order is manifestly illegal . . . the subordinate engages his penal responsibility according to the provisions of Articles 82-b and 83-2 of the Penal Code".[920] The manual further states that "if the subordinate is constrained by force or physical threat, he shall be totally relieved of his penal responsibility".[921]

876. Canada's LOAC Manual, referring to the *Finta case*, provides that "the fact that an accused person acted pursuant to an order of a Government or a superior does not relieve this person of criminal responsibility . . . However, in some cases the fact that an accused acted pursuant to a superior order may be considered in mitigation of punishment."[922] The manual further states that "it is no defence to a war crime that the act was committed in compliance with an order".[923] It adds that "an act . . . performed in compliance with an order which is manifestly unlawful to a reasonable soldier given the circumstances prevailing at the time does not constitute a defence and cannot be pleaded in mitigation of punishment".[924]

877. Canada's Code of Conduct provides that "it must be remembered that if you are charged for carrying out a manifestly unlawful order, it will not be a defence to say that you were only following orders. This is why leaders have an obligation to provide clear lawful commands."[925] It adds that "disciplined personnel do not commit war crimes or breach the Law of Armed Conflict. They understand the nature of a lawful command and are always conscious that they must carry out their orders in a manner consistent with the law and the goal of the overall mission."[926]

878. Colombia's Basic Military Manual states that "under the terms of Chapter IX of the First Geneva Convention relative to the repression of abuses and infractions, IHL establishes the principle of individual responsibility, that is to say, that acting pursuant to superior orders does not relieve the person of his responsibility for the grave breaches he may commit".[927]

879. The Military Manual of the Dominican Republic tells soldiers that "even if you had orders to commit the act, it is no defence if it was a manifestly criminal act".[928]

[919] Cameroon, *Disciplinary Regulations* (1975), Article 21(I).
[920] Cameroon, *Disciplinary Regulations* (1975), Article 21(II).
[921] Cameroon, *Disciplinary Regulations* (1975), Article 21(III).
[922] Canada, *LOAC Manual* (1999), p. 16-4, § 28.
[923] Canada, *LOAC Manual* (1999), p. 16-5, § 33.
[924] Canada, *LOAC Manual* (1999), p. 16-5, § 34.
[925] Canada, *Code of Conduct* (2001), Rule 11, § 5.
[926] Canada, *Code of Conduct* (2001), Rule 11, § 6.
[927] Colombia, *Basic Military Manual* (1995), p. 37.
[928] Dominican Republic, *Military Manual* (1980), p. 12.

880. France's LOAC Manual states that "each individual is responsible for the violations of the law of armed conflicts for which he/she has made himself/herself guilty, whatever the circumstances may be, and even if he/she acted in execution of an order emanating from a superior".[929]
881. Germany's Military Manual provides that "a plea of superior orders shall not be acknowledged if the subordinate realized or, according to the circumstances known to him, obviously could have realized that the action ordered was a crime (§ 5 of the Military Penal Code)".[930]
882. South Korea's Operational Law Manual states that the fact that a soldier obeyed an unlawful order cannot relieve him of responsibility.[931]
883. New Zealand's Military Manual states that "it is no defence to a war crimes charge that the act was committed in compliance with an order".[932] It further states that:

> An act which is performed in compliance with an unlawful order which, to a reasonable member of the armed forces in the circumstances prevailing at the time of the order, is obviously, palpably or manifestly unlawful, does not constitute a defence to a war crimes charge: nor can it be pleaded in mitigation of punishment.[933]

The manual then states that "if the order involves the commission of an act which is unlawful, though not manifestly so, the fact that it was committed in compliance with an order may be taken into consideration for the purpose of mitigation of punishment".[934] It adds that:

> If it is obvious that an order is unlawful, then it should not be obeyed. Orders which are obviously unlawful are extremely rare. An order to torture or kill prisoners of war or innocent civilians or to loot civilian property would be obviously unlawful. This kind of order should never be obeyed and it should never be assumed that it will provide a defence if a charge results from its obedience.[935]

In one of its annexes, the manual also states that "if a command is unlawful and is obeyed, the person who obeys it could find himself charged with a criminal offence or a war crime".[936]
884. Nigeria's Manual on the Laws of War provides that "obedience to an order of a government or of a superior, whether military or civil, or to a municipal law or regulation, affords no defence to a charge of committing a war-crime but may be considered in mitigation of punishment".[937]

[929] France, *LOAC Manual* (2001), p. 113.
[930] Germany, *Military Manual* (1992), § 144.
[931] South Korea, *Operational Law Manual* (1996), p. 189, § 3.
[932] New Zealand, *Military Manual* (1992), § 1710(1).
[933] New Zealand, *Military Manual* (1992), § 1710(2).
[934] New Zealand, *Military Manual* (1992), § 1710(3).
[935] New Zealand, *Military Manual* (1992), Annex C, § C14(4).
[936] New Zealand, *Military Manual* (1992), Annex C, § C14(2).
[937] Nigeria, *Manual on the Laws of War* (undated), § 9.

885. Peru's Human Rights Charter of the Security Forces provides that "the execution of a manifestly illegal order is no exemption from penal responsibility".[938]

886. South Africa's LOAC Manual, referring to the South African Constitution (1996), provides that "a person who commits a war crime pursuant to an order is guilty of a war crime if that person knew or should have known that the order was unlawful".[939]

887. South Africa's Medical Services Military Manual provides that "when an order is manifestly illegal the subordinate has the duty to refuse to obey. The order will not be a ground of justification in such a case, it will not justify his/her acts."[940]

888. Sweden's IHL Manual recalls that "according to the so-called Nuremberg principles, the fact that a person has acted upon the orders of a government or a superior shall not free him from liability in international law, provided that he had a genuine possibility of avoiding the act in question".[941]

889. Switzerland's Basic Military Manual provides that "the subordinate or inferior is also punishable if he realised while executing the order that he was participating in the perpetration of a crime. The fact that the subordinate or inferior acted pursuant to an order can constitute a mitigating circumstance."[942]

890. The UK Military Manual states that "obedience to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment".[943]

891. The UK LOAC Manual provides that "there is no defence of 'superior orders'. If a soldier carries out an illegal order, both he and the person giving that order are responsible."[944]

892. The US Field Manual provides that:

> The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.[945]

893. The US Air Force Pamphlet provides that:

[938] Peru, *Human Rights Charter of the Security Forces* (1991), p. 13.
[939] South Africa, *LOAC Manual* (1996), § 44.
[940] South Africa, *Medical Services Military Manual* (undated), p. 5.
[941] Sweden, *IHL Manual* (1991), Section 4.2, p. 95.
[942] Switzerland, *Basic Military Manual* (1987), Article 199(2).
[943] UK, *Military Manual* (1958), § 627.
[944] UK, *LOAC Manual* (1981), Section 10, p. 38, § 1.
[945] US, *Field Manual* (1956), § 509(a).

The fact that an act was committed pursuant to military orders is an acceptable defense only if the accused did not know or could not reasonably have been expected to know that the act ordered was unlawful . . . Nevertheless, in all cases, the fact that an individual was acting pursuant to orders may be considered a mitigating factor in determining punishment.[946]

The manual gives the example of the Manual for Courts-Martial, which states that:

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner discharge of a lawful duty, is not excusable.[947]

894. The US Soldier's Manual tells soldiers that:

Even if you had orders to commit the act, you are personally responsible. Orders are not a defense.
. . .
Soldiers who kill captives or detainees cannot excuse themselves from the acts by claiming that an order to "take care of" a captive or detainee was understood to mean "execution". Common sense and the laws of war will help you recognize what is clearly criminal.[948]

895. The US Naval Handbook states that:

Under both international law and US law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict. Only if the unlawfulness of an order is not known by the individual, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of an order protect a subordinate from the consequences of violation of the law of armed conflict.[949] [emphasis in original]

The manual further states that:

The fact that a person committed a war crime under orders of his military or civilian superior does not relieve him from responsibility under international law. It may be considered in mitigation of punishment. To establish responsibility, the person must know (or have reason to know) that an act he is ordered to perform is unlawful under international law. Such an order must be manifestly illegal. The standard is whether under the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful. If the person knows the act is unlawful and only does it under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.[950]

[946] US, *Air Force Pamphlet* (1976), § 15-4(d). [947] US, *Air Force Pamphlet* (1976), § 15-4(d).
[948] US, *Soldier's Manual* (1984), p. 26. [949] US, *Naval Handbook* (1995), § 6.1.4.
[950] US, *Naval Handbook* (1995), § 6.2.5.5.1.

896. The Annotated Supplement to the US Naval Handbook states that "under both international law and U.S. law, an order to commit an obviously criminal act . . . is an unlawful order and will not relieve the subordinate of his responsibility to comply with the law of armed conflict". It specifies that "the order may be direct or indirect, explicit or implied".[951]

897. Under the YPA Military Manual of the SFRY (FRY), a member of the armed forces is responsible if he commits a violation of the laws of war in execution of a superior order if he knew that such order involved the commission of a criminal act.[952]

National Legislation

898. Under Albania's Military Penal Code, a person is not relieved from personal criminal responsibility if the act was committed pursuant to a manifestly unlawful order.[953]

899. Under Argentina's Code of Military Justice as amended, in the event that a crime is committed through the execution of a military order, only the superior officer who gave the order shall be held responsible for the crime, and the subordinate shall only be considered an accomplice to the crime if the order is carried out to excess.[954]

900. Argentina's Decree on Trial before the Supreme Council of the Armed Forces, issued in connection with the trial of the military junta, stated that:

> The existence of plans for orders renders the members of the military junta in office at the time, as well as the officers of the armed forces at the decision-making level, responsible in their capacity as indirect perpetrators for the criminal acts committed in compliance with the plans drawn up and overseen by the superiors (Article 514 of the Code of Military Justice). The text of this rule mitigates the responsibility of the subordinates, in particular because in many cases the subordinates may well have failed to understand the moral and legal significance of their acts owing to the psychological tactics used and the coercive context in which they found themselves.[955]

901. Australia's War Crimes Act as amended provides that:

> The fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence.[956]

[951] US, *Annotated Supplement to the Naval Handbook* (1997), § 6.1.4, footnote 16.
[952] SFRY (FRY), *YPA Military Manual* (1988), § 22.
[953] Albania, *Military Penal Code* (1995), Article 21.
[954] Argentina, *Code of Military Justice as amended* (1951), Article 514.
[955] Argentina, *Decree on Trial before the Supreme Council of the Armed Forces* (1983), preamble.
[956] Australia, *War Crimes Act as amended* (1945), Section 16.

902. Austria's Military Penal Code as amended provides that a soldier is responsible for punishable acts even if he committed them in execution of an order.[957]

903. Bangladesh's International Crimes (Tribunal) Act, which provides for individual responsibility for, *inter alia*, crimes against humanity, crimes against peace, genocide, war crimes, "violations of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949", as well as "any other crimes under international law", states that "the fact that [the] accused acted pursuant to his domestic law or to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal deems that justice so requires".[958]

904. Under the Criminal Code of Belarus, a person who intentionally commits an offence pursuant to an order that he/she knows to be illegal is criminally responsible.[959]

905. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that:

> The fact that the defendant acted on the order of his/her government or a superior shall not absolve him/her from responsibility where, in the prevailing circumstances, the order could clearly result in the commission of a crime of genocide or of a crime against humanity . . . or a grave breach of the Geneva Conventions . . . and their Additional Protocol I.[960]

906. Under Brazil's Military Penal Code, obedience to a manifestly unlawful order is not a valid defence.[961]

907. Cambodia's Law on the Khmer Rouge Trial, in the provision dealing with individual responsibility, states that "the fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility".[962]

908. Chile's Code of Military Justice provides that a subordinate who receives an illegal order and who does not follow a special procedure of questioning it before performing it, will receive mitigation of punishment.[963] It also gives as a general rule, except the case mentioned above, that the commission of a criminal act in complying with the order of a superior in rank can be taken into account in mitigation of punishment.[964]

909. Congo's Genocide, War Crimes and Crimes against Humanity Act states that:

[957] Austria, *Military Penal Code as amended* (1970), Article 3(1).
[958] Bangladesh, *International Crimes (Tribunal) Act* (1973), Sections 3(2) and 5(2).
[959] Belarus, *Criminal Code* (1999), Article 40.
[960] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 5(2).
[961] Brazil, *Military Penal Code* (1969), Article 38.
[962] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.
[963] Chile, *Code of Military Justice* (1925), Articles 214(2) and 335.
[964] Chile, *Code of Military Justice* (1925), Article 211.

The author or accomplice of a crime hereunder cannot be exonerated of his/her responsibility only because he/she has executed an act . . . ordered by the legal authority. However, the court will take these circumstances into consideration when determining the punishment and its duration.[965]

910. Egypt's Penal Code provides that a public officer is not liable for acts committed pursuant to the order of a superior if he/she could reasonably believe that the order was lawful and if he has made necessary investigations and assured himself of the legitimacy of the order.[966]

911. Egypt's Military Criminal Code, which is silent on the defence of superior orders, provides that in case of silence, general rules should be applied.[967]

912. Estonia's Penal Code provides that "the fact that the offence provided for in the present chapter [i.e. crimes against humanity, crimes against peace and war crimes] was committed pursuant to the order of a representative of public administration or of a military commander shall not preclude the punishment of the author of the crime".[968]

913. Ethiopia's Penal Code provides that:

The subordinate who has carried out an order to commit an offence . . . shall be liable to punishment if he was aware of the illegal nature of the order or knew that the order was given without authority or knew the criminal nature of the act ordered, such as in cases of homicide, arson or any other grave offence against persons or property, essential public interests or international law.

The Court may, without restriction, reduce the penalty when the person who performed the act ordered was moved by a sense of duty dictated by discipline or obedience; the Court shall take into account the compelling nature of the duty.

The Court may impose no punishment where, having regard to all the circumstances and in particular to the stringent exigencies of State or military discipline, the person concerned could not discuss the order received and act otherwise than he did.[969]

914. France's Ordinance on Repression of War Crimes provided that:

Laws, decrees and regulations emanating from the enemy authority, orders or authorizations given by this authority or by authorities depending thereupon or having depended thereupon cannot be invoked as justifying facts in the meaning of the [Penal Code], but only, if ever, as attenuating circumstances or as absolutory excuses.[970]

915. France's Penal Code provides that a person who executes an act pursuant to a command by a legitimate authority shall not be criminally responsible,

[965] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 13.
[966] Egypt, *Penal Code* (1937), Article 63.
[967] Egypt, *Military Criminal Code* (1966), Article 10.
[968] Estonia, *Penal Code* (2001), § 88(2).
[969] Ethiopia, *Penal Code* (1957), Article 70.
[970] France, *Ordinance on Repression of War Crimes* (1944), Article 3.

provided the act was not manifestly illegal.[971] However, in the chapter dealing with crimes against humanity, the Code provides that:

The author of or accomplice to a crime . . . cannot be released from his/her responsibility for the sole reason of having committed an act . . . ordered by the legitimate authority. However, [the court] will take into account such circumstance when determining the punishment.[972]

916. Under Germany's Military Penal Code as amended, a person acting pursuant to an order of a superior is not relieved of criminal responsibility if he/she realised or, according to the circumstances known to him, should have realised that the order was a crime. The court can mitigate punishment if, taking circumstances into account, the personal liability of the subordinate is limited.[973]

917. Germany's Law on the Legal Status of Military Personnel stipulates that:

An order may not be complied with if, by that, a criminal act would be committed. If the subordinate nevertheless complies with the order, he/she is guilty only if he/she realises or if, under the circumstances known to him/her, it is obvious to him/her, that, by that, a criminal act would be committed.[974]

918. Germany's Law Introducing the International Crimes Code provides that:

Whoever commits an offence [consisting of a war crime, a violation of the duty of supervision or the omission to report a crime] in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt in so far as the perpetrator does not realise that the order is unlawful and in so far as it is also not manifestly unlawful.[975]

919. Under Iraq's Military Penal Code, a person remains criminally responsible if he/she knew the order he/she received aims at committing a crime.[976]

920. Israel's Nazis and Nazi Collaborators (Punishment) Law excludes certain defences otherwise existing under the Israeli Criminal Code of the time, *inter alia*, for cases dealing with crimes against the Jewish people, war crimes and crimes against humanity.[977] However, it also states that:

In determining the punishment of a person convicted of an offence under this Law, the court may take into account, as grounds for mitigating the punishment, the following circumstances:

(a) that the person committed the offence under conditions which, but for section 8, would have exempted him from criminal responsibility or constituted a reason for pardoning the offence, and that he did his best to reduce the gravity of the consequences of the offence;

[971] France, *Penal Code* (1994), Article 122-4.
[972] France, *Penal Code* (1994), Article 213-4.
[973] Germany, *Military Penal Code as amended* (1957), Section 5.
[974] Germany, *Law on the Legal Status of Military Personnel* (1995), § 11(2).
[975] Germany, *Law Introducing the International Crimes Code* (2002), Article 1(3).
[976] Iraq, *Military Penal Code* (1940), Articles 43 and 98.
[977] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 8, excluding the applicability of Articles 16–19 of the Israeli Criminal Code of the time.

(b) that the offence was committed with intent to avert, and was indeed calculated to avert, consequences more serious than those which resulted from the offence;

however, in the case of an offence under section 1 [a crime against the Jewish people, a crime against humanity or a war crime], the court shall not impose on the offender a lighter punishment than imprisonment for a term of ten years.[978]

921. Israel's Penal Law as amended states that:

(a) A person is not criminally responsible for an act or omission done or made either –
  (1) in execution of the law or
  (2) in obedience to the order of a competent authority, which he is bound by law to obey, unless the order is manifestly unlawful.
(b) Whether an order is manifestly unlawful is a question of law.[979]

922. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment for war crimes, provide that "the superior and the subordinate will both be held responsible in case of the perpetration of any of the infringements mentioned".[980]

923. Luxembourg's Law on the Punishment of Grave Breaches provides that "the fact that the accused has acted under the order of his Government or of a superior in rank does not relieve him of his responsibility if, under the circumstances at the time, he should have realised the criminal character of the order and had the possibility not to comply with it".[981]

924. Article 42 of the Penal Code as amended of the Netherlands provides that a person performing an act in execution of a legal requirement shall not be liable to punishment. Article 43 provides that a person shall not be liable to punishment "for acts committed in performance of an official order issued by an authorised authority" and that "an official order that has been given without authority does not relieve from punishment, unless the subordinate believes in good faith that the order is authorized and obedience to the order is inherent to his or her subordinate position".[982]

925. The International Crimes Act of the Netherlands provides that:

1. The fact that a crime as defined in this Act [genocide, crimes against humanity, war crimes, torture] was committed pursuant to a regulation issued by the legal power of a State or pursuant to an order of a superior does not make that act lawful.
2. A subordinate who commits a crime referred to in this Act in pursuance of an order by a superior shall not be criminally responsible if the order was believed by the subordinate in good faith to have been given lawfully and the execution of the order came within the scope of his competence as a subordinate.

[978] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Sections 10 and 11.
[979] Israel, *Penal Law as amended* (1977), Section 24.
[980] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 148.
[981] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 8.
[982] Netherlands, *Penal Code as amended* (1881), Articles 42 and 43.

3. For the purposes of subsection 2, an order to commit genocide or a crime against humanity is deemed to be manifestly unlawful.[983]

According to this Act, "superior" means: "(i) a military commander, or a person effectively acting as such, who has effective command or authority over or exercises effective control over one or more subordinates; (ii) a person who exercises effective authority, in a civilian capacity, over or exercises effective control over one or more subordinates".[984]

926. Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes" providing for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes in the meaning of the 1949 Geneva Conventions and both Additional Protocols, provides that:

The author or accomplice of one of the crimes set out in this chapter cannot be exonerated from his or her responsibility for the only reason that he or she committed an act stipulated or authorised by legal provisions or an act ordered by the legal authority. However, the court shall take these circumstances into consideration at the determination of the punishment.[985]

927. Under Peru's Code of Military Justice, obedience to a superior's order is a valid defence, if the order is not manifestly unlawful.[986]

928. The Revised Penal Code of the Philippines, in a provision entitled "Justifying circumstances", states that "the following do not incur any criminal liability: . . . any person who acts in obedience to an order issued by a superior for some lawful purpose".[987]

929. Poland's Penal Code provides that "a member of the armed forces who commits a prohibited act in carrying out an order does not commit an offence unless, while carrying out the order, he commits an offence intentionally".[988]

930. Rwanda's Penal Code provides, as a general rule, that an illegal act done in pursuance of the law or of a superior's order does not entail liability. The Code further provides, however, that the execution of a manifestly illegal order does not relieve the subordinate of responsibility.[989]

931. Slovenia's Penal Code provides that:

A subordinate shall not be punished if he commits a criminal offence by order or command of a superior issued in the course of military service, unless he has committed a war crime or any other grave criminal offence or if he knew that the carrying out of the order or command constituted a criminal offence.[990]

[983] Netherlands, *International Crimes Act* (2003), Article 11.
[984] Netherlands, *International Crimes Act* (2003), Article 1(1)(b).
[985] Niger, *Penal Code as amended* (1961), Article 208.6.
[986] Peru, *Code of Military Justice* (1980), Article 19(7).
[987] Philippines, *Revised Penal Code* (1930), Article 11(6).
[988] Poland, *Penal Code* (1997), Article 318.
[989] Rwanda, *Penal Code* (1977), Articles 70 and 229.
[990] Slovenia, *Penal Code* (1994), Article 283.

932. Spain's Royal Ordinance for the Armed Forces provides that "where an order would entail the execution of acts which are manifestly contrary to the laws and customs of war or constitute a crime . . . no soldier is bound to obey it; in any case, he must assume serious responsibility for his act or omission".[991]
933. Spain's Military Criminal Code states that obeying any order involving the commission of acts manifestly contrary to the laws or customs of war does not constitute an exonerating or mitigating circumstance.[992]
934. Spain's Law on Security Forces provides that under no circumstances may a defence of due obedience be applied to orders involving the execution of acts that manifestly constitute offences or are contrary to Spain's Constitution or laws.[993]
935. Sweden's Penal Code as amended provides that "an act committed by a person on the order of someone to whom he owes obedience shall not result in his being liable to punishment, if in view of the nature of obedience due, the nature of the act and the circumstances in general, it was his duty to obey the order".[994]
936. Under Switzerland's Military Criminal Code as amended, a subordinate who participates in the commission of a punishable offence while carrying out a superior's order is not relieved of responsibility if he/she knew that the act was a punishable offence. However, the judge may mitigate or exempt from punishment.[995]
937. Tajikistan's Criminal Code provides that:

It does not constitute a crime . . . if a person acts in execution of an order or an instruction which was obligatory for him/her and which was duly made.
A person who committed a wilful crime in executing an unlawful order or instruction shall be criminally liable on general grounds.[996]

938. Uruguay's Penal Code as amended, in a provision referring to compliance with the law, provides that "anyone who performs an act, ordered or permitted by law, on account of his public functions, his profession, [or] his authority . . . shall be exempt from liability".[997] It further provides that:

Anyone performing an act out of due obedience shall not be liable for it.
A determination of due obedience requires the following:
a) The order comes from an authority.
b) Said authority is competent to issue it.
c) The agent has the obligation to carry it out.

[991] Spain, *Royal Ordinance for the Armed Forces* (1978), Article 34.
[992] Spain, *Military Criminal Code* (1985), Article 21.
[993] Spain, *Law on Security Forces* (1986), Article 5.1(d).
[994] Sweden, *Penal Code as amended* (1962), Chapter 24, § 8.
[995] Switzerland, *Military Criminal Code as amended* (1927), Article 18(2).
[996] Tajikistan, *Criminal Code* (1998), Article 45(1)–(2).
[997] Uruguay, *Penal Code as amended* (1933), Article 28.

The agent's error as to the existence of this requirement shall be determined by the judge, taking into account his position in the administrative hierarchy, his level of education, and the seriousness of the act.[998]

939. Uruguay's Military Penal Code as amended states that "when a soldier commits an offence in the course of duty on orders from a superior, the conditions specified in Article 29 of the ordinary Penal Code [as amended] are presumed to apply in the absence of proof of the contrary".[999]

940. Yemen's Military Criminal Code states that:

In the case of the commission of any of the crimes set out under this chapter [i.e. war crimes], the . . . the subordinate will be held responsible for the crime and will not be released from the punishment provided for, except if the acts have been committed against [his] choice, or without [his] knowledge, or if [he] did not have the possibility to prevent them.[1000]

941. Under the provision of the Penal Code as amended of the SFRY (FRY) entitled "Responsibility for criminal acts committed under superior orders", the commission of a war crime is treated as an exception to the general rule that a subordinate will not be punished for a criminal act committed under superior order in execution of official duties, if he/she knew that such an act was a crime.[1001]

National Case-law

942. In its judgement in the *Military Junta case* in 1985, Argentina's National Court of Appeals held that the legal rule that exempted subordinates from responsibility for the crimes they committed on military orders was none other than the application of the "duty to obey" principle (Article 514, Code of Military Justice, according to which only the superior bears criminal responsibility in the event that a crime is committed through the execution of an order, *supra*). It found that the unlawful orders had been given by the accused for the purpose of carrying out military acts to combat terrorist subversion, an activity that was part of the functions they performed. Under the terms of Article 11 of Law 23.049, which provides a genuine interpretation of the text contained in Article 514, the subordinate shall be held responsible for the crime committed if he had decision-making powers, knew the order was illegal, or if the order involved committing atrocities or aberrant acts. The Court found that, owing to their position in the chain of command, some individuals knew of the unlawfulness of the system, and that others had committed atrocities. It also stated that some subordinates would not be covered by the defence of duty to obey, and that they

[998] Uruguay, *Penal Code as amended* (1933), Article 29.
[999] Uruguay, *Military Penal Code as amended* (1943), Article 17.
[1000] Yemen, *Military Criminal Code* (1998), Article 23.
[1001] SFRY (FRY), *Penal Code as amended* (1976), Article 239.

were responsible for the acts committed, together with those who had given the orders.[1002]

943. In the *Military Junta case* in 1986, Argentina's Supreme Court found, however, that, where a crime is committed through its execution, the relevant regulation (Article 514 of the Code of Military Justice) transferred responsibility for the crime to the superior, on the principle that responsibility lay in the allocation of duties for the purpose of ensuring discipline. This was not a transfer of the capacity of the perpetrator, but a transfer of penal responsibility for the purpose of imposing discipline. Consequently, the Court found that in peacetime only Article 514 of the Code of Military Justice applied within the framework of military orders, and that the object of the trial was the unlawful acts committed outside the scope of military operations, and that therefore the rules of the Penal Code (Article 45) should apply. According to the Court, those who gave the orders and made the material means available participated as necessary collaborators and not as perpetrators under the terms of Article 45 of the Penal Code, since the subordinates had ample opportunity to determine the fate of the detainees. The Court questioned the degree of "subjugation" to which, according to the Court of Appeals, those executing the acts were subjected. It distinguished perpetrators or co-perpetrators "who took part in the execution of the act" from other types of involvement entailing cooperation, aid or assistance. For this reason, the Court modified the Court of Appeals' designation of the perpetrators' commanders, referring to them instead as "participating as necessary collaborators".[1003]

944. In its judgement in the *Leopold case* in 1967, in which the accused was convicted of the murder of several POWs in Poland during the Second World War, Austria's Supreme Court held that under the principles laid down in the Nuremberg judgement, obedience to an order of a superior neither justified an offence nor in general excused it. Only "absolute coercion" could constitute such an excuse.[1004]

945. In the *Sergeant W. case* in 1966, Belgium's Court-Martial of Brussels sentenced a sub-officer to three years' imprisonment for the wilful killing of a civilian. The accused, who at the time of the event was chasing rebels, was serving in the Congolese army within the framework of military technical co-operation between Congo (DRC) and Belgium. He invoked the defence of superior orders. The Court held that, the accused's interpretation of the order he had received, i.e. to kill an unarmed person in his power, was manifestly unlawful; the accused therefore had a duty to disobey this order.[1005]

946. In its judgement in the *V.C. case* in 1983, in which the accused, a mercenary in Katanga (Congo/DRC), was ordered to kill a wounded person, Belgium's

[1002] Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.
[1003] Argentina, Supreme Court, *Military Junta case*, Judgement, 30 December 1986.
[1004] Austria, Supreme Court, *Leopold case*, Judgement, 10 May 1967.
[1005] Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.

Court of Cassation held that there was no general principle of law that allowed the killing of a wounded person because he was "mortally wounded". An order to kill a wounded person for that sole reason was manifestly criminal. Consequently, the justification of a superior's order could not be raised.[1006]

947. In its judgement in the *Kalid case* in 1995, a Belgian Military Court, with respect to the requirements for relying on a superior's order as grounds for justification, stated that in accordance with domestic and international law, to be able to claim a superior's order as grounds for justification:

(a) the cited order must be given beforehand, and its implementation must correspond to the purpose of that order,
(b) the cited order must be issued by a legitimate superior acting within the limits of his authority,
(c) the order issued must be legitimate, i.e., in conformity with the law and regulations;

. . . in connection with this last point, it may generally be assumed that a soldier of the lowest rank may base his actions on the assumption that the order was legitimate.[1007]

948. In the *Halilović case* in 1998, the Doboj District Court (Republika Srpska of Bosnia and Herzegovina) upheld a Municipal Court decision to sentence Ferid Halilović, a member of the Croatian Defence Council (HVO), to 15 years' imprisonment for war crimes committed in 1992 against the civilian population during his time as a prison guard at detention centres in Odzak, Novi Grad and Bosanski Brod where mainly Serb civilians were held. In its findings concerning mitigating circumstances, the District Court noted that "one also has to keep in mind that the accused was working in camps as a guard, so he did some forbidden acts at orders of superiors and especially at orders of the camp warden".[1008]

949. In its judgement on appeal in the *Finta case* in 1994, Canada's Supreme Court recognised that:

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test: the defences are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.[1009]

[1006] Belgium, Court of Cassation (Second Chamber), *V.C. case*, Judgement, 12 January 1983.
[1007] Belgium, Military Court, *Kalid case*, Judgement, 24 May 1995.
[1008] Bosnia and Herzegovina, Republika Srpska, Modrića Municipal Court, *Halilović case*, Decision, 23 October 1997; Doboj District Court, *Halilović case*, Decision, 10 August 1998.
[1009] Canada, Supreme Court, *Finta case*, Judgement on Appeal, 24 March 1994.

950. In his dissenting opinion in the *Finta case* in 1994, one of the judges referred to the judgement in the *case of the Major War Criminals* rendered by the IMT (Nuremberg) which relied on Article 8 of the 1945 IMT Charter (Nuremberg) to quote a part of the judgement according to which "the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible". The judge added that:

The element of moral choice was, I believe, added to the superior orders defence for those cases where, although it can readily be established that the orders were manifestly illegal and that the subordinate was aware of their illegality, nonetheless, due to the circumstances such as compulsion, there was no choice for the accused but to comply with the orders. In those circumstances the accused would not have the requisite culpable intent.[1010]

951. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 dealing with the criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for the torture and death of a Somali prisoner, one of the judges, in her dissenting opinion, stated that "if the accused had been ordered to assist in abusing the prisoner, it would have been a manifestly unlawful order with the result that there was no evidentiary foundation for the defence of obedience to superior orders".[1011]

952. In its judgement in the *Guzmán and Others case* in 1974, Chile's Santiago Council of War stated that:

The provisions of Article 335 of the Code of Military Justice [which provides that, under certain circumstances, a soldier disobeying an unlawful order is not punishable] require that: a) an order be received from a hierarchical superior; b) that this order be related to the military service; and c) that the subordinate has explained the illegality of the order to the superior, and that the latter has insisted on the order's performance. Where this last formality is lacking, or where the subordinate has exceeded the requirements of the order in executing it, this shall be considered as mitigating.[1012]

953. In its judgement in the *Dover Castle case* in 1921, Germany's Reichsgericht held that:

It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible.[1013]

[1010] Canada, Supreme Court, *Finta case*, Dissenting opinion of one of the judges, 24 March 1994.
[1011] Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, Dissenting opinion of Judge Weiler, 2 April 1996.
[1012] Chile, Santiago Council of War, *Guzmán and Others case*, Judgement, 30 July 1974.
[1013] Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.

The Court further held that the punishment of a subordinate, who had acted in conformity with his orders, could, under German military criminal law at the time, arise (1) if he had exceeded the order given to him, (2) he was aware that his superior's orders directed action which involved a civil or military crime or misdemeanour. In the relevant case, the Court did not consider that either of these elements was present and the accused, the commander of a submarine from which a British hospital ship had been torpedoed, was acquitted.[1014]

954. In the *Llandovery Castle case* in 1921, in which a British hospital ship had been torpedoed and destroyed and her lifeboats fired on, Germany's Reichsgericht rejected the plea of superior orders forwarded by two of the accused. It stated that the accused should be deemed to have had knowledge of the unlawful character of the order they carried out and stated that the defence could not be brought forward "if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law . . . In the present case it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing but a breach of law".[1015]

955. In its judgement in the *Subordinate's Responsibility case* in 1986, Germany's Federal Supreme Court held that a subordinate who had recognised an order as unlawful would not be relieved from his responsibility even if his superior was ignorant of the illegality of the order.[1016]

956. In its judgement in the *Ofer, Malinki and Others case* in 1958, Israel's District Military Court for the Central Judicial District stated that:

> The rule is that obedience to an officer's order, which by law a soldier is bound to obey, constitutes justification for the act, that is, exempts him from criminal responsibility. The exemption is that a manifestly illegal order does not constitute justification for the soldier's actions; a soldier need not . . . obey a manifestly illegal order, and if he does obey it, he must bear . . . criminal responsibility for his actions.[1017]

957. In its judgement in the *Ofer, Malinki and Others case* in 1959, Israel's Military Court of Appeal adopted these words and added that:

> These provisions are aimed at encouraging the moral and human conscience of our soldiers. A reasonable soldier can distinguish a manifestly illegal order on the face of it, without requiring legal counsel and without perusing the law books. These provisions impose moral and legal responsibility on every soldier, irrespective of rank.[1018]

[1014] Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.
[1015] Germany, Reichsgericht, *Llandovery Castle case*, Judgement, 16 July 1921.
[1016] Germany, Federal Supreme Court, *Subordinate's Responsibility case*, Judgement, 22 January 1986.
[1017] Israel, District Military Court for the Central Judicial District, *Ofer, Malinki and Others case*, Judgement, 13 October 1958.
[1018] Israel, Military Court of Appeal, *Ofer, Malinki and Others case*, Judgement, 3 April 1959.

958. In its judgement in the *Eichmann case* in 1962, Israel's Supreme Court, in response to the accused's defence that it was "the oath of allegiance taken by [him] on joining the S.S. organization and the compelling force of Hitler's order to destroy the Jews completely which guided him in acting as he did", pointed to the distinction to be made between the defence of "obedience to superior orders" and "act of State" and stated that:

The defence that the act was done in obedience to superior orders means *ex hypothesi* that the person who performed it had no alternative – either under the law or under the regulations of the disciplinary body (army etc.) of which he was a member – but to carry out the order he received from his superior . . . [This] makes it clear that the "superior orders" doctrine cannot, by its very nature, serve the appellant because, when we come to analyze the facts, it will be found that within the framework of the order to carry out the "Final Solution" the appellant acted independently and even exceeded the duties imposed on him through the service channels of the official chain of command . . .

The problem whether it is desirable to sanction this defence depends on the answer to the question whether, and to what extent, the mental state of the accused at the time of the offence ought to be taken into consideration – the fact that he did not then know that the order he carried out was contrary to the law. The *via media* solution provided by the general criminal law of this country . . . is that such defence is admissible where there was obedience to an order not manifestly unlawful . . . However, in Section 8 of the Nazis and Nazi Collaborators (Punishment) Law the legislature has provided that the defence of "superior orders" – and the same is true of the defences of "constraint" and "necessity" – shall not apply with respect to the offences covered by the Law, while in Section 11 it has provided that it is permissible, in certain circumstances, to take it into account as a factor in mitigation of sentence. We certainly agree with the District Court that even if it had to decide the case on the basis of the provisions of the general criminal law, it would also have had to reject that defence not only because the order for physical extermination was manifestly unlawful (and all the other orders to persecute the Jews were equally contrary to the "basic ideas of law and justice"), but also because the appellant was fully conscious at the same time that he was a party to the perpetration of the most grave and horrible crimes.[1019]

As to the conformity of the relevant provision of Israel's Nazis and Nazi Collaborators (Punishment) Law of 1950 with principles of international law, the Supreme Court ruled that:

Our first answer to this question is that until the Second World War there was no agreed rule in the law of nations which recognized the defence of "superior orders", not even with regard to the charge of committing an act contrary to "the laws of war" . . . There was . . . no departure from the provisions of international law – and this will be our second answer to the above question – when Article 8 of the [1945 IMT Charter (Nuremberg)] provided . . . that the fact that the accused acted pursuant to an order of a superior shall not free him from responsibility but that the Tribunal may take it into consideration in mitigation of punishment, should it find that justice so requires. It must be understood that this express provision

[1019] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.

was designed to defeat in advance any attempt by the Nazi criminals so to resort to the plea of *respondeat superior* as to reduce it to an absurdity, in view of the *Fuehrerprinzip* which dominated Nazi Germany and in the last analysis made it possible to identify Hitler alone as the source of the satanic orders in consequence of which the frightful Nazi crimes, including that of the "Final Solution", were committed.[1020]

Referring to the judgement of the IMT (Nuremberg) in the *case of the Major War Criminals*, the Supreme Court went on to state that:

It was there observed that the true test was not whether a superior order existed but "whether moral choice was in fact possible". In other words, the mere plea of obedience to the order of a superior – as distinct from the plea that he could not avoid committing the crime because he had no "moral choice" to pursue any other course – will not avail the accused . . . As stated, the applicability of these defences as relieving from responsibility in respect of the offences the subject of the Law of 1950 has been excluded by Section 11 thereof. But even had the Law permitted the accused to rely on the defence that in carrying out the order to commit the crime he was acting in circumstances of "constraint" or "necessity", he would still not succeed unless the following two facts were provided (1) that the danger to his life was imminent; (2) that he carried out the criminal assignment out of a desire to save his own life and because he found no other possibility of doing so . . . Neither of the said conditions has been met in this case.[1021]

959. In its judgement in the *Schintlholzer case* in 1988, Italy's Military Tribunal at Verona stated that:

It is not possible to assert that [the accused's] responsibility should be zero by simply transferring it to Schintlholzer's superiors, such as the SS Major Rudolf Thyrolf or other officers in the hierarchy of the command chain, which if followed back would reach to the senior officer of the Joint Bolzano Command . . .

It is therefore hardly necessary to point out even in this connection that if it was ever possible to establish any collateral responsibility by known or unknown SS officials at an operating level, this would not in any way raise any questions about the responsibility of Schintlholzer, which has been proven at this level and in the context which has to be assessed here and now.

Thus, as far as criminal intent is concerned, evidence of awareness of the unlawful nature of the conduct involved in the barbaric images described in the preliminary reconstruction of the facts would appear to have been acquired.

Taking this together with the considerations just described concerning the possibility of collateral responsibility, it should be added that this awareness, and therefore awareness of the manifestly criminal nature of the massacre of non-combatants, cannot in fact be denied or justified through appeal to the orders of a superior. But this should in any event likewise be pursued if particulars emerge.

However, as things stand, the only order of which there is any trace in the documents relating to this case is the order for war against the partisans from the

[1020] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.
[1021] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.

German Military Command in Bolzano, which in fact has nothing to do with the inhuman activities then engaged in by the "Schintlholzer" combat unit.[1022]

960. In its judgement in the *Priebke case* in 1996, Italy's Military Tribunal of Rome stated that a subordinate who commits a crime acting on the basis of superior orders could not invoke it as a defence, except in the case of a real impending danger of losing his life. However, the Tribunal recalled that "the threat of exemplary and immediate punishment by death: in such a case, he could have stepped back from his refusal and participated in the execution only to save his own life relying upon the excuse of state of necessity which is foreseen in all legal systems". Nevertheless, the Tribunal considered that superior orders could be considered in mitigation of punishment, pursuant to a provision of the 1930 Military Criminal Code. However, the Tribunal found that the accused could not be punished for reasons of statute of limitations.[1023] On appeal, this judgement was annulled by the Supreme Court of Cassation and another trial ordered.[1024]

961. In its judgement in the *Zühlke case* in 1948, a Special Court in Amsterdam (Netherlands), with regard to Article 8 of the 1945 IMT Charter (Nuremberg), stated that:

> The accused has pleaded that official orders were given him by his superiors. The chief Prosecutor does not consider this plea to be admissible, himself referring to Art. 8 of the [1945 IMT] Charter whereby an official order was declared to be non-exculpatory. This provision, however, . . . has no direct application in the present case, but could apply indirectly if it were to be regarded as a rule concerning a special instance of an express general rule of international criminal law. It is the opinion of the Court that this is not so, and it cannot be understood why the exonerating effect of an official order, which is recognised in one form or another in practically all national legislations, should not be valid in the sphere of international criminal law. It must be assumed that its operation has been excluded with regard to the "major" criminals, because they were considered a priori to have wanted to take part in the criminal system of Germany and were, therefore, made individually responsible for the crimes they committed in this system. Consequently the accused has ground for his plea.[1025]

However, in the case in question, the Court found that the plea of superior orders could not exonerate the accused from the charges. It based its findings on the opinion that subordinates were under an obligation not to carry out orders relating to "acts forbidden by international law" and that ignorance of the relevant rules did not "carry with it exclusion from penal liability" of the subordinates.[1026]

[1022] Italy, Military Tribunal at Verona, *Schintlholzer case*, Judgement, 15 November 1988.
[1023] Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996.
[1024] Italy, Supreme Court of Cassation, *Priebke case*, Judgement in Trial of Second Instance, 15 October 1996.
[1025] Netherlands, Special Court in Amsterdam, *Zühlke case*, Judgement, 3 August 1948.
[1026] Netherlands, Special Court in Amsterdam, *Zühlke case*, Judgement, 3 August 1948.

962. In its judgement in the *Zühlke case* in 1948, the Special Court of Cassation of the Netherlands stated that:

> If during the Second World War the doctrine "Befehl ist Befehl" (orders are orders) was sometimes carried out by the German forces to the extreme of its logical consequences for obviously criminal purposes, no longer compatible with the human dignity of the subordinates, there is no legal basis to do so, and an appeal to duress on the part of the subordinate concerned can at the most be admitted if actual requirements concerning such duress were present. The [appellant's] plea of duress . . . is rejected on the sufficient grounds that it does not appear that any pressure was brought to bear upon him.[1027]

963. In the *Nwaoga case* before Nigeria's Supreme Court in 1972, the appellant and two officers of the rebel Biafran army disguised in civilian clothes went to a town under the control of federal troops and killed an unarmed person. The appellant was convicted of murder. With respect to the plea of superior orders, the Court quoted with approval another judgement, stating that:

> It was held that a soldier is responsible by military and civil law and it is monstrous to suppose that a soldier could be protected when the order is grossly and manifestly illegal. Of course, there is the other proposition that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly lawful.
> . . .
> In the case before me that order to eliminate the deceased was given by an officer of an illegal regime, his orders therefore are necessarily unlawful and obedience to them involves a violation of the law and the defence of superior orders is untenable.[1028]

The Court, however, chose to base its decision on the fact that the accused committed an offence under the Criminal Code, and was liable like any civilian would be, whether or not he was acting under orders. It held that, in the circumstances (operation in disguise, not in the rebel army uniform but in plain clothes, appearing to be members of the peaceful private population), he was liable to punishment since the "deliberate and intentional killing of an unarmed person living peacefully inside the Federal territory . . . is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished".[1029]

964. In its judgement in the *Margen case* in 1950, the Supreme Court of the Philippines held that "obedience to an order of a superior gives rise to exemption from criminal liability only when the order is for some lawful purpose".[1030]

965. In the *Werner case* in 1947, a South African Court of Appeal rejected a plea of superior orders in a case in which the accused, himself a prisoner of war, was convicted for the murder of another prisoner. It held that "[the German

[1027] Netherlands, Special Court of Cassation, *Zühlke case*, Judgement, 6 December 1948.
[1028] Nigeria, Supreme Court, *Nwaoga case*, Judgement, 3 March 1972.
[1029] Nigeria, Supreme Court, *Nwaoga case*, Judgement, 3 March 1972.
[1030] Philippines, Supreme Court, *Margen case*, Judgement, 30 March 1950.

officer] had no authority to give orders, and the appellants were under no duty to obey them, even if those orders had not been so obviously illegal that they should have known them to be illegal".[1031]

966. In the *Auschwitz and Belsen case* in 1945, the British Military Court at Lüneberg rejected the defence of superior orders. It referred to Article 8 of the 1945 IMT Charter (Nuremberg) and quoted a comment of the IMT, which stated that "the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible".[1032]

967. In the *Krupp case* in 1947/48, in which Alfried Krupp and eleven others were charged with having employed POWs, forced labour and inmates of concentration camps in the German war industry, the US Military Tribunal at Nuremberg, in response to the argument of the defence that the accused had acted according to the Reich policies and to an order requiring certain production quota and that, if they had refused to do so, they would have suffered dire consequences, stated that:

> The real defense in this case . . . is that of necessity . . . Under the rule of necessity, the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done . . . Here we are not dealing with necessity brought about by circumstances independent of human agencies or by circumstances due to accident or misadventure. On the contrary, the alleged compulsion relied upon is said to have been exclusively due to the certainty of loss or injury at the hands of an individual or individuals if their orders were not obeyed. In such cases, if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal act.[1033]

968. In its judgement in the *Krauch (I.G. Farben Trial) case* in 1947/48 in which leading German industrials were charged with employment of POWs, forced labour and concentration camp inmates in illegal work and under inhuman conditions, the US Military Tribunal at Nuremberg stated that:

> The IMT recognized that while an order emanating from a superior officer or from the government is not, of itself, a justification for the violation of an international law (though it may be considered in mitigation), nevertheless, such an order is a complete defense where it is given under such circumstances as to afford the one receiving it no other moral choice than to comply therewith. As applied to the facts here, we do not think there can be much uncertainty as to what the words "moral choice" mean.[1034]

[1031] South Africa, Appeal Division, *Werner case*, Judgement, 20 May 1947.
[1032] UK, Military Court at Lüneberg, *Auschwitz and Belsen case*, Judgement, 17 November 1945.
[1033] US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 17 November 1947–30 June 1948.
[1034] US, Military Tribunal at Nuremberg, *Krauch (I.G. Farben Trial) case*, Judgement, 14 August 1947–29 July 1948.

969. In its judgement in the *Von Leeb case (The High Command Trial)* in 1947/48, the US Military Tribunal at Nuremberg, dealing with the plea of superior orders, stated that:

> International Common Law must be superior to and, where it conflicts with, take precedence over National Law or directives issued by any national governmental authority. A directive to violate International Criminal Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive . . . The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case.[1035]

However, turning to the specific problem of responsibility for passing on illegal orders, the Tribunal held that even a commander can be by-passed by a superior command and that in this case he "has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance". It further stated that: "it is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal".[1036]

970. In its judgement in the *Hadamar Sanatorium case* in 1945, the US Military Commission in Wiesbaden applied to the relationship of civilian employees to their superiors the doctrine that individuals who violate the laws and customs of war are criminally liable in spite of their acting under a superior order, if the order was illegal.[1037]

971. In the *Griffen case* in 1968, a US Army Board of Review approved the decision of the trial law officer who refused to give an instruction to the panel on the defence of obedience of orders, considering that an order to kill an unarmed and unresisting prisoner was "so palpably illegal on its face" that this defence was not an issue.[1038]

972. In the *Calley case* in 1973, the US Army Court of Military Appeals approved the following instructions given to the panel by the trial judge in a case where the accused invoked an order to kill unresisting detainees:

[1035] US, Military Tribunal at Nuremberg, *Von Leeb case (The High Command Trial)*, 30 December 1947–28 October 1948.
[1036] US, Military Tribunal at Nuremberg, *Von Leeb case (The High Command Trial)*, Judgement, 30 December 1947–28 October 1948.
[1037] US, Military Commission in Wiesbaden, *Hadamar Sanatorium case*, Judgement, 8–15 October 1945.
[1038] US, Army Board of Review, *Griffen case*, Judgement, 2 July 1968.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.[1039] [emphasis in original]

Citing a writer's opinion, the Court stated that:

For the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and *lawful on its face*, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, *the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness* . . .

Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court.[1040] [emphasis in original]

973. In his dissenting opinion in the *Calley case* in 1973, one of the judges stated that:

My impression is that the weight of authority . . . supports a more liberal approach to the defense of superior orders. Under this approach, superior orders should constitute a defense except "in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal".

While this test is phrased in language that now seems "somewhat archaic and ungrammatical", the test recognizes that the essential ingredient of discipline in any armed force is obedience to orders and that this obedience is so important it should not be penalized unless the order would be recognized as illegal, not by what some hypothetical reasonable soldier would have known, but also by "those persons at the lowest end of the scale of intelligence and experience in service". This is the real purpose in permitting superior orders to be a defense, and it ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part . . .

Because the original case language is archaic and somewhat ungrammatical, I would rephrase it to require that the military jury be instructed that, despite his asserted defense of superior orders, an accused may be held criminally accountable for his acts, allegedly committed pursuant to such orders, if the court members are convinced beyond a reasonable doubt (1) that almost every member of the armed forces would have immediately recognized that the order was unlawful, and (2) that

[1039] US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973.
[1040] US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973, referring to Col. William Winthrop, *Military Law and Precedents*, pp. 296–297, 2nd edition 1920 (reprint).

the accused should have recognized the order's illegality as a consequence of his age, grade, intelligence, experience, and training.[1041]

Other National Practice

974. At the CDDH, with respect to Article 77 of draft AP I submitted by the ICRC, Argentina explained its negative vote by referring to a great difficulty rooted in the determination of the degree of scrutiny of the orders required from the subordinate, which also varied according to his hierarchical rank.[1042] However, in the debates in Committee I of the CDDH, Argentina had stated that "on the whole, [it] supported the ICRC text of article 77, which retained [the principle of due obedience]" and that it "accepted what might be termed 'the human function of due obedience', in other words that in case of the flagrant breach of a fundamental humanitarian principle exoneration on account of due obedience did not apply".[1043]

975. At the CDDH, Australia submitted an amendment concerning Article 77 of draft AP I which read: "In paragraph 2 delete the words 'and that he had the possibility of refusing to obey the order'".[1044] Later at the CDDH, Australia stated that it "supported the objectives sought in the ICRC text of article 77 [of draft AP I]".[1045] With respect to its amendment submitted in 1975, it also stated that in this text "there was no provision which would give immunity to a soldier if he had had no opportunity of refusing to obey an order".[1046]

976. In an explanatory memorandum submitted to the Belgian Senate in the context of the adoption of the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols in 1991, which excludes the defence of superior orders in cases "where, in the prevailing circumstances, the order could clearly result in the commission of a crime of genocide or of a crime against humanity . . . or a grave breach of the Geneva Conventions . . . and their Additional Protocol I", it is stated that the words "if he had the option of not obeying" were omitted since this would necessarily be deduced from general principles of penal law regarding compulsion.[1047]

[1041] US, Army Court of Military Appeals, *Calley case*, Dissenting opinion of Judge Darden, 21 December 1973.

[1042] Argentina, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 329.

[1043] Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.52, 6 May 1976, pp. 141–142, §§ 31 and 33.

[1044] Australia, Amendment submitted to the CDDH concerning Article 77 of draft AP I, *Official Records*, Vol. III, CDDH/I/255, 24 March 1975, p. 331.

[1045] Australia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.51, 5 May 1976, p. 128, § 26.

[1046] Australia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.51, 5 May 1976, p. 128, § 28.

[1047] Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 15.

977. At the CDDH, Canada, which voted against the deletion of Article 77 of draft AP I submitted by the ICRC, in its explanation of vote stated that:

> We agree that under customary international law an accused is unable to plead as a defence that the criminal act with which he was charged was in compliance with superior orders that had been given to him. While denying this avenue of defence, the Canadian delegation is aware that compliance with an order to commit an act which the accused knew or should have known was clearly unlawful may be taken into consideration by way of mitigation of punishment.
> ...
> While we would have liked to see Article 77 adopted as part of the Protocol, we can console ourselves with the knowledge that the article was in fact broadly in accordance with existing international law, which continues to operate in so far as breaches of the Conventions and the Protocol are concerned.[1048]

978. In 1997, in reply to a report of the Special Rapporteur of the UN Commission on Human Rights on Torture, the Colombian government referred to its decision to present to Congress the reform of the military criminal justice system beginning in March 1997. As to the defence of obedience to superior orders, it stated that it "could only be invoked when the act was the result of a legitimate order and did not infringe fundamental rights".[1049]

979. According to the Report on the Practice of Croatia, "the position of the Croatian criminal law is that the superior order is not a valid defence against violations of international humanitarian law nor any other crime in general. To be found guilty for the offence it is not required that [the] subordinate ... knows that he has the right to disobey 'unlawful' order[s], but that he has to know that an act committed constitutes a crime or that the criminal character of the act must be obvious from the circumstances".[1050]

980. In 1994, in a statement before the UN Commission on Human Rights, the Chief Special Prosecutor of the Ethiopian Transitional Government stated that "the Ethiopian Government ... was aware that democracy could not allow criminals to go unpunished on the pretext that they had acted on government orders".[1051]

981. According to the Report on the Practice of India, in cases where armed force is used, "the police action or action of the armed forces will be questioned before a court of law. During such proceedings the person charged will not be

[1048] Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 330–331.

[1049] Colombia, Reply of the government to a report of the Special Rapporteur on Torture of the UN Commission on Human Rights, referred to in UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, § 66.

[1050] Report on the Practice of Croatia, 1997, Chapter 6.9.

[1051] Ethiopia, Transitional Government, Chief Special Prosecutor, Statement before the UN Commission on Human Rights, 17 February 1994, UN Doc. E/CN.4/1994/SR.28, 22 January 1996, § 3.

[held] liable if it is established that he obeyed the superior orders which were lawful".[1052] However, the report states that:

In view of the right and duty to disobey illegal superior orders . . . it is possible to suggest that the defence of superior orders will not be available in cases where lawfulness of police and military action is challenged as violative of humanitarian standards. The defence will be available only when the superior orders were lawful.[1053]

982. At the CDDH, Iran stated that it was opposed to the insertion of Article 77 of draft AP I.[1054]

983. In 1950, during a debate in the Sixth Committee of the UN General Assembly, Israel, with respect to the interpretation of the 1945 IMT Charter (Nuremberg), stated that:

There did not, however, appear to be any justification for asserting that the fact of having acted under orders might lessen the responsibility of the defendant, instead of considering that factor as having a bearing only on the punishment, or in omitting any reference in principle IV [of the Nuremberg Principles] to the authority of the Court to mitigate punishment.[1055]

984. During a debate in Committee I of the CDDH, Israel stated that it "favoured the inclusion of Article 77 of draft Protocol I" and that:

Although refusal to obey an order might strike against military discipline, the choice was one between, on the one hand, carrying out a manifestly illegal order – in other words perpetrating a violation of humanitarian law – and, on the other hand, respect for military discipline. But since it was a question of grave breaches, any violation of humanitarian law was far more dangerous in its effects than a possible failure to observe military discipline. Article 77 reflected fairly faithfully international criminal law as defined by the international military tribunals at the end of the Second World War.[1056]

985. At the CDDH, Israel stated that it had voted in favour of Article 77 of draft AP I and that:

The article is a reflection of existing customary international law clearly enunciated in the Nürnberg principles and embodied in [Israeli law].

We regret that Article 77 was not adopted . . . and wish to state that the rule continues to be governed by customary international law.[1057]

[1052] Report on the Practice of India, 1997, Chapter 6.8.
[1053] Report on the Practice of India, 1997, Chapter 6.9.
[1054] Iran, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307, § 3.
[1055] Israel, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 60.
[1056] Israel, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.52, 6 May 1976, p. 143, § 40.
[1057] Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 336.

986. In 1994, in its first periodical report to the UN Committee against Torture, Israel stated that:

Regarding article 2(3) of the [1984 Convention against Torture], we refer to section 24(1)(a) of the Penal Law, 5737-1977 which allows the defence of acting under superior orders only where the orders are lawful. Where an order is manifestly illegal, as would be the case with an order to commit acts of torture, acting under such order would clearly not constitute a defence for a person accused of committing such acts. On this, we would refer to the decision of the Supreme Court, sitting as High Court of Justice (27.12.89) to make absolute decree against the chief Military Advocate, the chief of the General Staff and others, requiring them to commit an army officer for trial before a court martial for committing acts of torture against residents of certain Arab villages in Samaria (administered territories) during the course of putting down the Arab uprising (intifada) at its inception in January 1988. According to the findings of an investigation instituted at the request of the International Red Cross, the residents had been bound and severely beaten by orders of the said army officer. The court characterized such acts as repugnant to civilized standards of behaviour and rejected the plea that they were carried out as a result of the "uncertainty" that prevailed as to orders for quelling the intifada. (High Court case No. 425/89 Piskei Din (Supreme Court Judgements), vol. 43, Part IV, p. 718).[1058]

987. In an article published in a military review, a member of the Kuwaiti armed forces stated that if a soldier received a clearly illegal order, he had the duty to disobey it,

otherwise, the soldier will be subject to penal and civil responsibility for his solidarity with the commander, unless the violation of the law is unclear, to the extent that the commanded is deceived by the same. Then, only the commander will be questioned. If the inferior knows the crime in advance, he shall be totally responsible. He would not be exempted unless it was indicated that he was in a state of moral obligation by a leader, or in case of necessity or force majeure.[1059]

988. At the CDDH, Mexico stated that it would abstain from the vote on Article 77 of draft AP I "because it considered that Article 77 should apply not merely to grave breaches, but to all breaches".[1060]

989. In 1982, during a debate in the Sixth Committee of the UN General Assembly on the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, Mongolia stated that:

In considering and improving the text of the 1954 draft, the International Law Commission should seek to eliminate the ambiguities in some provisions and to reflect more fully the principles of the [IMT] Charters and judgements of the Nürnberg and Tokyo Tribunals. In that connection, the wording of [article 4] of the draft Code

[1058] Israel, Initial report of 25 January 1994 submitted to the CAT under Article 19 of the 1984 Convention against Torture, UN Doc. CAT/C/16/Add.4, 4 February 1994, § 9.

[1059] Fellah Awad Al-Anzi, "The accomplishment of duties and the execution of military orders, their limits and constraints", *Homat Al-Watan*, No. 149, p. 61.

[1060] Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 308, § 7.

should be brought into line with that of [article 8] of the Charter of the International Military Tribunal.[1061]

990. According to the Report on the Practice of the Netherlands, Article 10 of the Criminal Law in Wartime Act as amended, Article 3 of the Genocide Convention Act and Article 3 of the Torture Convention Act (which have been repealed by the International Crimes Act) at first glance seem to provide that acting on superior orders can neither serve as a justification nor as an excuse. However, the report states that this certainly was not parliament's intention. Parliament only intended to provide that superior orders as such cannot justify a violation of the laws and customs of armed conflict, genocide or torture, thereby acknowledging the possibility of having complied with superior orders serving as an excuse. The report further states that, pursuant to Article 10(1) of the Criminal Law in Wartime Act as amended, violations of the laws and customs of armed conflict would have to be judged according to the general principles of criminal law, including the defences of compulsion and necessity.[1062]

991. At the CDDH, Norway considered that "the rejection of Article 77 [of draft AP I] did not weaken the validity of the Nürnberg principles and of the rules of international law".[1063]

992. At the CDDH, Poland expressed its regret that Article 77 of draft AP I had not been adopted and stated that "despite the rejection of the article, the Nürnberg principles remained important norms of international law".[1064]

993. In 1982, during a debate in the Sixth Committee of the UN General Assembly on the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, Poland stated that:

> [Its] delegation had serious objections to article 4 of the 1954 draft, and in particular to the words "if, in the circumstances at the time, it was possible for him not to comply with that order". That formulation was a fundamental departure from the principle of article 8 of the [1945 IMT Charter (Nuremberg)] which stated that action taken pursuant to an order of a Government or of a superior did not free an individual from responsibility, but could be considered in mitigation of punishment if the Tribunal determined that justice so required.[1065]

994. The Report on the Practice of Rwanda, referring to a paper drafted by a military writer, states that during the training of Rwandan military officers it is taught that "most of the countries support the effective application of the

[1061] Mongolia, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/37/SR.54, 24 November 1982, § 19.
[1062] Report on the Practice of the Netherlands, 1997, Chapter 6.9.
[1063] Norway, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 309, § 13.
[1064] Poland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 309, § 12.
[1065] Poland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/37/SR.52, 22 November 1982, § 6.

system of manifestly illegal orders according to which a subordinate cannot be justified in executing a manifestly illegal order".[1066]

995. At the CDDH, Spain stated with respect to Article 77(2) of draft AP I that:

Responsibility exists when the circumstances in which the penal offence takes place do not prevent the realization that the order received implies the commission of a grave offence, although the fact must be considered, as an attenuating circumstance, that it is rationally impossible to disobey orders received. For that reason the principle affirmed in paragraph 2 is a valid one.[1067]

996. At the CDDH, Switzerland proposed an amendment concerning Article 77 of draft AP I which aimed at deleting the Article.[1068]

997. At the CDDH, Syria submitted the following amendment concerning Article 77 draft AP I submitted by the ICRC:

Amend Article 77 as follows:

. . .

2. The fact of having acted pursuant to an order does not absolve an accused from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of not carrying out the order.[1069]

Later at the CDDH, Syria stated that it had voted against Article 77 of draft AP I "because it contravened international law". It added that:

The article rules on a matter of discipline between the individual concerned and the Government or authority to which he was subordinate, a matter which came under exclusive competence of the internal laws of States. Moreover, Article 77 was based on the rather dubious hypothesis that any subordinate would be able, in delicate circumstances, to distinguish between a legal and an illegal act and to make a valid appreciation of the legality of the order received. That hypothesis was pure fiction, for it was rarely that subordinates were acquainted with the legal nuances of often very lengthy texts, while any elementary knowledge that they might have of them would not enable them to make a valid judgement. In addition, Article 77 might well give rise to abuses under the screen of humanitarian law. It entailed incitement to disobedience or orders, which ran counter to the military codes of most States.[1070]

998. At the CDDH, Sudan stated that it had voted against Article 77 of draft AP I because of the provisions contained in its paragraph 1, but that "if the

[1066] Report on the Practice of Rwanda, 1997, Chapter 6.9, referring to 2 Lt. C. Bizimungu, Synthèse de l'exposé sur la justice militaire, *E.S.M.*, 12–13 November 1996, pp. 11–12.

[1067] Spain, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 338.

[1068] Switzerland, Amendment submitted to the CDDH concerning Article 77 of draft AP I, CDDH, *Official Records*, Vol. III, CDDH/I/303, 27 April 1976, p. 331.

[1069] Syria, Amendment submitted to the CDDH concerning Article 77 of draft AP I, CDDH, *Official Records*, Vol. III, CDDH/I/74, 20 March 1974, p. 331.

[1070] Syria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 308–309, § 9.

article had been put to the vote paragraph by paragraph, [Sudan] would have voted . . . in favour of paragraph 2".[1071]

999. At the CDDH, the UK, which opposed Article 77 of draft AP I submitted by the ICRC, stated that it:

could not accept that there ought to be one system of law which related to grave breaches of the Conventions and Protocols, while other breaches, including breaches of customary law and of other Conventions, were subjected to an entirely different system. That state of affairs would clearly lead only to confusion in an area where it was vital to have simply rules which could be readily understood by soldiers.

. . .

Much the best would be the omission of the article, leaving the situation to be regulated by the existing rules of international law concerning superior orders.[1072]

1000. In 1991, during a debate in the House of Commons, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Anyone who breaks the provisions of the Geneva conventions may be held liable. Thus, individual Iraqis now bear personal responsibility for breaches of them. That position was reaffirmed in Security Council resolutions 670 and 674. The superior orders defence will not be accepted as an excuse. Machinery already exists under [the Geneva Conventions Act as amended (1957)] for prosecuting grave breaches of them.[1073]

1001. In 1993, in a "Non-Paper" discussing the 1993 ICTY Statute and transmitted to the UN Legal Counsel, the UK FCO stated that:

We do not believe one should depart from the principle in Article 8 of the [1945 IMT Charter (Nuremberg)] . . . A similar provision is found in Article 2(3) of the [1984 Convention against Torture]. These provisions are preferable to that in Article 11 of the [1991 ILC] draft Code of Crimes [against the Peace and Security of Mankind]. Under that an individual would not be relieved of criminal responsibility if "in the circumstances at the time, it was possible for him not to comply with an order of a superior". This language, drawn from the 1954 Draft Code [of Offences against the Peace and Security of Mankind] would seem to make a large inroad into the Nuremberg rule and go against the general trend internationally towards the expansion of individual responsibility.[1074]

1002. At the CDDH, the US submitted an amendment relative to Article 77 of draft AP I which read:

[1071] Sudan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 339.

[1072] UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 307–308, §§ 4 and 6.

[1073] UK, House of Commons, Statement by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 March 1991, Vol. 188, col. 1100.

[1074] UK, FCO, Non-Paper, Former Yugoslavia: War Crimes Implementation of Resolution 808, 22 March 1993, reprinted in *BYIL*, Vol. 64, 1993, p. 701.

Delete the word "grave" from paragraph 1.
Amend paragraph 2 to read:

> "The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from responsibility if it be established that, in the circumstances at the time, he knew or should have known that he was committing a breach of the Conventions or of the present Protocol. The fact that the individual was acting pursuant to orders may, however, be taken into account in mitigation of punishment."[1075]

1003. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that under Article 7 of the 1993 ICTY Statute "it is, of course, a defence that the accused was acting pursuant to orders where he or she did not know the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful".[1076]

1004. During a debate in Committee I of the CDDH, Uruguay, although criticising Article 77 of draft AP I submitted by the ICRC, stated that it "supported the principles underlying Article 77, which undoubtedly had its place in the section of draft Protocol I dealing with the repression of breaches".[1077]

1005. A commentary relative to the Military Penal Code (as amended) of Uruguay states that:

> Article 29 exempts from liability anyone who executes an act of due obedience. The defence of due obedience is allowable for military personnel only under the following conditions: The illicit act must be the result of an order; the order must correspond to an act committed in the course of duty; it must have been issued by one who is competent to give it; and the subordinate must have a legal obligation to carry it out. It is considered that in the military system the subordinate must be fully protected when acting in accordance with due obedience, because in this way discipline is asserted and the prestige of the superior's authority is strengthened ... One of the problems [is], if the rule functions, when the order is clearly unlawful; in other words, if the subordinate agent of the offence has the obligation to analyse the order and determine its lawfulness or unlawfulness ... The solution adopted by our law code therefore establishes *a priori* the presumption that all the elements required to absolve the agent of liability on grounds of due obedience are present, without prejudice to the judge's authority to analyse the evidence in the light of the subordinate's personal characteristics, the seriousness and appropriateness of the act, and whether it was carried out in peacetime or wartime, and, on the basis of this analysis, to decide whether liability may properly be transferred completely from the agent to the superior, or whether, on the contrary, there has been certain unlawful conduct on the agent's part that would make him partially

[1075] US, Amendment submitted to the CDDH concerning Article 77 of draft AP I, CDDH, *Official Records*, Vol. III, CDDH/I/308, 27 April 1976, p. 332.
[1076] US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 16.
[1077] Uruguay, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.52, 6 May 1976, p. 144, § 45.

liable, or whether the order was twisted and the agent's exoneration from liability is therefore unjustified.[1078]

1006. At the CDDH, Yemen, which voted against Article 77 of draft AP I submitted by the ICRC, in its explanation of vote stated that "in the article there is a certain imbalance between international humanitarian law and the internal law on which all military discipline is based. That principle is confirmed by the constitutional regulations of all countries and by the principles of international law."[1079]

1007. In 1950, during a debate in the Sixth Committee of the UN General Assembly, the SFRY delegation commented on Principle IV of the 1950 Nuremberg Principles to the effect that:

> It felt that the [ILC] had departed here from the charter and judgement of Nürnberg. According to those instruments, the fact that a person who committed a criminal act had acted pursuant to an order of his government or of a superior, did not relieve him from responsibility but in exceptional cases might be considered in mitigation of punishment. If this position was supplemented by the criterion of "possible moral choice", the number of cases in which the court could acquit the guilty would be increased. Moreover, the courts might consider that the very fact that a person was in a subordinate position limited the moral choice possible to him. It was to be feared that the modification of the principle would give rise to ambiguity, and prejudice in application. Apart from that, the Yugoslav delegation fully understood the feelings of the members of the [ILC] which made them want to avoid having the penalty automatically applied to subordinates and to place the responsibility upon superiors. Even though the question was left to discretion of the court, it could give rise to abuse.[1080]

1008. The Report on the Practice of Zimbabwe states that "the defence of superior orders is recognized in Zimbabwean criminal law and would be applicable even where breaches of international humanitarian law are concerned but only if the orders given are not manifestly illegal".[1081]

III. Practice of International Organisations and Conferences

United Nations

1009. In 1993, in his report to the UN Security Council on the draft Statute of the ICTY, the UN Secretary-General stated that:

> Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to

[1078] Néstor J. Bolentini, Commentary and Annotations on the Military Penal Code as amended (1943), *Bibilioteca General Artigas*, Vol. 57, Centro Militar, 1979, Article 17, pp. 25–26.
[1079] Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 330–331.
[1080] SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.234 (1950), 6 November 1950, § 14.
[1081] Report on the Practice of Zimbabwe, 1998, Chapter 6.9.

superior orders may, however, be considered a mitigating factor, should the [ICTY] determine that justice so requires. For example, the [ICTY] may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.[1082]

1010. In 1997, the Special Rapporteur of the UN Commission on Human Rights on Torture recommended to the government of Colombia that a reform of the Code of Military Justice should include, *inter alia*, the "elimination of the principle of obedience to superior orders in connection with executions, torture and enforced disappearances".[1083]

1011. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had made the following statement in its first interim report:

A subordinate who has carried out an order of a superior or acted under government instructions and thereby has committed a war crime or a crime against humanity, may raise the so-called defence of superior orders, claiming that he cannot be held criminally liable for an act he was ordered to commit. The Commission notes that the applicable treaties unfortunately are silent on the matter. The Commission's interpretation of the customary international law, particularly as stated in the Nuremberg principles, is that the fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact available to him.[1084]

The Commission noted with satisfaction that Article 7(4) of the 1993 ICTY Statute had adopted an essentially similar approach on this subject.[1085] With regard to the "type, range and duration of the violations" committed during the conflict in the former Yugoslavia, the Commission further noted that:

[They] indicate that the absolute defence of obedience to superior orders is invalid and unfounded . . . This is particularly evident in view of the loose command and control structure where unlawful orders could have been disobeyed without individuals risking personal harm. Indeed, some did. A moral choice usually existed.[1086]

1012. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution

[1082] UN Secretary-General, Report pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, § 57.
[1083] UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, § 65.
[1084] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 61.
[1085] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 62.
[1086] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 318.

935 (1994), referring to Article 8 of the 1945 IMT Charter (Nuremberg), noted that "since the inception of the Nuremberg Charter it has been recognized that the existence of superior orders does not provide an individual with an exculpatory defence. Nevertheless, the existence of superior orders may be taken into account with respect to mitigation of punishment."[1087]

1013. In its Commentary on Article 11 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, the ILC referred to the decisions of the military tribunals after the Second World War and stated that:

> It is . . . recognized that, if a superior order is also to entail the responsibility of the subordinate, he must have had a choice in the matter and a genuine possibility of not carrying out the order. Such circumstances would not exist in cases of irresistible moral or physical coercion, state of necessity and obvious and acceptable error.[1088]

1014. In its commentary on Article 5 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the ILC, referring to various international instruments and judgements, noted that:

> (3) Article 5 addresses the criminal responsibility of a subordinate who commits a crime while acting pursuant to an order of a Government or a superior . . . The culpability and the indispensable role of the subordinate who actually commits the criminal act cannot be ignored. Otherwise the legal force and effect of the prohibition of crimes under international law would be substantially weakened by the absence of any responsibility or punishment on the part of the actual perpetrators of the heinous crimes and thus of any deterrence on the part of the potential perpetrators thereof.
>
> (4) The plea of superior orders is most frequently claimed as a defence by subordinates who are charged with the type of criminal conduct covered by the Code. Since the Second World War the fact that a subordinate acted pursuant to an order of a Government or a superior has been consistently rejected as a basis for relieving a subordinate of responsibility for a crime under international law . . .
>
> (5) Notwithstanding the absence of any defence based on superior orders, the fact that a subordinate committed a crime while acting pursuant to an order of his superior was recognized as a possible mitigation factor which could result in a less severe punishment in the [1945 IMT Charter (Nuremberg] and the subsequent legal instruments . . . The mere existence of superior orders will not automatically result in the imposition of a lesser penalty. A subordinate is subject to a lesser punishment only when a superior order in fact lessens the degree of his culpability . . . A subordinate who unwillingly commits a crime pursuant to an order of a superior because of the fear of serious consequences for himself of his family resulting from a failure to carry out that order does

[1087] UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, § 175.

[1088] ILC, Commentary on Article 11 of the 1991 Draft Code of Crimes against the Peace and Security of Mankind, included in Report of the International Law Commission on the work of its Forty-third Session, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), 1991, §§ 2 and 3.

not incur the same degree of culpability as a subordinate who willingly participates in the commission of a crime . . .

(6) Article 5 reaffirms the principle of individual criminal responsibility under which a subordinate is held accountable for a crime against the peace and security of mankind notwithstanding the fact that he committed such a crime while acting under the orders of a Government or a superior.[1089]

Other International Organisations

1015. No practice was found.

International Conferences

1016. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1017. In its judgement in the *case of the Major War Criminals* in 1946, the defence of superior orders was dismissed by the IMT (Nuremberg), which stated that:

The provisions of this Article [i.e. Article 8 of the 1945 IMT Charter (Nuremberg)] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[1090]

1018. In the *Erdemović case* in 1997, the ICTY Appeals Chamber found that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings".[1091]

1019. In their joint separate opinion in the *Erdemović case* in 1997, Judge McDonald and Judge Vohrah stated that:

Superior orders and duress are conceptually distinct and separate issues and often the same factual circumstances engage both notions, particularly in armed conflict situations. We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.[1092]

[1089] ILC, Commentary on Article 5 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, included in Report of the International Law Commission on the work of its Forty-eighth Session, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), §§ 3–6.

[1090] IMT (Nuremberg), *Case of the Major War Criminals*, Judgement, 1 October 1946.

[1091] ICTY, *Erdemović case*, Judgement on Appeal, 7 October 1997, Part IV, Disposition, § 4.

[1092] ICTY, *Erdemović case*, Judgement on Appeal, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, § 34.

1020. In its judgement in the *Erdemović case* in 1998, the ICTY Trial Chamber accepted that "the accused committed the offence in question [i.e. a violation of the laws and customs of war] under threat of death". However, it sentenced the accused for "the violation of the laws and customs of war" to which the accused himself had pleaded guilty.[1093] It applied the ruling of the Appeals Chamber in the same case and stated that:

> Duress may be taken into account only by way of mitigation . . . The evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.[1094]

1021. In 1994, in its concluding observations, the Committee against Torture, reacting against the recommendation of the Landau Commission that "psychological forms of pressure be used predominantly and that only 'moderate physical pressure' be sanctioned in limited cases where the degree of anticipated danger is considerable" considered that "it is a matter of deep concern that Israeli law pertaining to the defences of 'superior orders' and 'necessity' are in clear breach of that country's obligations under Article 2 of the [1984 Convention against Torture]".[1095]

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

1022. No practice was found.

VI. Other Practice

1023. No practice was found.

[1093] ICTY, *Erdemović case*, Sentencing Judgement bis, 5 March 1998, §§ 16 and 23.
[1094] ICTY, *Erdemović case*, Sentencing Judgement bis, 5 March 1998, § 17.
[1095] UN Committee against Torture, Report, UN Doc. A/49/44, 24 April 1994, § 167.

CHAPTER 44

WAR CRIMES

A. Definition of War Crimes

I. Treaties and Other Instruments

Treaties

1. Article 6(b) of the 1945 IMT Charter (Nuremberg) established jurisdiction of the IMT (Nuremberg) over, *inter alia*, "war crimes: namely, violations of the laws or customs of war".

2. Article 85(5) AP I provides that grave breaches of the 1949 Geneva Conventions and of the Protocol "shall be regarded as war crimes". Article 85 AP I was adopted by consensus.[1]

3. Article 8(2) of the 1998 ICC Statute provides that:

For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . .

[1] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . .

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: . . .

. . .

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . .

4. Article 30(1) of the 1998 ICC Statute provides that "unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge".

5. Article 1(1) of the 2002 Statute of the Special Court for Sierra Leone provides that:

> The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

Other Instruments

6. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution. At the end of the list, it is stated that "the Commission desires to draw attention to the fact that the offences enumerated . . . are not regarded as complete and exhaustive; to these such additions can from time to time be made as may seem necessary".

7. Article II of the 1945 Allied Control Council Law No. 10 defines war crimes as:

> atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

8. Article 5(b) of the 1946 IMT Charter (Tokyo) gave the Tribunal jurisdiction over, *inter alia*, "Conventional War Crimes: Namely, violations of the laws or customs of war".

9. Article 2(12) of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind states that "the following acts are offences against the peace and security of mankind: . . . acts in violation of the laws and customs of war".

10. Article 22(2) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "for the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict".

11. Article 1 of the 1993 ICTY Statute provides that "the [ICTY] shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".

12. Article 2 of the 1993 ICTY Statute, entitled "Grave breaches of the Geneva Conventions of 1949", provides that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . ."

13. Article 3 of the 1993 ICTY Statute, entitled "Violations of the laws or customs of war", provides that the Tribunal "shall have the power to prosecute persons violating the laws or customs of war".

14. Article 1 of the 1994 ICTR Statute provides that:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

15. Article 4 of the 1994 ICTR Statute, entitled "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II", provides that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions . . . and of Additional Protocol II thereto".

16. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. Section 6(1) provides that:

> For the purposes of the present regulation, "war crimes" means:
>
> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . .
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . .
> (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August

1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: . . .

. . .

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . .

II. National Practice

Military Manuals

17. Argentina's Law of War Manual states that "grave breaches are considered as war crimes" and provides a list of grave breaches.[2]

18. Australia's Defence Force Manual states that "war crimes are illegal actions relating to the inception or conduct of armed conflict. They may be viewed as any violation of LOAC (either customary or treaty law which is committed by any person)."[3] The manual adds that "war crimes which are directed against protected persons or facilities under the Geneva Conventions or the Additional Protocols fall within two main categories. The more serious violations are termed grave breaches and the less serious are simple breaches."[4]

19. Belgium's Law of War Manual defines as a war crime "any violation of the laws of war . . . or of the laws of the belligerents, during or on the occasion of war". However, it criticises this definition, saying that "it includes not only crimes against peace and against humanity . . . and violations of the laws of war as such . . . but also violations of the internal legislation of the adversary" which, according to the manual, do not necessarily merit being considered as war crimes.[5] It states, therefore, that "it would be preferable to restrict the term 'war crime' to violations that cause outrage to the public conscience owing to their 'brutality', their 'inhuman character' or the wilful refusal to recognise rights of property having no connection with military necessity".[6] Under the heading "Grave breaches of the Geneva Conventions", the manual lists a number of war crimes which are clearly defined and listed as "grave breaches" in the Conventions. It refers to Articles 50–51 GC I, 51 GC II, 130 GC III and 147 GC IV, as well as to Articles 11, 85 and 86 AP I.[7]

20. Canada's LOAC Manual explains that:

Broadly speaking, "war crimes" include all violations of International Law in relation to an armed conflict for which individuals may be prosecuted and punished, including crimes against peace, crimes against humanity and genocide. In the narrow, technical sense "war crimes" are violations of the laws and customs of war.[8]

[2] Argentina, *Law of War Manual* (1989), § 8.03.
[3] Australia, *Defence Force Manual* (1994), § 1312; see also *Commanders' Guide* (1994), § 1302.
[4] Australia, *Defence Force Manual* (1994), § 1314; see also *Commanders' Guide* (1994), § 1304.
[5] Belgium, *Law of War Manual* (1983), p. 54.
[6] Belgium, *Law of War Manual* (1983), p. 55.
[7] Belgium, *Law of War Manual* (1983), p. 55.
[8] Canada, *LOAC Manual* (1999), p. 16-1, § 2.

The manual further states that:

The term "war crime" in its narrower meaning is a technical expression for a violation of the laws or customs of war. This includes:

a. grave breaches of the Geneva Conventions or Additional Protocols to the Geneva Conventions;
b. violations of the Hague Conventions; and
c. violations of the customs of war.[9]

At the end of the section dealing with "War crimes in the narrow sense", which lists "Grave breaches of the 1949 Geneva Conventions", "Grave breaches of Additional Protocol I" and "Violations of [the] Hague Conventions and customary law", the manual also states that "the fact that a particular act is not listed here as a war crime does not preclude its being treated as a war crime if it is a violation of the laws and customs of war (LOAC)".[10] With respect to non-international armed conflicts, the manual notes that "when AP II was adopted, States refused to make violations of its provisions criminal offences".[11] It adds that "today, however, many provisions of AP II are nevertheless recognized under customary International Law as prohibitions that entail individual criminal responsibility when breaches are committed during internal armed conflicts"[12] and that "violations of many provisions of AP II committed by individual members of a party to an internal conflict are thus criminal offences under International Law".[13]

21. Colombia's Basic Military Manual provides that "grave breaches of IHL committed by the parties to the conflict constitute war crimes or crimes against humanity".[14]

22. Croatia's LOAC Compendium, in a provision entitled "Grave Breaches (War Crimes)", contains a list of punishable acts ("among others").[15]

23. Ecuador's Naval Manual provides that:

War crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of warfare, and which have been generally recognized as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population.[16]

24. France's LOAC Summary Note gives a detailed list of war crimes and provides that "grave breaches of the law of war are war crimes".[17]

[9] Canada, *LOAC Manual* (1999), p. 16-2, § 8.
[10] Canada, *LOAC Manual* (1999), p. 16-4, § 22.
[11] Canada, *LOAC Manual* (1999), p. 17-5, § 42.
[12] Canada, *LOAC Manual* (1999), p. 17-5, § 43.
[13] Canada, *LOAC Manual* (1999), p. 17-5, § 44.
[14] Colombia, *Basic Military Manual* (1995), p. 31.
[15] Croatia, *LOAC Compendium* (1991), p. 56.
[16] Ecuador, *Naval Manual* (1989), § 6.2.5.
[17] France, *LOAC Summary Note* (1992), § 3.4.

25. France's LOAC Teaching Note states that "every grave breach of the rules of the law of armed conflicts represents a war crime."[18]
26. France's LOAC Manual, under the heading "War crimes", cites, *inter alia*, Article 212(1) of the French Penal Code (which provides for life imprisonment for such acts as deportation, enslavement, massive and systematic summary executions, abductions of persons followed by their disappearance, torture and inhuman acts) and Article 75 AP I. It also refers to Articles 41 and 56 of the 1907 HR, Articles 3, 49 and 50 GC I, Articles 3, 50 and 51 GC II, Articles 3, 80–88, 105–108, 129 and 130 GC III, Articles 3, 146 and 147 GC IV and Articles 11, 75 and 85 AP I. The manual further states that:

> Article 8 of the [1998 ICC Statute] defines as war crimes "grave breaches of the Geneva Conventions of 12 August 1949, [committed] against persons or property protected under the provisions of the relevant Geneva Convention" and "grave breaches of the laws and customs of war in an international or non-international armed conflict".[19]

27. Germany's Military Manual provides a list of grave breaches ("in particular") of IHL.[20]
28. Hungary's Military Manual, in a provision entitled "Grave Breaches (War Crimes)", contains a list of punishable acts ("among others").[21]
29. Israel's Manual on the Laws of War states that "the violation of the laws and customs of war is termed a 'war crime'".[22]
30. Italy's IHL Manual does not define war crimes as such, but includes a non-exhaustive list of acts that are considered war crimes and/or grave breaches under national and international law.[23] In the section on "Grave breaches of the international Conventions and the Protocols additional thereto", the manual lists, *inter alia*, "the violation of fundamental guarantees of respect and protection of the person".[24]
31. South Korea's Military Regulation 187 contains a list of war crimes.[25]
32. According to the Military Manual of the Netherlands, a war crime is a violation of the rules of the law of war. The manual uses the term "war crime" both in a broad and in a narrow sense. It explains that war crimes in the broad sense include violations of the laws and customs of war, crimes against peace and crimes against humanity. In the narrow sense, they are defined as violations of the laws and customs of war. As to the difference between war crimes and crimes against humanity, the manual states that crimes against humanity can also be committed outside the context of armed conflict and can be directed against one's own population. Furthermore, the manual recalls that the Geneva

[18] France, *LOAC Teaching Note* (2000), p. 7.
[19] France, *LOAC Manual* (2001), pp. 44–46.
[20] Germany, *Military Manual* (1992), § 1209. [21] Hungary, *Military Manual* (1992), p. 90.
[22] Israel, *Manual on the Laws of War* (1998), p. 64.
[23] Italy, *IHL Manual* (1991), Vol. I, § 84. [24] Italy, *IHL Manual* (1991), Vol. I, § 85.
[25] South Korea, *Military Regulation 187* (1991), Article 4.2.

Conventions and AP I provide for the distinction between (ordinary) breaches and grave breaches. As to the latter, it states that they must be subject to criminal sanction. According to the manual, grave breaches of treaty law are violations of the most fundamental rules of IHL. In addition, there are ordinary breaches. These concern acts which constitute grave breaches but which lack the intent of the actor or cases in which neither death nor serious bodily injuries are caused. As other examples of such ordinary breaches, the manual lists cases of appropriation of property of POWs, insulting internees and unnecessary damaging of civilian objects. According to the manual, war crimes can also take place by negligence. Lastly, the manual refers to Article 86 AP I, noting the duty to repress grave breaches and to take measures necessary to suppress all other breaches which result from a failure to act when under a duty to do so.[26]

33. New Zealand's Military Manual states that:

> The term "war crime" is the generic expression for large and small violations of the laws of warfare, whether committed by members of the armed forces or by civilians. It includes "grave breaches". These are war crimes which are also major violations of the Geneva Conventions of 1949 or of AP I. "War crimes", in the broadest sense, include crimes against peace and crimes against humanity of the type prosecuted before the International Military Tribunal at Nuremberg following World War II.[27]

The manual further provides a long list of "grave breaches" and other war crimes.[28] It also states that "the fact that a particular act is not listed in this Manual as a war crime or grave breach does not preclude its being treated as a war crime if it is in breach of any rule of the customary or treaty law of armed conflict".[29] With respect to non-international armed conflicts in particular, the manual states that:

> Although breaches of AP II would amount to war crimes if committed in international armed conflict, both the governmental and rebel authority should treat them as breaches of the national criminal law, since the law concerning war crimes relates to international armed conflicts.[30]

34. Nigeria's Manual on the Laws of War states that:

> "War crime" is the technical term for violation of the Laws of war. It includes plotting, incitement or attempt to commit such crimes, as well as participation in the execution of these crimes. Grave breaches of the Geneva Conventions are considered as serious war crimes when committed against [a number of protected persons and objects listed within the provision].[31]

[26] Netherlands, *Military Manual* (1993), pp. IX-3/IX-6.
[27] New Zealand, *Military Manual* (1992), § 1701(1).
[28] New Zealand, *Military Manual* (1992), §§ 1702, 1703 and 1704.
[29] New Zealand, *Military Manual* (1992), § 1704(6).
[30] New Zealand, *Military Manual* (1992), § 1824(1).
[31] Nigeria, *Manual on the Laws of War* (undated), § 6.

35. According to South Africa's LOAC Manual, "any breach of the law of armed conflict is considered a war crime".[32] Referring to AP I, the manual further distinguishes between two separate categories of grave breaches and states that "the first category relates to combat activities and medical experimentation. It requires both willfulness and the death or serious injury to body or health is caused. The second category requires only willfulness."[33] The manual then lists certain acts defined as "grave breaches", stating however, that grave breaches are "not limited" to those listed.[34] Lastly, the manual expressly states that "grave breaches of the law of war are regarded as war crimes".[35]

36. Spain's LOAC Manual contains a list of grave breaches which it considers to be "typified as war crimes". It also states that "grave breaches are considered war crimes" and then sets out a list of acts considered to be grave breaches.[36]

37. Sweden's IHL Manual, in a provision dealing with penal responsibility for violations of IHL, states that:

> The Conventions distinguish between grave breaches and other transgressions. A grave breach in the meaning of the conventions exists where the breach has been directed at persons or property protected by the conventions and has also included any of certain specially listed acts.[37]

38. Switzerland's Basic Military Manual provides that "violations of the laws and customs of war, commonly called war crimes, engage the individual responsibility of the persons who committed them as well as the responsibility of the States to which the perpetrators of the violation are nationals".[38] The manual then provides a list of grave breaches of the Geneva Conventions and of AP I.[39]

39. The UK Military Manual states that:

> The term "war crime" is the technical expression for violations of the law of warfare, whether committed by members of the armed forces or by civilians. It has also been customary to describe as war crimes such acts as espionage and so-called war treason which, although not prohibited by international law, are properly liable to punishment by the belligerent against which they are directed. However, the accuracy of the description of such acts as war crimes is doubtful.[40]

The manual identifies a number of offences as war crimes, some of which are listed as grave breaches and some of which, under the heading "Other war crimes", it describes as "examples of punishable violations of the laws of war, or war crimes".[41] Under the same heading, it adds that "similarly, all other

[32] South Africa, *LOAC Manual* (1996), § 35. [33] South Africa, *LOAC Manual* (1996), § 36.
[34] South Africa, *LOAC Manual* (1996), §§ 37 and 38.
[35] South Africa, *LOAC Manual* (1996), § 41.
[36] Spain, *LOAC Manual* (1996), Vol. I, §§ 9.2.a.(2) and 11.8.b.(1).
[37] Sweden, *IHL Manual* (1991), Section 4.2, p. 93.
[38] Switzerland, *Basic Military Manual* (1987), Article 191.
[39] Switzerland, *Basic Military Manual* (1987), Articles 192 and 193.
[40] UK, *Military Manual* (1958), § 624.
[41] UK, *Military Manual* (1958), §§ 625 and 626.

violations of the [1949 Geneva] Conventions not amounting to 'grave breaches' are also war crimes".[42]

40. The US Field Manual provides that "the term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[43] It then states that "conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, ... war crimes are punishable".[44] The manual further provides a list of "Grave Breaches of the Geneva Conventions of 1949 as War Crimes"[45] and a list of "Other Types of War Crimes" which it describes as being "representative of violations of the law of war ("war crimes)".[46]

41. The US Air Force Pamphlet emphasises the importance of criminal intent as an element of any war crime.[47]

42. The US Instructor's Guide provides that "under the Geneva Conventions the most serious offenses are called grave breaches of the law of war".[48]

43. The US Naval Handbook provides that:

> War crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of warfare, and which have been generally recognized as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population.[49]

The Handbook then provides a list of acts which it characterizes as "representative war crimes".[50]

National Legislation

44. Argentina's Draft Code of Military Justice, after listing various more precisely defined violations of the LOAC, provides that it is an offence

> in the event of an armed conflict, to commit or order to commit any other breaches or acts contrary to the provisions of international treaties to which [Argentina] is a party, with regard to the conduct of hostilities, the protection of the wounded, sick or shipwrecked, the treatment owed to prisoners of war, the protection of the civilian population and of cultural objects.[51]

45. Australia's War Crimes Act considers that:

> Unless the contrary intention appears, ...
> "war crime" means –
> (a) a violation of the laws and usages of war; or
> (b) any war crime within the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]

[42] UK, *Military Manual* (1958), § 626.
[43] US, *Field Manual* (1956), § 499; see also *Operational Law Handbook* (1993), p. Q-183.
[44] US, *Field Manual* (1956), § 500.
[45] US, *Field Manual* (1956), § 502.
[46] US, *Field Manual* (1956), § 504.
[47] US, *Air Force Pamphlet* (1976), § 15-2(c).
[48] US, *Instructor's Guide* (1985), p. 13.
[49] US, *Naval Handbook* (1995), § 6.2.5.
[50] US, *Naval Handbook* (1995), § 6.2.5.
[51] Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the Code of Military Justice as amended (1951).

committed in any place whatsoever, whether within or beyond Australia, during any war.[52]

46. Australia's War Crimes Act as amended, under the heading "War crimes", states that:

(1) A serious crime is a war crime if it was committed:
  (a) in the course of hostilities in a war;
  (b) in the course of an occupation;
  (c) in pursuing a policy associated with the conduct of a war or with an occupation; or
  (d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.
(2) For the purposes of subsection (1), a serious crime was not committed:
  (a) in the course of hostilities in a war; or
  (b) in the course of an occupation;
  merely because the serious crime had with the hostilities or occupation a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.
(3) A serious crime is a war crime if it was:
  (a) committed:
    (i) in the course of political, racial or religious persecution; or
    (ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
  (b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.
(4) Two or more serious crimes together constitute a war crime if:
  (a) they are of the same or a similar character;
  (b) they form, or are part of, a single transaction or event; and
  (c) each of them is also a war crime by virtue of either or both of subsections (1) and (3).[53]

47. Azerbaijan's Criminal Code provides for punishment, *inter alia*, in case of war crimes (Article 57) and contains provisions criminalising: the use of "mercenaries" (Article 114); "violations of [the] laws and customs of war" (Article 115); "violations of the norms of international humanitarian law in time of armed conflict" (Article 116); "negligence or giving criminal orders in time of armed conflict" (Article 117); "pillage" (Article 118); and "abuse of protected signs" (Article 119). In a remark relating to the part entitled "War crimes", the Code states that "any of [the] acts considered in the present part and committed with regard to [the] planning, preparation, beginning or conduct of hostilities during either international or internal armed conflict, are considered as war crimes".[54]

48. Bangladesh's International Crimes (Tribunal) Act, under a norm providing for the punishment of prohibited acts, lists "war crimes: namely, violation of laws or customs of war which include, but are not limited to . . . [a list of

[52] Australia, *War Crimes Act* (1945), Section 3.
[53] Australia, *War Crimes Act as amended* (1945), Section 7.
[54] Azerbaijan, *Criminal Code* (1999), Articles 57 and 114–119 and remark 1 relating to Part 17.

offences]". The Act also provides for the punishment of the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" and "any other crimes under international law".[55]

49. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended states that:

The grave breaches listed below which cause injury or damage, by act or omission, to persons or objects protected by the Conventions signed at Geneva on 12 August 1949 and approved by the Act of 3 September 1952, and by Protocols I and II additional to those Conventions adopted at Geneva on 8 June 1977 and approved by the Act of 16 April 1986, shall – without prejudice to the criminal provisions applicable to other breaches of the Conventions referred to in the present Act and without prejudice to criminal provisions applicable to breaches committed out of negligence – constitute crimes under international law and be punishable in accordance with the provisions of the present Act.[56]

50. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that:

As war crimes are considered:

A. Grave breaches of the Geneva Conventions . . . which means any of the acts listed hereafter if they aim at persons or objects protected by the provisions of the Geneva Conventions . . .
B. Other grave breaches of the laws and customs applicable to international armed conflicts within the framework established by international law . . .
C. In case of armed conflict which is not of an international nature, the grave breaches of common article 3 of the four Geneva Conventions, which means any of the acts listed hereunder committed against persons who do not directly participate in the hostilities, including the members of the armed forces who have laid down their weapons and persons who have been placed *hors de combat* because of sickness, wounds, detention or any other reason . . .
D. Other grave breaches of the laws and customs applicable to armed conflicts which are not of an international nature within the framework established by international law.[57]

51. Canada's Criminal Code states that:

"War crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.[58]

52. Canada's Crimes against Humanity and War Crimes Act defines a war crime as:

[55] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d), (e) and (f).
[56] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).
[57] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4.
[58] Canada, *Criminal Code* (1985), Article 3.76.

an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.[59]

53. Chile's Code of Military Justice, under the heading "Treason, espionage and offences against the sovereignty and external security of the State", provides a list of certain crimes directed against specific protected persons and objects, including misuse of the red cross flag and emblem in times of war.[60]

54. China's Law Governing the Trial of War Criminals contains a list of offences regarded as war crimes and provides for the punishment of "other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights".[61]

55. According to the DRC Code of Military Justice as amended, war crimes are "all offences against the laws of the Republic which are not justified by the laws and customs of war".[62]

56. Congo's Genocide, War Crimes and Crimes against Humanity Act states that:

By "war crimes" is meant:

a) grave breaches of the Geneva Conventions of 12 August 1949;
b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;
c) serious violations of article 3 common to the four Geneva Conventions of 12 August 1949;
d) other serious violations recognised as being applicable to armed conflicts not representing an international character, within the established framework of international law.[63]

57. Estonia's Penal Code states that:

(1) Offences committed in times of war which are not provided for under this section [dealing with war crimes] are punishable on the basis of other provisions of the special part of this Code.
(2) A person who has committed an offence provided for under this section shall be punished only for the commission of a war crime even if the offence comprises the necessary elements of other offences provided for in the special part of this Code.[64]

[59] Canada, *Crimes against Humanity and War Crimes Act* (2000), Sections 4 and 6.
[60] Chile, *Code of Military Justice* (1925), Articles 261–264.
[61] China, *Law Governing the Trial of War Criminals* (1946), Article 3.
[62] DRC, *Code of Military Justice as amended* (1972), Article 502.
[63] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.
[64] Estonia, *Penal Code* (2001), § 94.

58. According to the Report on the Practice of Ethiopia, acts which, in the meaning of Ethiopia's Penal Code, constitute "war crimes in the context of [an] international armed conflict would also be crimes in the context of [an] internal armed conflict".[65]

59. Finland's Revised Penal Code provides that:

A person who in an act of war

1) uses a prohibited means of warfare or weapon;
2) abuses an international symbol designated for the protection of the wounded or the sick; or
3) otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law

shall be sentenced for a *war crime*.[66] [emphasis in original]

60. France's Ordinance on Repression of War Crimes, relating to offences committed during the Second World War, provided for the prosecution of:

Enemy nationals or non-French agents . . . guilty of crimes or offences committed since the opening of hostilities either in France or in a territory under French authority, either against a French national or a person protected by France, a soldier serving or having served under the French flag, a stateless person residing on French territory . . . or a refugee on French territory, or to the prejudice of the property of any of these persons mentioned above and of any French legal entity, provided that these offences, even if committed at the occasion or under the pretext of the state of war, are not justified by the laws and customs of war.[67]

61. Israel's Nazis and Nazi Collaborators (Punishment) Law defines war crimes as:

murder, ill-treatment or deportation to forced labour or for any other purpose of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.[68]

62. Jordan's Draft Military Criminal Code contains a list of acts which it considers to be "war crimes" and which are committed "in times of armed conflict", emphasizing that "the provisions of [the part on war crimes] will apply to civilians who commit any war crime".[69]

63. Latvia's Criminal Code provides for the punishment of "the committing of war crimes, that is, of violating provisions and customs regarding the conduct

[65] Report on the Practice of Ethiopia, 1998, Chapter 6.4.
[66] Finland, *Revised Penal Code* (1995), Chapter 11, Section 1.
[67] France, *Ordinance on Repression of War Crimes* (1944), Article 1.
[68] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).
[69] Jordan, *Draft Military Criminal Code* (2000), Articles 41 and 44.

of war forbidden by international agreements binding upon the Republic of Latvia".[70]

64. The Draft Amendments to the Code of Military Justice of Lebanon provides a list of punishable acts, some of which it describes as "grave breaches committed against protected persons or protected objects . . . considered to be war crimes" (Article 146(1)–(8)). Other offences in the list "are considered to be war crimes when committed wilfully and causing death or serious injury to body or health" (Article 146(9)–(14)) or "considered to be war crimes when committed wilfully and in violation of the [Geneva] Conventions or [AP I]" (Article 146(15–20)).[71]

65. Luxembourg's Law on the Punishment of Grave Breaches criminalises and identifies as "international law crimes" the grave breaches of the Geneva Conventions.[72]

66. Moldova's Penal Code, at the end of a list of punishable acts related to armed conflict, states that:

> The provisions of Articles 389–391 [entitled "Pillage of the dead on the battlefield" (Article 389), "Acts of violence against the civilian population in the area of military hostilities" (Article 390) and "Grave breach of international humanitarian law committed during armed conflict" (Article 391)] also apply to the civilian population.[73]

67. The Extraordinary Penal Law Decree as amended of the Netherlands, relating to offences committed during the Second World War, provided that:

> He who during the time of the . . . war and while in the forces or service of the enemy state is guilty of a war crime or any crime against humanity as defined in Article 6 under (b) or (c) of the [1945 IMT Charter (Nuremberg)] shall, if such crime contains at the same time the elements of an act punishable according to Netherlands Law, receive the punishment prescribed for such act.
>
> If such crime does not at the same time contain the elements of an act punishable according to the Netherlands law, the perpetrator shall receive the punishment prescribed by Netherlands law for the act with which it shows the greatest similarity.[74]

68. The Decree Instituting the Commission for the Investigation of War Crimes of the Netherlands, relating to offences committed during the Second World War, stated that "under war crimes shall be understood . . . facts which constitute crimes considered as such according to Dutch law and which are forbidden by the laws and customs of war and have been committed during the present war by other than Dutchmen or Dutch subjects".[75]

[70] Latvia, *Criminal Code* (1998), Section 74.
[71] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(1)–(8), (9)–(14) and (15)–(20).
[72] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1.
[73] Moldova, *Penal Code* (2002), Article 393.
[74] Netherlands, *Extraordinary Penal Law Decree as amended* (1943), Article 27-a.
[75] Netherlands, *Decree Instituting the Commission for the Investigation of War Crimes* (1945).

69. The Definition of War Crimes Decree of the Netherlands states that "under war crimes are understood acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy".[76]

70. New Zealand's International Crimes and ICC Act defines war crimes as grave breaches of the 1949 Geneva Conventions, other serious violations of the laws and customs of war applicable in international armed conflict, serious violations of common Article 3 of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in armed conflict not of an international character.[77]

71. Nicaragua's Revised Penal Code provides that a person who during an international war or civil war commits serious violations of international treaties on the use of weapons, the treatment of prisoners or other rules of war, shall be guilty of an offence against the international order.[78]

72. Norway's Act on the Punishment of Foreign War Criminals provided that acts forbidden by Norwegian criminal law which had been committed against Norwegian nationals or interests or in Norway during the Second World War and were in violation of the laws and customs of war could be tried according to Norwegian law.[79]

73. Spain's Penal Code, after listing "crimes against protected persons and objects in the event of an armed conflict", provides that it is an offence

> in the event of an armed conflict, to commit or order to commit any other breaches or acts contrary to the provisions of international treaties to which [Spain] is a party, with regard to the conduct of hostilities, the protection of the wounded, sick or shipwrecked, the treatment owed to prisoners of war, the protection of the civilian population and of cultural objects.[80]

74. The UK Regulations for the Trial of War Criminals as amended states that "'war crime' means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939".[81]

75. The US War Crimes Act as amended provides that:

> As used in this section the term "war crime" means any conduct –
> (1) defined as a grave breach in any of the [1949 Geneva Conventions], or any protocol to such convention to which the United States is a party;
> (2) prohibited by Article 23, 25, 27, or 28 of the [1907 HR];
> (3) which constitutes a violation of common Article 3 of the [1949 Geneva Conventions], or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

[76] Netherlands, *Definition of War Crimes Decree* (1946), Article 1.
[77] New Zealand, *International Crimes and ICC Act* (2000), Section 11.
[78] Nicaragua, *Revised Penal Code* (1997), Article 551.
[79] Norway, *Act on the Punishment of Foreign War Criminals* (1946).
[80] Spain, *Penal Code* (1995), Article 614.
[81] UK, *Regulations for the Trial of War Criminals as amended* (1945), Regulation 1.

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.[82]

National Case-law

76. In its judgement in the *Enigster case* in 1952, Israel's District Court of Tel Aviv held with respect to the Israeli Nazis and Nazi Collaborators (Punishment) Law that "at all events the victims of a war crime must be nationals of an occupied territory, while this is not necessary in the case of a crime against humanity which may be committed against any civilian population". However, it also stated that "true, it is possible to find a man guilty of a war crime even though he is of the population of occupied territory and possesses the same national character as his victims, if his actions show that he identified himself with the Occupant".[83]

77. In the *Pilz case* in 1949, the Special Criminal Chamber of the District Court of The Hague (Netherlands) and, on appeal in 1950, the Special Court of Cassation of the Netherlands agreed that the 1907 HR had not been violated, since the object of the 1907 HR, and in particular of Article 46, was to protect the inhabitants of an enemy-occupied country and not members of the occupying forces. With respect to the 1929 GC, the Special Court of Cassation stated that the 1929 GC only protected members of an army against acts by members of the opposing army. Therefore, the acts of a German military doctor with respect to an escaping member of the German army did not constitute war crimes, but were crimes in the domestic sphere of German military law and jurisdiction.[84]

78. In a number of post-Second World War decisions, UK and US courts held that war crimes could be committed by civilians. The cases included prosecutions against the staff of a State sanatorium for the extermination of civilians deported from occupied territories; officials of companies which supplied the gas used for the extermination of concentration camp detainees; and high-ranking officials in private corporations for, *inter alia*, deportation of the civilian populations of occupied territories to slave labour and plunder of public and private property in occupied territories. For example, in the *Flick case* in 1947, the US Military Tribunal at Nuremberg stated that:

Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment

[82] US, *War Crimes Act as amended* (1996), Section 2441(c).
[83] Israel, District Court of Tel Aviv, *Enigster case*, Judgement, 4 January 1952.
[84] Netherlands, District Court of The Hague (Special Criminal Chamber), *Pilz case*, Judgement, 21 December 1949; Special Court of Cassation, *Pilz case*, Judgement, 5 July 1950.

falls on the offender *in propria persona*. The application of international law to individuals is not a novelty.[85]

79. In its judgement in the *Leo Handel case* in 1985, a US District Court held that:

"War crimes" refers to criminal actions taken against the soldiers or civilians of *another* country rather than against the defendant's fellow citizens. This limitation on the meaning of "war crimes" is reflected in the [1945 IMT Charter (Nuremberg)] annexed to the Agreement for the Establishment of an International Military Tribunal.[86] [emphasis in original]

However, the Court also stated that "by contrast, crimes against humanity include 'murder, extermination, enslavement, deportation, and other inhumane acts committed against *any* civilian population'".[87] (emphasis in original)

80. In a written opinion in the *Trajković case* in 2001, the International Prosecutor for the Office of the Public Prosecutor of Kosovo (FRY) referred to Articles 146 and 147 GC IV and stated that:

The cited provisions of Geneva Convention IV establish that, in general, a person commits a crime of war only if:
(1) during armed conflict, whether or not international,
(2) he commits a prohibited act against a protected person or population.

. . . ICTY jurisprudence makes explicit the third element, a nexus between the armed conflict and the prohibited act.[88]

Other National Practice

81. In 1973, during a debate in the Third Committee of the UN General Assembly, the representative of Belgium stated that "with regard to the definition of the concept of war crimes and crimes against humanity, his Government based its position on the Charter of the International Military Tribunal, Nuremberg, and the body of judicial practice to which it had given rise".[89]

82. In an explanatory memorandum submitted in 1992 to the Belgian Senate in the context of the adoption of the Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, it

[85] US, Military Tribunal at Nuremberg, *Flick case*, Judgement of 22 December 1947; see also US, Military Commission in Wiesbaden, *Hadamar Sanatorium case*, Judgement, 8–15 October 1945, US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 17 December 1947–30 June 1948, US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 14 August 1947–29 July 1948 and UK, Military Court at Hamburg, *Zyklon B case*, Judgement, 1–8 March 1946.

[86] US, District Court, Central District, California, *Leo Handel case*, Judgement, 31 January 1985.

[87] US, District Court, Central District, California, *Leo Handel case*, Judgement, 31 January 1985.

[88] SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Section II(D).

[89] Belgium, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2022, 9 November 1973, § 40.

was stated that the law reserved the application of other criminal provisions applicable to other breaches of the conventions to which it referred. It further stated that, because of this reservation, "the repression of all violations of the laws and customs of war is covered by 'ordinary' national penal law" insofar as the violations correspond to offences punishable under national (penal) law.[90] An early draft of this law was amended in order to include acts committed in the context of non-international conflicts that corresponded to the grave breaches of the Geneva Conventions and AP I. Among the reasons for the inclusion of acts committed in the context of non-international conflicts, members of the Senate who submitted the amendment mentioned, *inter alia*, that international law did not prohibit such criminalisation. The amendment was ultimately supported by the Belgian government, which noted that although the proposals "go further than required by the Conventions and Protocols, they remain within the scope of the – admittedly extensive – application of an international instrument ratified by Belgium".[91]

83. The Report on the Practice of Belgium notes that the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols shows that Belgium believes that the grave breaches aimed at by the Geneva Conventions and AP I are also war crimes when committed in a non-international armed conflict. It further states that the above-mentioned reservation, as well as Belgian practice in the aftermath of the Second World War, when courts, lacking specific legislation in this regard, applied national law to "war crimes", show that it is Belgium's *opinio juris* that the term "war crime" can be a broader one than the technical term of "grave breach" in the meaning of the Geneva Conventions and AP I.[92]

84. According to the Report on the Practice of Chile, the provisions of Chile's Code of Military Justice dealing with certain offences directed against protected persons and objects define what the national law "considers to be crimes of war". The report further states that:

> This definition predates the Geneva Conventions of 1949 and is fundamentally based on the Law of The Hague that originated in the Peace Conferences of 1899 and 1907 . . . The definitions laid down by the Code of Military Justice are understood to form part of customary international law.[93]

[90] Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 6.

[91] Belgium, Senate, Complementary report submitted on behalf of the Commission of Justice, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1991–1992 Extraordinary Session, Doc. 481-5, 22 December 1992, pp. 2 ff.

[92] Report on the Practice of Belgium, 1997, Chapter. 6.5.

[93] Report on the Practice of Chile, 1997, Chapter 6.5.

85. In 1998, during a debate in the Sixth Committee of the UN General Assembly on the establishment of an international criminal court, China stated that:

As far as war crimes are concerned, China has doubts about the inclusion of war crimes in domestic armed conflicts in the Court's jurisdiction, because provisions in international law concerning war crimes in such conflicts are still incomplete . . . The definition of war crimes in domestic armed conflicts in the present [Rome] Statute has far exceeded not only customary international law but also the provisions of [AP II].[94]

86. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the Nuremberg Principles established by the ILC, France stated that:

The offences listed by the [IMT (Nuremberg)] were based on already existing principles of international law; they were principles "recognized" by the [1945 IMT Charter (Nuremberg)], as was stated in the General Assembly resolution, and not principles "laid down" by that charter.

. . . The list of war crimes in article 6(b) of the [1945 IMT Charter (Nuremberg)] was based on the definitions of traditional international law contained in the Hague Conventions of 1907, the Treaty of Versailles of 1919 and the Geneva Conventions of 1929. Thus, the concept of war crimes as it was recognized in the [1945 IMT Charter (Nuremberg)] had already existed in 1939.[95]

87. In a speech before the French National Consultative Commission on Human Rights in 1998, the Director of the Legal Department of the French Ministry of Foreign Affairs noted with regard to the definition of war crimes to be included in the 1998 ICC Statute that the provisions in the "war crimes" section covered what the French referred to as the laws of war, namely the Geneva Conventions and their Additional Protocols. He added that it was agreed that in practice the Statute would reflect existing law.[96]

88. In 1998, the French National Consultative Commission on Human Rights recommended that:

As regards the definition of war crimes, endorsement must be made [in the 1998 ICC Statute] of the grave breaches of international humanitarian law committed in international as well as in internal armed conflicts, as defined by the Geneva Conventions and their two additional Protocols.[97]

89. In 1998, at the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the French Minister of Foreign Affairs declared that "some States are entirely opposed to the idea that the definition

[94] China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 36.

[95] France, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, §§ 9–10.

[96] France, National Consultative Commission on Human Rights, Statement by the Director of the Legal Department of the Ministry of Foreign Affairs, 22 April 1998, p. 3.

[97] France, National Consultative Commission on Human Rights, Opinion on the establishment of an international criminal court, 14 May 1998, § 3.

of war crimes may apply to internal conflicts. But accepting this restriction would be a retrograde step. Here in Rome we must find a workable solution to this problem."[98]

90. In 1993, during a debate in the Sixth Committee of the UN General Assembly, Germany stated that:

> Articles 22 and 26 of the draft statute [for an international criminal court] contained criteria for jurisdiction. First, the court would have jurisdiction over the crimes defined in international treaties as set forth in article 22 [containing a list of crimes including, *inter alia*, genocide, grave breaches of the 1949 Geneva Conventions and AP I, apartheid and related crimes, crimes against internationally protected persons and hostage-taking and related crimes]. The treaties listed in article 22 covered most of the crimes which called for international prosecution. It was somewhat surprising, however, that the crime of torture as defined in article 1 of the [1984 Convention against Torture] was not included in the list. Second, the court would be competent to try crimes under general international law as stipulated in Article 26(2)(a) of the draft statute [providing for the possibility of special acceptance of jurisdiction by States in respect of other international crimes not covered by Article 22]. The German Government shared the Working Group's concern that the prosecution of certain crimes which were outlawed by international customary law but not covered by article 22 might be excluded from the jurisdiction of the Court. However, the principle *nullum crimen sine lege* required clarity and precision in the definition of crimes in the statute.[99]

91. The Report on the Practice of Iran notes that, with regard to the Iran–Iraq war, Iran used the terms "violating international law" and "crimes" interchangeably when referring to acts committed in violation of IHL.[100]

92. The Report on the Practice of South Korea refers to the list of war crimes provided for in the Military Regulation 187 and states that "other acts not illustrated here can be classified as war crimes. This means that definitions of war crimes in the Geneva Conventions become customary."[101]

93. The Report on the Practice of the Netherlands, referring to an interview with a legal advisor of the Ministry of Justice of the Netherlands, states that:

> Section 8 of the Criminal Law in Wartime Act [as amended, according to which "violations of the laws and customs of war" are offences] cannot be construed as a definition of war crimes. A violation [of IHL other than a grave breach] has to be as severe as is required for a grave breach in order to be a war crime. The Ministry of Justice does not make a distinction between international and internal armed conflicts regarding the grave breaches regime.[102]

[98] France, Minister of Foreign Affairs, Statement at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 June 1998.

[99] Germany, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.19, 27 October 1993, § 4.

[100] Report on the Practice of Iran, 1997, Chapter 6.5.

[101] Report on the Practice of South Korea, 1997, Chapter 6.5.

[102] Report on the Practice of the Netherlands, 1997, Interview with a legal advisor at the Ministry of Justice, 18 March 1997, Chapter 6.5.

94. In 1991, in a diplomatic note to Iraq, the US reminded Iraq that "under International Law, violations of the Geneva Conventions, the Geneva [Gas] Protocol of 1925, or related International Laws of armed conflict are war crimes".[103]
95. In 1993, during a debate in the UN Security Council following the adoption of the 1993 ICTY Statute, the US stated that:

> It is understood that the "laws and customs of war" referred to in Article 3 [of the 1993 ICTY Statute which aims at the prosecution of "violations of the laws and customs of war] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.[104]

96. According to the Report on US Practice, the US considers any violation of the law of war a war crime, provided the accused had the requisite criminal intent at the time of his or her participation in the violation. The report adds that conspiracy to violate the laws of war, inciting violations and aiding and abetting violations of the laws of war are also punishable as war crimes.[105]
97. In an order issued in 1991, the YPA Chief of General Staff stated that "war crimes and other grave breaches of norms of law on warfare are serious criminal offences".[106]

III. Practice of International Organisations and Conferences

United Nations

98. In resolutions adopted in 1982 and 1983, the UN Commission on Human Rights declared that "Israel's continuous grave breaches of the Geneva Convention relative to the Protection of Civilian Persons in Time of War . . . and of the Additional Protocols . . . are war crimes".[107]
99. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that "there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes". Referring to common Article 3 of the 1949 Geneva Conventions, AP II and

[103] US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.
[104] US, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 15.
[105] Report on US Practice, 1997, Chapter 6.6.
[106] SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 2.
[107] UN Commission on Human Rights, Res. 1982/1, 11 February 1982, § 3; Res. 1983/1, 15 February 1983, § 3.

Article 19 of the 1954 Hague Convention, the Commission noted that these provisions did not use the terms "grave breaches" or "war crimes". It added that "the content of customary law applicable to internal armed conflict is debatable", and as a result, "in general, unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification".[108]

100. In 1993, the ILC Working Group on a draft statute for an international criminal court commented with regard to Article 22 of the draft statute that "subparagraph (b) of article 22 [which includes grave breaches of the 1949 Geneva Conventions and AP I in the list of crimes defined by treaties] does not include [AP II] because this protocol contains no provision concerning grave breaches".[109]

Other International Organisations

101. No practice was found.

International Conferences

102. In the working paper on war crimes submitted by the ICRC in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court contains lists of "Grave breaches of international humanitarian law applicable in international armed conflicts", "Other serious violations of international law applicable in international armed conflicts" and "Serious violations of international humanitarian law applicable in non-international armed conflicts".[110]

IV. Practice of International Judicial and Quasi-judicial Bodies

103. In its judgement in the *Akayesu case* in 1998, the ICTR stated that:

For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 [of the Geneva Conventions] and parts of Article 4 of Additional Protocol II – which comprise the subject-matter jurisdiction of Article 4 of the [1994 ICTR] Statute – form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby.

[108] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 42 and 52.

[109] ILC, Working Group on a draft statute for an international criminal court, Report, *Yearbook of the International Law Commission*, 1993, Vol. II, Part Two, UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 2), Commentary on Article 22, § 3, p. 107.

[110] ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1–3.

Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.[111]

104. In its judgement in the *Rutaganda case* in 1999, the ICTR stated that:

Furthermore, the Trial Chamber in the Akayesu Judgement concluded that violations of these norms would entail, as a matter of customary international law, individual responsibility for the perpetrator. It was also recalled that as Rwanda had become a party to the 1949 Geneva Conventions and their 1977 Additional Protocols, on 5 May 1964 and 19 November 1984, respectively, these instruments were in any case in force in the territory of Rwanda in 1994, and formed part of Rwandan law. Thus, Rwandan nationals who violated these international instruments incorporated into national law, including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts.[112]

105. In its judgement in the *Musema case* in 2000, the ICTR stated that:

The Chamber therefore concludes that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the [1994 ICTR] Statute. Violations thereof, as a matter of custom and convention, attracted individual criminal responsibility and could result in the prosecution of the authors of the offences.[113]

106. In its decision on the Defence Motion for Interlocutory Appeal in the *Tadić case* in 1995, the ICTY Appeals Chamber, with regard to the expression of the "violations of the laws and customs of war" aimed at in Article 3 of the 1993 ICTY Statute, stated that:

A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

. . .

Indeed, Article 3, before enumerating the violations, provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the [1907 HR] and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover *all violations* of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).[114] [emphasis in original]

[111] ICTR, *Akayesu case*, Judgement, 2 September 1998, § 611.
[112] ICTR, *Rutaganda case*, Judgement, 6 December 1999, § 88.
[113] ICTR, *Musema case*, Judgement, 27 January 2000, § 242.
[114] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 87.

The ICTY Appeals Chamber further stated that:

The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 [of the 1993 ICTY Statute relative to "violations of the laws and customs of war"] to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . .
(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.[115]

107. In its judgement in the *Tadić case* in 1997, the ICTY Trial Chamber, with regard to the expression of the "violations of the laws and customs of war" aimed at in Article 3 of the 1993 ICTY Statute, stated that:

610. According to the Appeals Chamber [*Tadić case* (Interlocutory Appeal)], the conditions that must be satisfied to fulfil the requirements of Article 3 of the Statute are:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ; and
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Those requirements apply to any and all laws or customs of war which Article 3 covers.

611. In relation to requirements (i) and (ii), it is sufficient to note that the Appeals Chamber has held, on the basis of the *Nicaragua case*, that Common Article 3 [of

[115] ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 94.

the 1949 Geneva Conventions] satisfies these requirements as part of customary international humanitarian law.
612. While, for some laws or customs of war, requirement (iii) may be of particular relevance, each of the prohibitions in Common Article 3: against murder; the taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying-out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples, constitute, as the Court put it, "elementary considerations of humanity", the breach of which may be considered to be a "breach of a rule protecting important values" and which "must involve grave consequences for the victim". Although it may be possible that a violation of some of the prohibitions of Common Article 3 may be so minor as to not involve "grave consequences for the victim", each of the violations with which the accused has been charged clearly does involve such consequences.
613. Finally, in relation to the fourth requirement, namely that the rule of customary international humanitarian law imposes individual criminal responsibility, the Appeals Chamber held in the *Appeals Chamber Decision* that

> customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

Consequently, this Trial Chamber has the competence to hear and determine the charges against the accused under Article 3 of the Statute relating to violations of the customary international humanitarian law applicable to armed conflicts, as found in Common Article 3.[116]

108. In the judgement on appeal in the *Tadić case* in 1999, the ICTY Appeals Chamber stated with respect to violations committed "against the persons or property protected under the provisions of the relevant Geneva Conventions" that:

Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines "protected persons" – hence possible victims of grave breaches – as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals". In other words, subject to the provisions of Article 4(2), the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection.[117]

109. In the judgement in the *Delalić case* in 1998, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the Tadić case (Interlocutory Appeal) and stated that:

[116] ICTY, *Tadić case*, Judgement, 7 May 1997, §§ 610–613.
[117] ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, § 164.

279. The Appeals Chamber, in its discussion of Article 3, proceeded further to enunciate four requirements that must be satisfied in order for an offence to be considered as within the scope of this Article. These requirements are the following:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (. . .);
(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. (. . .);
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

280. This Trial Chamber finds no reason to depart from the position taken by the Appeals Chamber on this matter . . .[118]

110. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber, referring to the *Tadić case*, stated that:

As interpreted by the Appeals Chamber in the *Tadić* Jurisdiction Decision, Article 3 [of the 1993 ICTY Statute] has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is immaterial whether the breach occurs within the context of an international or internal armed conflict.[119]

111. In the judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the *Tadić case* (Interlocutory Appeal) and stated that:

131. . . . The Appeals Chamber is of the view that the [UN] Secretary-General's Report and the statements made by State representatives in the [UN] Security Council at the time of the adoption of the Statute . . . clearly support a conclusion that the list of offences listed in Article 3 was meant to cover violations of *all* of the laws or customs of war, understood broadly, in addition to those mentioned in the Article by way of example . . .
. . .
133. . . . The Appeals Chamber thus confirms the view expressed in the [*Tadić case*, Judgement on Appeal] that the expression "laws and customs of war" has evolved to encompass violations of Geneva law at the time the alleged offences were committed, and that consequently, Article 3 of the Statute may be interpreted as intending the incorporation of Geneva law rules.[120] [emphasis in original]

112. In its judgement in the *Blažkić case* in 2000, the ICTY Trial Chamber, referring to the *Tadić case*, stated that:

175. The Prosecution contended that the provisions of the Regulations annexed to the Hague Convention IV of 1907 constitute international customary rules

[118] ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 279–280.
[119] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 132.
[120] ICTY, *Delalić case*, Judgement on Appeal, 2 February 2001, §§ 131 and 133.

which were restated in Article 6(b) of the Nuremberg Statute. Violations of these provisions incur the individual criminal responsibility of the person violating the rule. Conversely, the Defence did not acknowledge that violations of the laws or customs of war within the meaning of Common Article 3 of the Geneva Conventions had ever been upheld to impose criminal sanctions upon individuals.
176. The Trial Chamber recalls that violations of Article 3 of the Statute which include violations of the Regulations of The Hague and those of Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute. They are thus likely to incur individual criminal responsibility in accordance with Article 7 of the Statute. The Trial Chamber observes moreover that the provisions of the criminal code of the SFRY, adopted by Bosnia-Herzegovina in April 1992, provide that war crimes committed during internal or international conflicts incur individual criminal responsibility. The Trial Chamber is of the opinion that, as was concluded in the *Tadić* Appeal Decision, customary international law imposes criminal responsibility for serious violations of Common Article 3.[121]

113. In the judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the *Tadić case* (Interlocutory Appeal) and stated that:

The Appeals Chamber in the Jurisdiction Decision further identified four requirements specific to Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [. . .]; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values , and the breach must involve grave consequences for the victim. [. . .]; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[122]

114. In the judgement in the *Kvočka case* in 2001, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, stated that:

For a successful prosecution under Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met;
(iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[123]

[121] ICTY, *Blažkić case*, Judgement, 3 March 2000, §§ 175–176.
[122] ICTY, *Kunarac case*, Judgement, 22 February 2001, § 403.
[123] ICTY, *Kvočka case*, Judgement, 2 November 2001, § 123.

115. In the judgement in the *Krnojelac case* in 2002, the ICTY Trial Chamber, with regard to the expression of the "violations of the laws and customs of war" aimed at in Article 3 of the 1993 ICTY Statute, stated that:

> In addition, four requirements specific to Article 3 must be satisfied, namely,
>
> (i) the violation must constitute an infringement of a Rule of international humanitarian law; (ii) the Rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [. . .]; (iii) the violation must be "serious", that is to say, it must constitute a breach of a Rule protecting important values, and the breach must involve grave consequences for the victim. [. . .]; (iv) the violation of the Rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[124]

116. In the judgement in the *Vasiljević case* in 2002, the ICTY Trial Chamber stated that:

> In addition, there are four conditions which must be fulfilled before an offence may be prosecuted under Article 3 of the Statute:
>
> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
> (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[125]

117. In the judgement in the *Naletilić case* in 2003, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, stated that:

> In view of the jurisprudence of the Tribunal, the Chamber must be satisfied of four additional requirements:
>
> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met;
> (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[126]

118. In the judgement in the *Stakić case* in 2003, the ICTY Trial Chamber stated that:

[124] ICTY, *Krnojelac case*, Judgement, 15 March 2002, § 52.
[125] ICTY, *Vasiljević case*, Judgement, 29 November 2002, § 26.
[126] ICTY, *Naletilić case*, Judgement, 31 March 2003, § 226.

As argued by the parties, in addition to the requirements common to Articles 3 and 5 of the Statute, four additional requirements specific to Article 3 must be satisfied in respect of the crime of murder as a violation of the laws or customs of war:

> The violation must constitute an infringement of a rule of international humanitarian law;
> The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [. . .];
> The violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [. . .];
> The violation of the rule must entail, under customary or conventional law, the individual responsibility of the person breaching the rule.[127]

119. In the judgement in the *Galić case* in 2003, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the *Tadić case* (Interlocutory Appeal) and stated that:

According to the same Appeals Chamber Decision, for criminal conduct to fall within the scope of Article 3 of the Statute, the following four conditions ("the *Tadić* conditions") must be satisfied:

(i) the violation must constitute an infringement of a rule of international humanitarian law;
(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
(iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

The *Tadić* conditions limit the jurisdiction of the Tribunal to violations of the laws or customs of war that are at once recognized as criminally punishable and are "serious" enough to be dealt with by the Tribunal.[128]

120. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber, referring to the *Tadić case*, stated that:

168. As to the argument that Additional Protocol I does not entail individual criminal responsibility, the Trial Chamber recalls a statement in the *Tadić* Jurisdiction Decision:

> Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches . . . because, as the Nuremberg Tribunal concluded "[c]rimes against international law are

[127] ICTY, *Stakić case*, Judgement, 31 July 2003, § 580.
[128] ICTY, *Galić case*, Judgement, 5 December 2003, § 11.

committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

The Appeals Chamber in that case had no difficulty in finding that customary law "imposes criminal liability for serious violations of Common Article 3" of the Geneva Conventions, an article that contains no reference to individual responsibility. This finding was reaffirmed by the Appeals Chamber in [*Delalić*].
169. By analogy, violations of Additional Protocol I incur individual criminal liability in the same way that violations of Common Article 3 give rise to individual criminal liability.[129]

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

121. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "grave breaches of the law of war are regarded as war crimes. They shall be repressed by penal sanctions." Delegates also teach that "other breaches of the law of war shall be repressed by disciplinary or penal sanctions".[130]
122. The ICRC Commentary on the Fourth Geneva Convention states that "the Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called 'war crimes'".[131]

VI. Other Practice

123. No practice was found.

B. Jurisdiction over War Crimes

I. Treaties and Other Instruments

Treaties
124. Article VI of the 1948 Genocide Convention provides that:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

125. Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV provide that:

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

[129] ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 168–169.
[130] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 775 and 780.
[131] Jean S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, Geneva, 1958, p. 583.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed [grave breaches of 1949 Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

126. Article 28 of the 1954 Hague Convention provides that:

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

127. Article 85(1) AP I incorporates the provisions set forth in the second paragraph of Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV by reference. Article 85 AP I was adopted by consensus.[132]

128. Article 5 of the 1984 Convention against Torture provides that:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.[133]

129. Article 10 of the 1994 Convention on the Safety of UN Personnel provides that:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 [Crimes against United Nations and associated personnel] in the following cases:
   (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
   (b) When the alleged offender is a national of that State.
2. A State Party may also establish its jurisdiction over any such crime when it is committed:
   (a) By a stateless person whose habitual residence is in that State; or
   (b) With respect to a national of that State; or
   (c) In an attempt to compel that State to do or to abstain from doing any act.

...

[132] CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

[133] Similar requirements to prosecute or extradite are also found in Article IV of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and numerous conventions for the prevention of terrorism.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 [Crimes against United Nations and associated personnel] in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 [Extradition of alleged offenders] to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

130. Article IV of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that:

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
b. When the accused is a national of that state;
c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

131. Article 15(2) of the 1994 Inter-American Convention on the Forced Disappearance of Persons states that:

This Convention shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and their Protocols, concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.

132. Article 14 of the 1996 Amended Protocol II to the CCW provides that:

(1) Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons on territory under its jurisdiction and control.
(2) The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.

133. Article 9 of the 1997 Ottawa Convention provides that:

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

134. The preamble to the 1998 ICC Statute provides that:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be

ensured by taking measures at the national level and by enhancing international co-operation,

...

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

135. Article 12 of the 1998 ICC Statute provides that:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
   (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

136. Article 13 of the 1998 ICC Statute provides that:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

137. Upon signature of the 1998 ICC Statute, Egypt declared that "no war criminal shall escape justice or escape prosecution in other legal jurisdictions".[134]

138. Article 15(2) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Serious violations of this Protocol", which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article [serious violations of the Protocol] and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

[134] Egypt, Declarations made upon signature of the ICC Statute, 26 December 2000, § 5.

139. Article 16(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Jurisdiction" provides that:

Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:
(a) when such an offence is committed in the territory of that State;
(b) when the alleged offender is a national of that State;
(c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

Other Instruments

140. Article 8 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Establishment of jurisdiction", provides that:

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20 [i.e. genocide, crimes against humanity, crimes against UN and associated personnel and war crimes], irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 [i.e. crime of aggression] shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

141. Section 4 of the 1999 UN Secretary-General's Bulletin provides that "in cases of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts".

142. Article 5 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

[To fulfil their duty to prosecute persons alleged to have committed violations of international human rights and international humanitarian law norms that constitute crimes under international law, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations under Article 4 of the same instrument], States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies and to provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses.

143. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including genocide, war crimes, crimes against humanity and torture. Section 2 provides that:

2.1 With regard to the serious criminal offences listed under Section [10(1)(a), (b), (c) and (f)] of UNTAET Regulation No. 2000/11 [i.e. genocide, war crimes, crimes against humanity and torture] . . . the panels shall have universal jurisdiction.
2.2 For purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:
(a) the serious criminal offence at issue was committed within the territory of East Timor;
(b) the serious criminal offence was committed by an East Timorese citizen; or
(c) the victim of the serious criminal offence was an East Timorese citizen.

II. National Practice

Military Manuals

144. Australia's Commanders' Guide states that:

War crimes jurisdiction is universal. This means that any nation may prosecute any person who is suspected of committing a major war crime and no statute of limitations applies for such prosecutions. Trial of a suspected war criminal may take place at any time that the individual is located or evidence of a war crimes commission is unearthed. Australia has vested its war crime jurisdiction in the State Supreme Courts . . .

Where there is widespread evidence of war crimes having been committed, the international community may elect to establish a world forum or war crimes tribunal to conduct trials. The Nuremberg and Tokyo war crimes tribunals conducted after WW II are examples of this approach.[135]

145. Belgium's Law of War Manual states that:

The States signatory to the [1949 Geneva] Conventions undertook to take a series of measures to promote respect thereof.

These measures can be summarised as follows:

. . .

3) search for, identification of and prosecution by the national courts of the authors of grave breaches, regardless of their nationality, or delivery (extradition) of those authors to the State asking for them, within the limits of the legislation in force.[136]

146. Canada's LOAC Manual states that:

If a breach [of GC III] amounts to a grave breach all persons responsible therefor, or having ordered such acts, shall, regardless of their nationality, be liable to be tried by any party to [GC III]. They may also be handed over by the latter for trial by any other party to [GC III] able to prosecute effectively.[137]

[135] Australia, *Commanders' Guide* (1994), §§ 1307–1308.
[136] Belgium, *Law of War Manual* (1983), p. 55.
[137] Canada, *LOAC Manual* (1999), p. 10-6, § 52.

The manual further provides that:

The Criminal Code of Canada contains several provisions that allow Canadian courts to assume jurisdiction over and try alleged war criminals in a wide variety of circumstances.

. . . Any state into whose hands a person who has allegedly committed a grave breach falls is entitled to institute criminal proceedings, even though that state was neutral during the conflict in which the offence was alleged to have been committed.[138]

147. Ecuador's Naval Manual states that "international law . . . provides that belligerent States have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offences".[139]

148. France's LOAC Teaching Note, in a part dealing with "grave breaches of the rules of the law of armed conflict", states that:

On the criminal level, persons charged with [grave breaches of the 1949 Geneva Conventions] may be prosecuted before French judicial courts, but also before foreign courts or international criminal courts having jurisdiction over war crimes: today this means the International Criminal Tribunals for the Former Yugoslavia and Rwanda for the crimes committed solely on the occasion of these two conflicts; tomorrow, this will mean . . . the International Criminal Court which will have jurisdiction over all war crimes and crimes against humanity in case of the failure of national tribunals.[140]

149. South Korea's Operational Law Manual states that not only international tribunals but also national military courts or military committees have jurisdiction to try persons accused of committing war crimes. It adds that war crimes which are not punishable under national law remain punishable under the laws of war.[141]

150. The Military Manual of the Netherlands states that:

Each country is competent to prosecute and try war crimes, irrespective of the nationality of the perpetrator, or of the country where the war crime was committed or against whose interest it was committed. The rules on extradition of persons suspected of having committed, or ordered the commission of, a war crime are closely connected to the principle of universality . . .

The Criminal Law in Wartime Act [as amended] has not entirely incorporated the principle of universality as foreseen in the law of war treaties. It requires that the Netherlands be involved in an armed conflict (Article 1). A Dutch judge is not competent in case the Netherlands is neutral or not a party to the conflict.[142]

151. The Military Handbook of the Netherlands provides that "hostile persons who have committed a war crime and fall into the hands of [our] own troops must be tried".[143]

[138] Canada, *LOAC Manual* (1999), pp. 16-5/16-6, §§ 37–38.
[139] Ecuador, *Naval Manual* (1989), § 6.2.5.
[140] France, *LOAC Teaching Note* (2000), p. 7.
[141] South Korea, *Operational Law Manual* (1996), p. 193, § 4.
[142] Netherlands, *Military Manual* (1993), pp. IX-8 and IX-9.
[143] Netherlands, *Military Handbook* (1995), p. 7-45.

152. New Zealand's Military Manual states that:

The [1949 Geneva] Conventions make one further departure of significance. For the first time they provide in treaty form a clear obligation upon States to punish what the Conventions describe as "grave breaches", even if those States are not parties to the conflict, the offenders and the victims not their nationals, and even though the offences were committed outside the territorial jurisdiction of the State concerned. In other words, the Conventions have introduced the concept of universal jurisdiction in so far as grave breaches are concerned, and if the State in question is unwilling to try an offender found within its territory, it is obliged to hand him over for trial to any party to the Convention making out a *prima facie* case.[144]

The manual also provides that:

Any State into whose hands a person who has allegedly committed a grave breach falls is entitled to institute criminal proceedings, even though the holding State was neutral during the conflict in which the offence was alleged to have been committed. Since 1945, it has been generally accepted that if the holding State is unwilling to institute its own proceedings, it may if it wishes hand the offender over to a claimant State on presentation of *prima facie* evidence that the alleged offender has committed the offence in question.[145]

In addition, the manual states that:

According to customary international law, war crimes, including grave breaches, may be tried by a military tribunal including officers of forces of States other than that establishing the tribunal, provided those forces may claim to be particularly affected or interested in the trial in question . . .

Such interest would arise if the accused is a member of an allied force, if the victims of the offence are nationals of the State of such force, or if the offence had been committed in the territory of such a State.[146]

153. South Africa's LOAC Manual states that "signatory States [of the 1949 Geneva Conventions] are required to treat as criminals under domestic law anyone who commits or orders a grave breach [of the 1949 Geneva Conventions]".[147]

154. Spain's LOAC Manual provides that "States have the obligation to search for persons accused of having committed, or having ordered to be committed, grave breaches, being obliged to make them appear before their own tribunals, regardless of their nationality".[148]

155. Sweden's IHL Manual states that:

Each state is obliged to search for persons accused of committing or ordering a grave breach and shall bring them, regardless of their nationality, before its own courts. A permitted alternative is to hand over the wanted person to another contracting

[144] New Zealand, *Military Manual* (1992), § 117.5.
[145] New Zealand, *Military Manual* (1992), § 1711.1.
[146] New Zealand, *Military Manual* (1992), § 1714.1, including footnote 85.
[147] South Africa, *LOAC Manual* (1996), § 35.
[148] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

party, provided that this state has an interest in punishing the breach and has made out a *prima facie* case.[149]

156. Switzerland's Basic Military Manual provides that:

1. Violations of the laws and customs of war must be punished. The guilty persons may be brought either before the courts of their own country or before the courts of the injured State, or before an international tribunal.
2. Each Contracting Party is also bound to search for and prosecute in its own courts persons who have committed grave breaches of the provisions of the law of nations in time of war.[150]

157. The UK Military Manual states that:

Those who commit [acts of marauding], whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerents.[151]

The manual also provides that:

Charges of war crimes are subject to the jurisdiction of military courts, whether national or international, or of such other courts as the belligerent concerned may determine. With regard to the trial of civilians for "grave breaches" of the 1949 [Geneva] Conventions which include the most serious war crimes, jurisdiction can only be conferred upon the ordinary courts of the Power concerned or upon the courts set up by the Occupant. Prisoners of war charged with "grave breaches" and of all other war crimes must be tried by the same courts and in the same manner as in the case of crimes committed whilst in captivity. The courts, whether military or civil, of neutral States may also exercise jurisdiction in respect of war crimes. This jurisdiction is independent of any agreement made between neutral and belligerent States. War crimes are crimes *ex jure gentium* and are thus triable by the courts of all States . . . British military courts have jurisdictions outside the United Kingdom over war crimes committed not only by members of the enemy armed forces but also by enemy civilians and other persons of any nationality, including those of British nationality or the nationals of allied or neutral States. It is not necessary that the victim of the war crime be a British subject.[152]

The manual further emphasises that "parties [to the 1949 Geneva Conventions] are also bound . . . regardless of their nationality, to bring [persons alleged to have committed grave breaches] to trial in their own courts".[153]

158. The UK LOAC Manual states that "UK courts are entitled to deal with certain violations of the [1949] Geneva Conventions (wherever occurring) under the Geneva Conventions Act 1957".[154]

[149] Sweden, *IHL Manual* (1991), Section 4.2, p. 93.
[150] Switzerland, *Basic Military Manual* (1987), Article 198(1) and (2).
[151] UK, *Military Manual* (1958), § 636.
[152] UK, *Military Manual* (1958), § 637.
[153] UK, *Military Manual* (1958), § 639.
[154] UK, *LOAC Manual* (1981), Section 2, p. 5, § 2(a).

159. The US Field Manual provides that "war crimes are within the jurisdiction of general courts-martial ... military commissions, provost courts, military government courts, and other military tribunals ... of the United States, as well as of international tribunals".[155] The manual adds that:

Each High Contracting Party [to the 1949 Geneva Conventions] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches [of the said Conventions] and shall bring such persons, regardless of their nationality, before its own courts ...

[These] principles ... are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces ...

The jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons ...

The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law ... Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.[156]

160. The US Air Force Pamphlet states that:

Domestic tribunals have the competence and, under the grave breaches articles of the [1949] Geneva Conventions, the strict obligation to punish certain violations ... Ad hoc international tribunals, such as those established in Germany and Japan following World War II, did punish individuals for their personal actions violating the law of armed conflict. However, the importance of criminal responsibility ... primarily relates to a state's own efforts to enforce the law of armed conflict with respect to its *own* armed forces.[157] [emphasis in original]

It further states that:

Within the [1949] Geneva Conventions system, state responsibility to repress breaches is stressed, and no provision is made for international tribunals within the Conventions ...

In the United States, jurisdiction is not limited to offenses against US nationals but extends to offenses against victims of other nationalities. Violations by adversary personnel, when appropriate, are tried as offenses against international law which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in regular military courts, military commissions, provost courts, military government

[155] US, *Field Manual* (1956), § 505(d).
[156] US, *Field Manual* (1956), §§ 506(a) and (b) and 507(a) and (b).
[157] US, *Air Force Pamphlet* (1976), § 10-6.

courts, and other military tribunals of the United States, as well as in international tribunals.[158]

161. The US Naval Handbook provides that:

3.11.1 . . . International law generally recognizes five bases for the exercise of criminal jurisdiction: (a) territorial, (b) nationality, (c) passive personality, (d) protective, and (e) universal. It is important to note that international law governs the rights and obligations between nations. While individuals may benefit from the application of that body of law, its alleged violation cannot usually be raised by an individual defendant to defeat a criminal prosecution.
3.11.1.1 Territorial Principle. This principle recognizes the right of a nation to proscribe conduct within its territorial borders, including its internal waters, archipelagic waters, and territorial sea.
3.11.1.1.1 Objective Territorial Principle. This variant of the territorial principle recognizes that a nation may apply its laws to acts committed beyond its territory which have their effect in the territory of that nation . . .
3.11.1.2 Nationality Principle. This principle is based on the concept that a nation has jurisdiction over objects and persons having the nationality of that nation . . . Under the nationality principle a nation may apply its laws to its nationals wherever they may be . . . As a matter of international comity and respect for foreign sovereignty, the United States refrains from exercising that jurisdiction in foreign territory.
3.11.1.3 Passive Personality Principle. Under this principle, jurisdiction is based on the nationality of the victim, irrespective of where the crime occurred or the nationality of the offender . . .
3.11.1.4 Protective Principle. This principle recognizes the right of a nation to prosecute acts which have a significant adverse impact on its national security or governmental functions . . .
3.11.1.5 Universal Principle. This principle recognizes that certain offenses are so heinous and so widely condemned that any nation may apprehend, prosecute and punish that offender on behalf of the world community regardless of the nationality of the offender or victim. Piracy and the slave trade have historically fit these criteria. More recently, genocide, certain war crimes, hostage taking, and aircraft hijacking have been added to the list of such universal crimes.[159]

The Handbook also states that "international law also provides that belligerents have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for [war crimes]".[160] It further states that:

Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions for violations of the law of armed conflict have been trials of one's own forces for breaches of military discipline. Violations of the law of armed conflict committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.

[158] US, *Air Force Pamphlet* (1976), §§ 15-3(a) and 15-4(a).
[159] US, *Naval Handbook* (1995), §§ 3.11.1–3.11.1.5.
[160] US, *Naval Handbook* (1995), § 6.2.5.

Although jurisdiction extends to enemy personnel, trials have almost exclusively been against unlawful combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends.

In the United States, its territories and possessions, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals.[161]

162. The YPA Military Manual of the SFRY (FRY) provides that "the parties to a conflict have a duty . . . to call to account and punish perpetrators [of violations of the laws of war], regardless of their nationality".[162] It adds that:

Persons who commit a war crime or other serious violations of the laws of war shall be brought to justice before their own national courts or, if they fall into enemy hands, before its courts. The perpetrators of such criminal acts may also be brought to justice before an international court if such court is established.[163]

National Legislation

163. Argentina's Code of Military Justice as amended provides that:

When operational troops are on enemy territory, all the inhabitants of the occupied zone are subject to the jurisdiction of the military tribunals, no matter which ordinary crime or offence they are accused of, except if the military authority provides that they are to be prosecuted by the ordinary courts of the occupied zone.[164]

164. Armenia's Penal Code provides that:

Foreign citizens and stateless persons not permanently residing in the Republic of Armenia, who have committed a crime outside the territory of the Republic of Armenia, are subject to criminal liability under the Penal Code of the Republic of Armenia, if they have committed:

(1) such crimes which are provided for in an international treaty of the Republic of Armenia . . .[165]

165. Australia's War Crimes Act as amended gives the Australian courts jurisdiction over persons accused of certain "serious crimes" and "war crimes" committed either within or outside Australia during the Second World War. However, it states that "a person shall not be charged with an offence against this Act unless he or she is: (a) an Australian citizen; or (b) a resident of Australia or of an external Territory".[166]

[161] US, *Naval Handbook* (1995), § 6.2.5.3.
[162] SFRY (FRY), *YPA Military Manual* (1988), § 18.
[163] SFRY (FRY), *YPA Military Manual* (1988), § 20.
[164] Argentina, *Code of Military Justice as amended* (1951), Article 111.
[165] Armenia, *Penal Code* (2003), Article 15(3).
[166] Australia, *War Crimes Act as amended* (1945), Sections 6, 7 and 11.

166. Australia's Geneva Conventions Act as amended, which provides for the punishment of grave breaches of the Geneva Conventions and AP I committed "in Australia or elsewhere", states that "this section applies to persons regardless of their nationality or citizenship".[167]

167. Austria's Penal Code provides that:

The following crimes committed abroad are punished under Austrian criminal law irrespective of the criminal law of the scene of the crime:

. . .

(6) other punishable acts which Austria is under an obligation to punish even when they have been committed abroad, irrespective of the criminal law of the scene of the crime.[168]

168. Azerbaijan's Criminal Code provides that:

12.1. Citizens of the Azerbaijan Republic and stateless persons who permanently reside on the territory of Azerbaijan shall be held criminally responsible under the present Code for an act (action or inaction) committed outside the territory of the Azerbaijan Republic, if this act is considered as a crime by the legislation of the Azerbaijan Republic, as well as by the legislation of the foreign state where the crime was committed and if they have not been tried in a foreign State for this crime.
12.2. Foreigners and stateless persons might be held criminally responsible under the present Code in case of the commission of a crime outside the territory of the Azerbaijan Republic against the citizens of the Azerbaijan Republic, against the interests (advantages) of the Azerbaijan Republic, as well as in cases covered by international treaties to which the Azerbaijan Republic is a party and if they have not been tried in a foreign State for this crime.
12.3. Foreigners and stateless persons who have committed crimes against peace and humanity, war crimes, terrorism, hijacking an aircraft, taking hostages, torture, marine piracy, . . . directing attacks against the persons of international organizations who enjoy international protection, crimes related to radioactive materials, other crimes punishment of which results from the international treaties to which the Azerbaijan Republic is a party, regardless of where the crime was committed, shall be held criminally responsible and punished under the present Code.
12.4. Servicemen of military units of the Armed Forces of the Azerbaijan Republic, being members of the peacekeeping military units, shall be held criminally responsible under the present Code for the crimes committed outside the territory of the Azerbaijan Republic, if not provided for otherwise by the international treaties to which the Azerbaijan Republic is a party.[169]

169. Bangladesh's International Crimes (Tribunal) Act provides that:

A Tribunal shall have power to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed in the territory of Bangladesh, whether before or after the commencement of this act, any of the following crimes [crimes against humanity, crimes against peace, genocide, war crimes, "violations of any humanitarian rules

[167] Australia, *Geneva Conventions Act as amended* (1957), Section 7(3).
[168] Austria, *Penal Code* (1974), Article 64.
[169] Azerbaijan, *Criminal Code* (1999), Article 12(1)–(4).

applicable in armed conflicts laid down in the Geneva Conventions of 1949" or "any other crimes under international law"].[170]

170. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".[171]

171. The Criminal Code of Belarus provides for universal jurisdiction for the crime of genocide, crimes against humanity, the use of prohibited means and methods of warfare, violations of the laws and customs of war and grave breaches of IHL, which are included in the special section of the Code, as well as for offences under treaties to which Belarus is a party.[172]

172. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, which provides for the punishment of genocide (Article 1(1)), crimes against humanity (Article 1(2)) and grave breaches of the 1949 Geneva Conventions and Additional Protocols (Article 1(3)), states that "the Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed".[173]

173. The Criminal Code of the Federation of Bosnia and Herzegovina punishes several war crimes and provides that:

> (1) Criminal legislation of the Federation applies to a foreigner who has committed a criminal offence against the Federation or its citizens in the territory of Bosnia and Herzegovina or abroad, when the offence in question is some other than the one referred to under Article 131 of this Code, provided that he/she is found on the territory of the Federation or has been extradited.
> (2) Criminal legislation of the Federation applies to a foreigner who commits a criminal offence abroad against another country or a foreigner, for which the law of that country prescribes imprisonment for a term of five years or a heavier penalty, provided the perpetrator is found on the territory of the Federation.[174]

The Criminal Code of the Republika Srpska contains the same provision.[175]

174. Botswana's Geneva Conventions Act provides that:

> In the case of an offence under this section [i.e. a grave breach in the meaning of Articles 50 GC I, 51 GC II, 130 GC and 147 GC IV] committed outside Botswana, a person may be proceeded against, indicted, tried and punished therefor in any place in Botswana as if the offence had been committed in that place.[176]

[170] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(1).
[171] Barbados, *Geneva Conventions Act* (1980), Section 3(2).
[172] Belarus, *Criminal Code* (1999), Article 6.
[173] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 7.
[174] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 133 and 154–166.
[175] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 123 and 433–445.
[176] Botswana, *Geneva Conventions Act* (1970), Section 3(2).

175. Bulgaria's Penal Code as amended, which contains a section on "Crimes against the Laws and Customs of Waging War" (Articles 410–415), provides that:

(1) the Penal Code shall also apply to foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected . . .
(2) the Penal Code shall also apply to other crimes committed by foreign citizens abroad, where this is stipulated in an international agreement, to which the Republic of Bulgaria is a party.[177]

176. Canada's Geneva Conventions Act as amended, which provides for the punishment of grave breaches of the Geneva Conventions and AP I, provides that:

Where a person is alleged to have committed an offence [in the meaning of Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV or Articles 11 or 85 AP I], proceedings in respect of that offence may, whether or not the person is in Canada, be commenced in any territorial division in Canada and that person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

For greater certainty, any legal requirements that the accused appear at and be present during proceedings and any exceptions to those requirements apply to proceedings commenced in any territorial division pursuant to [the above].[178]

177. Canada's Criminal Code provides that:

Every person who . . . commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at the time if,

(a) at the time of the act or omission,
  (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
  (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or
  (iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or
(b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the persons with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.[179]

178. Canada's Crimes against Humanity and War Crimes Act provides that any person who has committed genocide, war crimes or crimes against humanity within or outside Canada may be prosecuted for such offences if:

[177] Bulgaria, *Penal Code as amended* (1968), Articles 6(1)–(2).
[178] Canada, *Geneva Conventions Act as amended* (1985), Section 3(2) and (3).
[179] Canada, *Criminal Code* (1985), Article 3.71.

(a) at the time the offence is alleged to have been committed,
  (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
  (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
  (iii) the victim of the alleged offence was a Canadian citizen, or
  (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
(b) after the time the offence is alleged to have been committed, the person is present in Canada.[180]

179. Chile's Code of Military Justice provides that:

The Military Courts of the Republic have jurisdiction over Chileans and foreigners in order to pass judgement on all matters of military jurisdiction which might arise within the national territory. They also have jurisdiction to try the same matters when they arise outside national territory in the following cases:

1. When they occur within a territory which is militarily occupied by the Chilean armed forces;
2. When they concern offences by soldiers in the course of duty or when undertaking military assignments;
3. When they concern offences against the sovereignty of the State and its external or internal security.[181]

180. Colombia's Penal Code, which criminalises a number of war crimes under the 1949 Geneva Conventions and Additional Protocols, provides that:

The Colombian Penal Code shall apply to: . . .
any foreigner who has committed an offence outside Colombia against a foreigner, as long as the following conditions are met:
(a) that he is present on Colombian territory;
(b) that the crime is punishable in Colombia by a minimum prison sentence of not less than three years;
(c) that the crime is not a political offence; and
(d) that if extradition has been requested, it has not been granted by the Colombian Government.[182]

181. The Geneva Conventions and Additional Protocols Act of the Cook Islands, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV as well as to Articles 11(4) and 85(2), (3) and (4) AP I, provides that:

(1) Any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of [AP I] is guilty of an offence.
. . .
(3) This section applies to persons regardless of their nationality or citizenship.[183]

[180] Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 8(a)–(b).
[181] Chile, *Code of Military Justice* (1925), Article 3.
[182] Colombia, *Penal Code* (2000), Articles 16(6)(a)–(d) and 135–164.
[183] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1) and (3).

182. Costa Rica's Penal Code as amended provides that:

Regardless of the regulations in force in the place where the punishable act is committed and of the nationality of the perpetrator, punishment under Costa Rican law shall be applicable to . . . anyone who commits other punishable acts against human rights covered by treaties signed by Costa Rica or by this Code.[184]

183. Côte d'Ivoire's Code of Military Penal Procedure extends the jurisdiction of military courts to:

crimes and offences not justified by the laws and customs of war committed by foreign nationals and their agents during hostilities and anywhere in the territory of the Republic or zone of military operations, and directed against or to the prejudice of Ivorian nationals, soldiers serving under the national flag, stateless persons or refugees.[185]

184. Cuba's Penal Code grants Cuban courts jurisdiction over, *inter alia*, crimes against humanity, human dignity or collective health or prosecutable under international treaties regardless of the nationality of the accused or the place where the crimes were committed as long as the acts in question also constitute crimes where they were committed.[186]

185. Cyprus's Geneva Conventions Act, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, provides for the prosecution and punishment of "any person who, in spite of nationality, commits in the Republic or outside the Republic, any serious violation . . . of the [1949] Geneva Conventions". It states that:

In case an offence provided by this Article has been committed outside the Republic, a person may be prosecuted, charged with the offence, be tried and punished anywhere within the territory of the Republic, as if the offence had been committed in this territory; for all purposes relative or relevant to the trial or punishment, the offence is considered being committed in this territory.[187]

186. Cyprus's AP I Act states with respect to "any serious violation of the provisions of the [AP I]" that:

In case an offence provided by this Article has been committed outside the Republic, a person may be prosecuted, charged with the offence, be tried and punished anywhere within the territory of the Republic as if the offence had been committed in this territory; for all purposes relevant to the trial or punishment, the offence is considered being committed in this territory.[188]

187. Denmark's Penal Code provides that:

The following acts committed outside of the territory of the Danish state shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator:

[184] Costa Rica, *Penal Code as amended* (1970), Article 7.
[185] Côte d'Ivoire, *Code of Military Penal Procedure* (1974), Article 11(1).
[186] Cuba, *Penal Code* (1987), Article 5(3).
[187] Cyprus, *Geneva Conventions Act* (1966), Section 4(1) and (2).
[188] Cyprus, *AP I Act* (1979), Section 4(1) and (2).

...

5) where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start judicial proceedings;
6) where transfer of the accused for legal proceedings in another country is rejected, and the act, provided it is committed within the territory recognized by international law as belonging to a foreign state, is punishable according to the law of this state, and provided that according to Danish law the act is punishable with a sentence more severe than one year of imprisonment.[189]

188. Ecuador's Code of Criminal Procedure provides that the following persons fall under the jurisdiction of Ecuador: "Ecuadorians or foreign nationals who commit offences against international law or offences under international conventions or treaties which are in force, provided that such persons have not been prosecuted in another State".[190]

189. El Salvador's Penal Code provides that:

Criminal legislation shall also apply to offences committed by anyone whosoever in a place not subject to Salvadoran jurisdiction, provided that they affect property internationally protected by specific agreements or rules of international law or seriously undermine universally recognised human rights.[191]

190. Ethiopia's Penal Code provides with respect to a range of war crimes that:

Any person who has committed in a foreign country:

(a) an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered;

...

shall be liable to trial in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter... unless he has been prosecuted in the foreign country.[192]

191. Finland's Revised Penal Code, providing for the punishment of "war crimes", "aggravated war crimes" and "petty war crimes",[193] states that:

Finnish law shall apply to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence).[194]

192. Under France's Code of Military Justice, military tribunals have jurisdiction over acts committed by enemy nationals or any agents in the service of the administration or interests of the enemy on territory under French jurisdiction, or acts committed abroad against French nationals or refugees or stateless persons residing on French territory.[195]

189 Denmark, *Penal Code* (1978), Article 8(5) and (6).
190 Ecuador, *Code of Criminal Procedure* (2000), Article 18(6).
191 El Salvador, *Penal Code* (1997), Article 10.
192 Ethiopia, *Penal Code* (1957), Article 17(a).
193 Finland, *Revised Penal Code* (1995), Chapter 11, Sections 1–3.
194 Finland, *Revised Penal Code* (1995), Chapter 11, Section 7.
195 France, *Code of Military Justice* (1982), Article 70.

193. France's Penal Code provides that:

French criminal law is applicable to any felony committed by a French national outside the territory of the Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the Republic if the conduct is punishable by the legislation of the country where it has been committed. This present article applies even though the accused acquired French nationality subsequent to the conduct imputed to him or her.[196]

194. France's Code of Criminal Procedure provides that:

The authors of and accomplices in offences committed outside the territory of the Republic may be prosecuted and tried in French courts when, pursuant to the provisions of the Criminal Code, Book 1, or of another legislative instrument, French law is applicable or when an international convention gives French courts jurisdiction to deal with the matter.[197]

The Code adds that "pursuant to the international conventions referred to below, any person who renders himself guilty outside the territory of the Republic of any of the offences enumerated in those articles may, if in France, be prosecuted and tried by French courts".[198] The provisions that follow give jurisdiction over persons who violate certain specific treaties.[199]

195. France's Law on Cooperation with the ICTY provides that:

The authors of or accessories to the offences mentioned in Article 1 [serious violations of IHL] can be prosecuted and tried by the French courts, in application of French law, if they are found in France. These provisions apply to attempted offences whenever such attempts are punishable . . . The international tribunal shall be informed of any ongoing proceedings relating to facts that may be of its competence.[200]

France's Law on Cooperation with the ICTR includes a similar provision for the acts of genocide and serious violations of IHL committed in Rwanda.[201]

196. Germany's Criminal Procedure Code as amended, as foreseen by the Law Introducing the International Crimes Code, states with regard to acts committed outside the territorial field of application of this law that:

> (1) . . . The public prosecution office may dispense with prosecuting an offence punishable pursuant to [Article 1] paragraphs 6 to 14 of the [Law Introducing the International Crimes Code] [namely genocide, crimes against humanity and war crimes], if the accused is not present in Germany and such presence is not to be anticipated. If . . . the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.

196 France, *Penal Code* (1994), Article 113(6).
197 France, *Code of Criminal Procedure* (1994), Article 689.
198 France, *Code of Criminal Procedure* (1994), Article 689(1).
199 France, *Code of Criminal Procedure* (1994), Article 689(2)–(7).
200 France, *Law on Cooperation with the ICTY* (1995), Article 2.
201 France, *Law on Cooperation with the ICTR* (1996), Article 2.

(2) ... The public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to [Article 1] paragraphs 6 to 14 of the [Law Introducing the International Crimes Code], if
1. there is no suspicion of a German having committed such offence,
2. such offence was not committed against a German,
3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated, and
4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and intended.[202]

197. Under Germany's Penal Code, German courts have jurisdiction to try persons accused of war crimes, even if committed on the territory of a foreign State, because of an international treaty binding on Germany.[203] Under the Code, German criminal law also applies to the crime of genocide when committed abroad.[204]

198. Germany's Law Introducing the International Crimes Code provides that "this Law shall apply to all criminal offences against international law designated under this Law, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany".[205]

199. Guatemala's Penal Code provides that Guatemalan criminal law applies to "any offence which, by virtue of a treaty or convention, is punishable in Guatemala, even if the offence is not committed in Guatemalan territory".[206] The Code includes several war crimes as crimes under national law.[207]

200. Guatemala's Code of Criminal Procedure provides that courts and other authorities responsible for trials must fulfil the obligations imposed on them by international treaties in the matter of respect for human rights.[208]

201. India's Geneva Conventions Act provides that "when an offence under this chapter [i.e. a grave breach of the Geneva Conventions] is committed by any person outside India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found".[209]

202. Ireland's Geneva Conventions Act as amended provides for the punishment of grave breaches of the Geneva Conventions and AP I committed by "any person, whatever his or her nationality" and "whether in or outside the State". It further provides for jurisdiction of Irish courts over "minor breaches"

[202] Germany, *Law Introducing the International Crimes Code* (2002), Article 3(5); *Criminal Procedure Code as amended* (1987), § 153(f).
[203] Germany, *Penal Code* (1998), § 6(9).
[204] Germany, *Penal Code* (1998), § 6(1).
[205] Germany, *Law Introducing the International Crimes Code* (2002), Article 1(1).
[206] Guatemala, *Penal Code* (1973), Article 5(5).
[207] Guatemala, *Penal Code* (1973), Article 378.
[208] Guatemala, *Code of Criminal Procedure* (1992), Article 16.
[209] India, *Geneva Conventions Act* (1960), Section 4.

of the Geneva Conventions and both Additional Protocols if committed by "any person, whatever his nationality . . . in the State" or by "any citizen of Ireland . . . outside the State".[210]

203. Israel's Penal Law as amended, under Section 16 entitled "Offences against the Law of Nations", states that:

a) The penal laws of Israel shall apply in respect of external offences for the committing of which the State of Israel has undertaken, in multilateral international treaties open to accession, to penalise; this will also apply even where the person committing the offence is not an Israeli citizen or resident, and irrespective of the place of committing of the offence.
b) The qualifications specified in Section 14(b)(2) and (3), and (c), shall also apply in respect of the applicability of the penal laws of Israel under this Section.[211]

Section 14 of the Law states that:

(b) . . . (2) A qualification for penal liability under the laws of that State [i.e. another State] does not apply; (3) The person has not yet been acquitted of that offence in that State or, having been convicted, he has not served the sentence imposed on him in respect of that offence. (c) No penalty more grave than what could have been imposed under the laws of the State where the offence was committed shall be imposed in respect of the offence.[212]

204. Kenya's Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions committed "whether within or outside Kenya" by "any person, whatever his nationality", states that:

Where an offence under this section is committed outside Kenya, a person may be proceeded against, indicted, tried and punished therefor in any place in Kenya, as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[213]

205. Kyrgyzstan's Criminal Code, in an article concerning "Action of Criminal Law with Regard to Persons who have Committed a Crime outside the Borders of the Kyrgyz Republic", provides that:

(1) Citizens of the Kyrgyz Republic, as well as stateless persons permanently residing in the Kyrgyz Republic, shall be liable under the present Code if they have not been punished by the judgement of a court of a foreign state.
(2) Citizens of the Kyrgyz Republic who have committed a crime within the territory of another state can not be extradited to this state.
(3) Foreigners and stateless persons who have committed a crime outside the borders of the Kyrgyz Republic and who are within its territory can be extradited to a foreign state to be tried or to serve their sentence in accordance with an international treaty.[214]

[210] Ireland, *Geneva Conventions Act as amended* (1962), Sections 3 and 4.
[211] Israel, *Penal Law as amended* (1977), Section 16.
[212] Israel, *Penal Law as amended* (1977), Section 14.
[213] Kenya, *Geneva Conventions Act* (1968), Section 3(2).
[214] Kyrgyzstan, *Criminal Code* (1997), Article 6.

206. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment of war crimes, provide that "the Lebanese tribunals have jurisdiction for the war crimes provided for in this law, regardless of the nationality of the author and the place where they have been committed".[215]

207. Luxembourg's Code of Criminal Investigation provides that:

> Every foreigner who outside the territory of the Grand-Duché is responsible, whether as a principal or an accomplice, for the following:
>
> ...
>
> (2) in wartime, abduction of minors; attacks on modesty or rape; prostitution or corruption of youth; murder or intentional bodily injury; attacks on individual liberty committed against a Luxembourg national or a national of an allied country,
>
> can be prosecuted and tried according to the provisions of Luxembourg laws if he is found either in the Grand-Duché, an enemy country or if the government obtains his extradition.[216]

208. Luxembourg's Law on the Repression of War Crimes provides for the prosecution of non-Luxembourg nationals having committed war crimes "if such infringements have been committed at the occasion or under the pretext of war and if they are not justified by the laws and customs of war, these agents either being found within the Grand-Duché or on enemy territory, or the Government having obtained their extradition".[217]

209. Luxembourg's Law on the Punishment of Grave Breaches provides that "any individual who has committed an offence under this law outside the territory of the Grand-Duché can be prosecuted in the Grand-Duché even though he may not be present there".[218]

210. Malawi's Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions by "any person, whatever his nationality", states that:

> Where an offence under this section is committed without Malawi a person may be proceeded against, tried and punished therefor in any place in Malawi as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[219]

211. Malaysia Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions by "any person, whatever his citizenship or nationality", states that:

> In the case of an offence under this section committed outside the Federation, a person may be proceeded against, charged, tried and punished therefor in any place

[215] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 150.
[216] Luxembourg, *Code of Criminal Investigation* (1944), Article 7.
[217] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 1.
[218] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 10.
[219] Malawi, *Geneva Conventions Act* (1967), Section 4(1) and (2).

in the Federation as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[220]

212. The Geneva Conventions Act of Mauritius provides for the punishment of grave breaches of the Geneva Conventions committed "in Mauritius or elsewhere" and states that "this section applies to persons regardless of their nationality or citizenship".[221]

213. Mexico's Penal Code as amended provides that offences committed in a foreign territory and against foreigners or Mexicans by a Mexican national, or by a foreigner against Mexican nationals, shall be prosecuted in Mexico provided that the following conditions are met:

I. the accused is in the territory of the Republic;
II. the case was not finally judged in the country where the offence took place; and
III. the offence of which he is accused is an offence in the country where it took place and in the Republic.[222]

214. The Criminal Law in Wartime Act as amended of the Netherlands stipulates that Dutch criminal law shall apply:

(1) to any person who commits an offence described in Articles 4–7 outside the Kingdom but within Europe, if that offence is committed against or in connection with a Dutch citizen or a Dutch legal entity or if any Dutch interest is or may be adversely affected thereby;
(2) to any person who commits an offence described in Articles 131-134 *bis*, 189 and 416-417 *bis* of the Penal Code outside the Kingdom but within Europe, if the offence in those Articles is an offence within the meaning of (1) above;
(3) to a Dutch citizen who commits an offence described in Article 1 outside the Kingdom but within Europe.[223]

215. The International Crimes Act of the Netherlands provides that:

1. Without prejudice to the relevant provisions of the [Penal Code as amended] and the [Military Criminal Law as amended], Dutch criminal law shall apply to:
   (a) anyone who commits any of the crimes defined in this Act [genocide, crimes against humanity, war crimes and torture] outside the Netherlands, if the suspect is present in the Netherlands;
   (b) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the crime is committed against a Dutch national;
   (c) a Dutch national who commits any of the crimes defined in this Act outside the Netherlands.
   . . .
3. Prosecution on the basis of subsection 1 (c) may also take place if the suspect becomes a Dutch national only after committing the crime.[224]

[220] Malaysia, *Geneva Conventions Act* (1962), Section 3(1) and (2).
[221] Mauritius, *Geneva Conventions Act* (1970), Section 3.
[222] Mexico, *Penal Code as amended* (1931), Article 4.
[223] Netherlands, *Criminal Law in Wartime Act as amended* (1952), Article 3.
[224] Netherlands, *International Crimes Act* (2003), Article 2.

216. New Zealand's Geneva Conventions Act as amended, which provides for the punishment of grave breaches of the 1949 Geneva Conventions and AP I committed by "any person . . . in New Zealand or elsewhere", states that "this section applies to persons regardless of their nationality or citizenship".[225]

217. New Zealand's International Crimes and ICC Act provides that:

(1) Proceedings may be brought for an offence
  (a) against section 9 [genocide] or section 10 [crimes against humanity], if the act constituting the offence charged is alleged to have occurred
    (i) on or after the commencement of this section; or
    (ii) on or after the applicable date but before the commencement of this section; and would have been an offence under the law of New Zealand in force at the time the act occurred, had it occurred in New Zealand; and
  (b) against section 11 [war crimes], if the act constituting the offence charged is alleged to have occurred on or after the commencement of this section; and
  (c) against section 9 or section 10 or section 11 regardless of
    (i) the nationality or citizenship of the person accused; or
    (ii) whether or not any act forming part of the offence occurred in New Zealand; or
    (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.[226]

218. Nicaragua's Draft Penal Code provides that:

Nicaraguan Penal Law shall be applicable to Nicaraguan nationals and foreigners who have committed within the national territory the following crimes: . . . other crimes which, under international treaties and conventions, must be prosecuted in Nicaragua in accordance with constitutional provisions.[227]

219. Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes" in which it provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes in the meaning of the 1949 Geneva Conventions and both AP I and AP II, states that:

The courts of Niger have jurisdiction over the crimes set out in this chapter, regardless of the place where these might have been committed. For the crimes committed abroad by a national of Niger against a foreigner, the action of the foreigner or his family or the official notice of the authority of the State where the crime has been committed are not required.[228]

220. Nigeria's Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions "whether in or outside the

[225] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1)–(3).
[226] New Zealand, *International Crimes and ICC Act* (2000), Part 2, Section 8(1).
[227] Nicaragua, *Draft Penal Code* (1999), Article 16(p).
[228] Niger, *Penal Code as amended* (1961), Article 208.8.

Federation" and committed by "any person, whatever his nationality", states that:

A person may be proceeded against, tried and sentenced in the Federal territory of Lagos for an offence under this section committed outside the Federation as if the offence had been committed in Lagos, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in Lagos.[229]

221. Papua New Guinea's Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions "in Papua New Guinea or elsewhere", states that "this section [on the "punishment of offenders against the Geneva Conventions"] applies to persons regardless of their nationality or citizenship".[230]

222. Paraguay's Penal Code, in the section on "Acts against universally protected interests committed in a foreign country", provides that "Paraguayan penal law shall also be applied to the following acts committed in a foreign country: . . . other acts that according to an international treaty the Paraguayan State is obliged to prosecute, even if they were committed in a foreign country".[231]

223. Poland's Penal Code includes a special section on "Offences against peace and humanity, and war crimes" and provides that:

Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements.[232]

224. Russia's Criminal Code provides that:

1. Nationals of the Russian Federation and stateless persons permanently residing in the Russian Federation who have committed a crime outside the borders of the Russian Federation shall incur criminal responsibility under the present Code if the act they have committed is recognised as a crime in the state where it has been committed and if these persons have not been convicted in a foreign state. When convicting such persons the punishment cannot exceed the highest limit of the sanction specified in the law of the foreign state where the crime has been committed.
2. Members of the armed units of the Russian Federation located outside the borders of the Russian Federation for crimes committed within the territory of a foreign state shall incur criminal responsibility under the present Code if not provided for otherwise by an international treaty to which the Russian Federation is a party.

[229] Nigeria, *Geneva Conventions Act* (1960), Section 3(1) and (2).
[230] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).
[231] Paraguay, *Penal Code* (1997), Article 8(1).
[232] Poland, *Penal Code* (1997), Chapter XVIII, Article 113.

3. Foreigners and stateless persons who are not permanent residents of the Russian Federation who have committed a crime outside the borders of the Russian Federation shall incur criminal responsibility under the present Code in cases when the crime was directed against the interests of the Russian Federation and in cases provided for by an international treaty to which the Russian Federation is a party if they have not been convicted in a foreign state and if criminal proceedings against them are instituted within the territory of the Russian Federation.[233]

225. Rwanda's Law Setting up Gacaca Jurisdictions was enacted:

to organize the putting on trial of persons prosecuted for having, between October 1, 1990 and December 31, 1994, committed acts qualified and punished by the penal code and which constitute . . . crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by [GC IV and the Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity].[234]

It states that:

Jurisdictions called on to try, by virtue of this law, offences of genocide and massacres, may try public actions filed against persons who have neither had address nor residence in Rwanda or who are outside Rwanda, when there is conclusive evidence or serious guilt clues, whether or not they have previously been cross-examined.[235]

226. The Geneva Conventions Act of the Seychelles, which provides for the prosecution of "any person, whatever his nationality" having committed any grave breach under the Geneva Conventions "whether in or outside Seychelles", provides that:

Where an offence under this section is committed outside Seychelles, a person may be proceeded against, charged, tried and punished therefor in any place in Seychelles, as if the offence had been committed in that place, and the offence is, for all purposes incidental to or consequential on the trial or punishment thereof, deemed to have been committed in that place.[236]

227. Singapore's Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [of the 1949 Geneva Conventions] shall be guilty of an offence under this Act and on conviction thereof . . . [be punished].

In the case of an offence under this section committed outside Singapore, a person may be proceeded against, charged, tried and punished therefor in any place in Singapore as if the offence had been committed in that place, and the offence shall, for the purposes incidental to or consequential on the trail or punishment thereof, be deemed to have been committed in that place.[237]

[233] Russia, *Criminal Code* (1996), Article 12(1)–(3).
[234] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1(a).
[235] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 93.
[236] Seychelles, *Geneva Conventions Act* (1985), Section 3(1) and (2).
[237] Singapore, *Geneva Conventions Act* (1973), Section 3(1) and (2).

228. Slovenia's Penal Code criminalises genocide and war crimes broadly defined and applies to Slovenian nationals who have committed offences abroad; to non-nationals who have committed offences against Slovenian nationals abroad: and to non-nationals who have committed a criminal offence against a third country or any of its citizens abroad.[238]

229. Under Spain's Law on Judicial Power, Spanish criminal courts have jurisdiction over offences committed by Spanish nationals and foreigners, whether on Spanish territory or abroad, in particular genocide or other offences which according to international treaties or conventions, must be prosecuted in Spain.[239]

230. Sri Lanka's Draft Geneva Conventions Act provides that:

A person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any person to commit,
(a) a grave breach of any of the [1949 Geneva] Conventions; or
(b) a breach of common Article 3 of the [1949 Geneva] Conventions

is guilty of an indictable offence.[240]

231. Sweden's Penal Code as amended provides that:

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:
1. by a Swedish citizen or an alien domiciled in Sweden,
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.[241]

The Code further provides that:

Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish Law and by a Swedish court: . . . if the crime is . . . a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines or false or careless statement before an international court.[242]

Moreover, the Code provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for a crime against international law to imprisonment.[243]

[238] Slovenia, *Penal Code* (1994), Articles 122 and 123.
[239] Spain, *Law on Judicial Power* (1985), Article 23(4).
[240] Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 3(1).
[241] Sweden, *Penal Code as amended* (1962), Chapter 2, § 2.
[242] Sweden, *Penal Code as amended* (1962), Chapter 2, § 3(6).
[243] Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

232. Switzerland's Military Criminal Code as amended gives Swiss military tribunals jurisdiction over violations of IHL, regardless of the international or non-international character of an armed conflict, whether the crime has been committed on Swiss territory or abroad, whether the perpetrator or the victim is of Swiss nationality or of a foreign nationality and whether the perpetrator had military or civil status, even if there exists no link to the Swiss legal system other than the presence of the accused on Swiss territory.[244]

233. Switzerland's Penal Code as amended is applicable also with regard to acts committed abroad which the State is obliged to prosecute by an international treaty, provided that the act is also punishable in the State where it was committed and that the author of the crime is found on the territory of Switzerland and not extradited to another State.[245]

234. Tajikistan's Criminal Code provides for jurisdiction over stateless permanent residents who commit crimes under Tajikistan law outside the country and over foreigners and stateless persons not resident in Tajikistan who commit crimes under the Code when the crime is prohibited by norms of international law or treaties.[246] The Code provides that several war crimes are crimes under national law.[247]

235. Trinidad and Tobago's Draft ICC Act provides that:

> Any person who commits any of the crimes specified in Articles 6 [of the 1998 ICC Statute – genocide], 7 [of the 1998 ICC Statute – crimes against humanity] and 8 [of the 1998 ICC Statute – war crimes] outside Trinidad and Tobago, may be prosecuted and punished for that crime in Trinidad and Tobago as if the crime had been committed in Trinidad and Tobago.[248]

236. Uganda's Geneva Conventions Act provides that:

> Any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the [1949 Geneva] Conventions . . . commits an offence and on conviction thereof [shall be punished].
>
> Where an offence under this section is committed without Uganda a person may be proceeded against, indicted, tried and punished therefor in any place in Uganda as if the offence had been committed in that place, and the offence shall, for all purposes incidental or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[249]

237. The UK Geneva Conventions Act as amended provides that:

> Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the [1949 Geneva] conventions or the first protocol

[244] Switzerland, *Military Criminal Code as amended* (1927), Articles 2(1) and (9), 6, 9, 108 and 109.
[245] Switzerland, *Penal Code as amended* (1937), Article 6 *bis*.
[246] Tajikistan, *Criminal Code* (1998), Article 15.
[247] Tajikistan, *Criminal Code* (1998), Articles 397–405.
[248] Trinidad and Tobago, *Draft ICC Act* (1999), Part II, Section 5(2).
[249] Uganda, *Geneva Conventions Act* (1964), Section 1(1) and (2).

shall be guilty of an offence and on conviction on indictment [shall be punished]. In the case of an offence under this section committed outside the United Kingdom, a person may be proceeded against, indicted, tried and punished therefor in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[250]

238. The UK UN Personnel Act provides that "a person is guilty of an offence under, or by virtue of, section 1 [attacks on UN workers], 2 [attacks in connection with premises and vehicles] or 3 [threats of attacks on UN workers] regardless of his nationality".[251]

239. The UK War Crimes Act states that:

(1) Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –
  a) was committed during the period beginning with 1 September 1939 and ending with 5 June 1945 in a place which at the time was part of Germany or under German occupation; and
  b) constituted a violation of the laws and customs of war.
(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8 March 1990, or has subsequently become, a British citizen or resident of the United Kingdom.[252]

240. The UK ICC Act includes as offences under domestic law the acts of genocide, crimes against humanity and war crimes as defined in the 1998 ICC Statute.[253] Thus it provides that:

(1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.
(2) This section applies to acts committed
  (a) in England or Wales, or
  (b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.[254]

There is a similar provision for Northern Ireland without the reference to "a person subject to UK service jurisdiction".[255]

241. The US Convention on Genocide Implementation Act includes the following conditions as a required circumstance for the alleged offences:

(1) the offense is committed within the United States; or
(2) the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)).[256]

[250] UK, *Geneva Conventions Act as amended* (1957), Section 1(1) and (2).
[251] UK, *UN Personnel Act* (1997), Section 5(3).
[252] UK, *War Crimes Act* (1991), Articles 1 and 2.
[253] UK, *ICC Act* (2001), Part 5, Section 50.
[254] UK, *ICC Act* (2001), Part 5, Section 51.
[255] UK, *ICC Act* (2001), Part 5, Section 58.
[256] US, *Convention on Genocide Implementation Act* (1987), Section 1091(d).

242. The US Convention against Torture Implementation Act, which provides for the punishment of acts of torture committed outside the US, provides that:

There is jurisdiction over [acts of torture] if –

(1) the alleged offender is a national of the United States; or
(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.[257]

243. The US War Crimes Act as amended provides that:

(a) Offense. – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
(b) Circumstances. – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).[258]

244. Vanuatu's Geneva Conventions Act provides that:

Any grave breach of any of the [1949] Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu.

Where a person has committed an act or omission that is an offence by virtue of [the above], the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in Vanuatu.[259]

245. Zimbabwe's Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [the Geneva Conventions or AP I] shall be guilty of an offence.

...Where an offence in terms of this section has been committed outside Zimbabwe, the person concerned may be proceeded against, indicted, tried and punished therefore in any place in Zimbabwe as if the offence had been committed in that place and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[260]

National Case-law

246. In his legal opinion in the *Schwammberger case* before the Cámara Federal de la Plata in 1989, the Attorney-General of Argentina stated that:

States that have endured and suffered genocide have the right by means of their laws to assess the extent of the crimes and to punish in their courts of law those accused

[257] US, *Convention against Torture Implementation Act* (1994), Section 2340A(b).
[258] US, *War Crimes Act as amended* (1996), Section 2441(a) and (b).
[259] Vanuatu, *Geneva Conventions Act* (1982), Sections 4 and 5.
[260] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1) and (3).

of participating in such aberrant and cruel behaviour. Neither time, nor borders, nor the laws of any given country shall prevent the just advance of punitive law in the face of such repugnant acts, which are so deeply debasing for mankind and which undermine civilised coexistence.[261]

247. In the *Polyukhovich case* before Australia's High Court in 1991 in which the accused was charged with crimes committed during the Second World War, certain judges addressed the question of the customary law obligation to prosecute and extradite persons accused of war crimes committed during the Second World War. Judge Brennan considered that:

As the material drawn from international agreements and UNGA resolutions acknowledges, international law recognizes a State to have universal jurisdiction to try suspected war criminals whether or not that State is under an obligation to do so and whether or not there is any international concern that the State should do so.[262]

Judge Toohey held that the "universality of jurisdiction is in fact a permissive doctrine".[263] He also discussed the relationship between war crimes and universal jurisdiction and held that "the question whether the crimes existed as such at that time is basic. If such conduct amounted, then, to customary international crimes, their very nature leads to the conclusion that they were the subject of universal jurisdiction."[264]

248. In its judgement in the *Cvjetković case* in 1994, Austria's Supreme Court held that the Austrian courts were entitled to exercise jurisdiction over the accused under Article 6 of the 1948 Genocide Convention.[265]

249. In *The Four from Butare case* in 2001, a Belgian Court found four Rwandans guilty of war crimes during the 1994 genocide in Rwanda. The accused were arrested under the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended and charged with grave breaches of the Geneva Conventions and AP I, as well as violations of common Article 3 of the 1949 Geneva Conventions and Articles 1, 2 and 4 AP II.[266] The judgement was confirmed by the Belgian Court of Cassation in 2002.[267]

250. In the *Finta case* in 1989, in which the accused was prosecuted for war crimes and crimes against humanity committed during the Second World War, Canada's High Court of Justice rejected the defence's arguments that the law on

[261] Argentina, Cámara Federal de la Plata, *Schwammberger case*, Legal opinion of the Attorney-General, 30 August 1989, Point V.
[262] Australia, High Court, *Polyukhovich case*, Legal Reasoning of Judge Brennan, 14 August 1991, § 33.
[263] Australia, High Court, *Polyukhovich case*, Legal Reasoning of Judge Toohey, 14 August 1991, § 27.
[264] Australia, High Court, *Polyukhovich case*, Legal Reasoning of Judge Toohey, 14 August 1991, § 35.
[265] Austria, Supreme Court, *Cvjetković case*, Judgement, 13 July 1994.
[266] Belgium, Cour d'Assises de Bruxelles, *The Four from Butare case*, Judgement, 7–8 June 2001.
[267] Belgium, Court of Cassation, *The Four from Butare case*, Judgement, 9 January 2002.

which the prosecution was based was unlawful inasmuch as it gave the courts extraterritorial jurisdiction. The Court held that one of the bases of jurisdiction which it considered were applicable to the case in question was the "'universal principle' of jurisdiction". The Court went on to explain that "this principle recognizes that with respect to certain types of international crimes a country has the right to prosecute an offender irrespective of the fact that the offence was not committed on its territory".[268] In its judgement in 1994, the Supreme Court, with reference to the relevant provision of the Canadian Criminal Code, stated that:

> Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified [enumerated within the judgement] are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity.
> ...
> The war crimes and crimes against humanity provision stands as an exception to the general rule regarding the territorial ambit of criminal law. Parliament intended to extend the arm of Canada's criminal law in order to be in a position to prosecute these extraterritorial acts if the alleged perpetrators were discovered here.[269]

In their dissenting opinion, three of the judges stated that:

> Extraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity. Not only is the state where the crime took place unlikely to prosecute; following the cessation of hostilities or other conditions that fostered their commission, there also is a tendency for the individuals who perpetrated them to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected this prospect.[270]

251. In the *Sarić case* in 1994, Denmark's High Court tried a Bosnian Muslim refugee arrested in Denmark on charges of torture of POWs in violation of the 1949 Geneva Conventions. The accused was convicted and sentenced to eight years' imprisonment.[271] Jurisdiction was based on the grave breaches provisions of Articles 129 and 130 GC III and Articles 146 and 147 GC IV in conjunction with Article 8(5) of the Danish Penal Code which provides Danish Courts with jurisdiction to try perpetrators of certain crimes when Denmark is bound by a treaty to do so. The verdict was confirmed by the Supreme Court in 1995.[272]

252. In the *Javor case* before Frances's Tribunal de Grande Instance of Paris in 1994 and relative to events in Bosnia and Herzegovina, the investigating

[268] Canada, High Court of Justice, *Finta case*, Judgement, 10 July 1989.
[269] Canada, Supreme Court, *Finta case*, Judgement, 24 March 1994.
[270] Canada, Supreme Court, *Finta case*, Dissenting opinion of judges La Forest, L'Heureux-Dubé and McLachlim, 24 March 1994.
[271] Denmark, High Court, *Sarić case*, Judgement, 25 November 1994.
[272] Denmark, Supreme Court, *Sarić case*, Judgement, 15 August 1995.

magistrate at first instance considered that the principles of international co-operation regarding the search and punishment of war criminals referred to in UN General Assembly Resolution 3074 (1973) were binding and were directly applicable in French national law. The investigating magistrate had also considered that he had jurisdiction on the basis of the 1949 Geneva Conventions and the 1984 UN Convention against Torture.[273] The Court of Appeal of Paris reversed the decision and held that the investigating magistrate had wrongly considered that the principles of international cooperation provided in UN General Assembly Resolution 3074 were legally binding as a treaty.[274] In 1996, the Court of Cassation confirmed the absence of direct applicability of the jurisdictional provisions of the 1949 Geneva Conventions. The Court also rejected the jurisdiction in respect to torture because the accused was not on French territory at the time of the alleged acts.[275]

253. In the *Munyeshyaka case* in 1996, France's Court of Appeal of Nîmes considered a case concerning a Rwandan priest accused of an alleged role in the 1994 massacres in Kigali and held that there was no basis in French law for universal jurisdiction in respect to the imputed crime of genocide.[276] In 1998, the Court of Cassation reversed the judgement and found that jurisdiction was established on the basis of the Law on Cooperation with the ICTR of 1996, which allowed perpetrators of grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity who were present in France to be prosecuted in France by the application of French law. The Court added that the relevant bases in French law could be found in Article 689 of the Code of Criminal Procedure (torture) and Article 211 of the Penal Code (genocide).[277]

254. In the *Djajić case* in 1997, Germany's Supreme Court of Bavaria based its jurisdiction on Article 6(9) of the German Penal Code, which extended the jurisdiction of German courts to acts committed abroad by non-nationals if this was provided for in an international treaty binding upon Germany. The Court referred to GC IV and the grave breaches regime. It stated that Article 6(9) of the Penal Code contained an additional implicit requirement of a link to Germany. This necessary link with Germany, so as not to infringe the principle of non-intervention, was found in the fact that the accused had established his domicile in Germany and had lived in Germany for some time. The Court added that the prosecution of war criminals was "in the interest of the international community as a whole", and not only in the particular interest of Germany. It further noted that "Article 146 [GC IV], in its paragraph 2, obliges

[273] France, Tribunal de Grande Instance of Paris, *Javor case*, Order establishing partial lack of jurisdiction and the admissibility of civil suit, 6 May 1994.
[274] France, Court of Appeal of Paris, *Javor case*, Judgement, 24 November 1994.
[275] France, Court of Cassation, *Javor case*, Judgement, 26 March 1996.
[276] France, Court of Appeal of Nîmes, *Munyeshyaka case*, Judgement, 20 March 1996.
[277] France, Court of Cassation, *Munyeshyaka case*, Judgement, 6 January 1998.

each State party to the Convention 'to search for persons alleged to have committed . . . such grave breaches'. It had to 'bring such persons, regardless of their nationality, before its own courts'."[278]

255. In the *Jorgić case* in 1997, Germany's Higher Regional Court at Düsseldorf based its jurisdiction on Article 6(1) and (9) of the German Penal Code, which provided for the prosecution by German authorities of genocide and other acts for which there is a compulsory prosecution under the terms of an international treaty. The Court stated that GC IV was a "basis for criminal prosecution" and held that the fact that the accused had lived for many years in Germany, was married to a German citizen and was voluntarily coming back to Germany met the requirement of a "specific link" with Germany. The Court considered the conflict to be an international conflict and the victims to be "protected persons" in the meaning of Article 4 GC IV. It stated that Article VI of the 1948 Genocide Convention, "according to today's predominant international opinion, does not contain a prohibition of [applying] the principle of universal jurisdiction to genocide". According to the Court, its jurisdiction would also result from Article 9(1) of the 1993 ICTY Statute. Moreover, the Court referred to Article 146, second paragraph, GC IV under which, as the Court confirmed, the States party to GC IV "have engaged to bring persons who are alleged to have committed, or to have ordered to be committed, such grave breaches, before their own courts, regardless of their nationality". The accused was found guilty of complicity in genocide, in conjunction with dangerous bodily harm, deprivation of liberty and murder.[279] In 1999, the Federal Supreme Court of Germany upheld the conviction for the most part and confirmed that the relevant provision of the German Penal Code establishing jurisdiction for genocide was in conformity with the 1948 Genocide Convention. The Court agreed with the initial judgement in that there was a sufficient link with Germany.[280] In its decision in 2000, the Federal Constitutional Court stated that:

A norm of international customary law prohibiting the extension of German competence to legislate in criminal matters . . . was at variance with Art. VI of the [1948] Genocide Convention. With regard to the principle of non-interference recognized in international customary and international treaty law (Art. 2(1) of the United Nations Charter), the Federal Constitutional Court required that jurisdiction over events occurring in the territory of another State and therefore outside German territorial sovereignty be predicated on a meaningful link . . . Whether such a link exists depends on the subject matter. In criminal law, a meaningful link is constituted not only by the principles of territoriality, protection, active and passive personality, and criminal representation, but also by the principle of universal jurisdiction . . . The principle of universal jurisdiction applies to conduct deemed to constitute a threat to protected interests of the international community. It therefore differs from the principle of criminal representation, codified in Article 7, para. 2(2)

[278] Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.
[279] Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997.
[280] Germany, Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

of the German Penal Code, in that the conduct does not need to be punishable by the law of the place where it occurred and no failure to extradite is required.[281]

256. In the *Sokolović case* in 1999, Germany's Higher Regional Court at Düsseldorf held that, according to Article 6(9) of the German Penal Code and in connection with the provisions of the 1949 Geneva Conventions, German domestic courts had jurisdiction over grave breaches of the 1949 Geneva Conventions committed during the conflict in the former Yugoslavia.[282] In its judgement in 2000, the Federal Supreme Court agreed with the qualification of "international armed conflict" given to the 1992 situation in the former Yugoslavia and upheld the initial judgement against the accused, stating that "a duty to prosecute arises from [GC IV] at least when an international armed conflict takes place and when the criminal offences fulfil the requirements of a 'grave breach' in the meaning of Article 147 of [GC IV]".[283] Referring to the requirement of a specific link to Germany which had been established in the judgement at first instance, the Court noted that the Higher Regional Court at Düsseldorf had correctly found such link to be established. However, it stated that:

> [The Supreme Court] is nevertheless inclined not to require such additional link, in any case with regard to [Article 6 para. 9 of the German Penal Code]... Indeed, the prosecution and punishment in accordance with German penal law by the Federal Republic of Germany, acting in fulfilment of an internationally binding obligation accepted under agreement between States, of an act committed abroad by a foreigner against foreigners, can hardly be said to be an infringement of the principle of non-interference.[284]

257. In the *Kusljić case* in 1999, Germany's Supreme Court of Bavaria tried a Bosnian national for crimes committed in 1992 in the territory of Bosnia and Herzegovina. The accused was sentenced to life imprisonment for, *inter alia*, genocide in conjunction with six counts of murder. The Court found that a specific link to Germany, necessary for the prosecution under German penal law of acts committed abroad by a non-German actor and against non-German victims, was established.[285] In its revising decision in 2001, the Federal Supreme Court stated that the accused – the specific intentional element to commit genocide not being established – could however be convicted for homicide in six cases committed in 1992 in Bosnia and Herzegovina. Referring to its judgement of the same day in the *Sokolović case*, the Court ruled that German courts, on the ground of Article 6(9) of the German Penal Code, had jurisdiction over grave breaches in the meaning of Articles 146 and 147 GC IV.[286]

[281] Germany, Federal Constitutional Court, *Jorgić case*, Decision, 12 December 2000.
[282] Germany, Higher Regional Court at Düsseldorf, *Sokolović case*, Judgement, 29 November 1999.
[283] Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2000.
[284] Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2000.
[285] Germany, Supreme Court of Bavaria, *Kusljić case*, Judgement, 15 December 1999.
[286] Germany, Federal Supreme Court, *Kusljić case*, Decision, 21 February 2001.

258. In its judgement in the *Eichmann case* in 1961, Israel's District Court of Jerusalem stated with respect to the acts for which Eichmann was accused that:

The abhorrent crimes defined in this Law [Nazis and Nazi Collaborators (Punishment) Law of 1950] are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*.

...

In view of the repeated affirmation by the United Nations in the resolution of the General Assembly of 1946 and in the Convention of 1948, and also in view of the Advisory Opinion of the International Court of Justice, there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, *ex tunc*; that is to say, the crimes of genocide which were committed against the Jewish people and other peoples during the period of the Hitler régime were crimes under international law. It follows, therefore, in accordance with the accepted principles of international law, that the jurisdiction to try such crimes is *universal*.[287] [emphasis in original]

With respect to Article 6 of the 1948 Genocide Convention, the Court noted that:

It is clear that Article 6 [of the 1948 Genocide Convention], like all other articles which determine the conventional obligations of the contracting parties, is intended for cases of genocide which will occur in the future after the ratification of the treaty or the adherence thereto by the State or States concerned... It is certain that it [the obligation arising from Article 6 of the 1948 Genocide Convention] constitutes no part of the principles of customary international law, which are also binding outside the conventional application of the Convention.

Moreover, even with regard to the conventional application of the Convention, it is not to be assumed that Article 6 is designed to limit the jurisdiction of countries to crimes of genocide by the principle of territoriality.[288]

...

In the [1948 Genocide Convention] the Members of the United Nations... contented themselves with the determination of territorial jurisdiction as a *compulsory minimum*... But there is nothing... to lead us to deduce any rule against the principle of universal jurisdiction with respect to the crime in question. It is clear that the reference in Article 6 to territorial jurisdiction... is not exhaustive. Every sovereign State may exercise its existing powers within the limits of customary international law.[289] [emphasis in original]

[287] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, §§ 12 and 19.

[288] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, §§ 22 and 23.

[289] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 25.

With respect to the provisions of Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV, the Court stated that:

Here the principle of "universality of jurisdiction with respect to war crimes" is laid down as the obligatory jurisdiction of the High Contracting Parties, from which none of them may withdraw and which none of them may waive (as expressly stated in the [1949 Geneva Conventions]). That obligation is binding not only on the belligerents, but also on the neutral parties to the [1949 Geneva] Conventions.[290]

Moreover, with respect to the protective principle and a specific territorial link, the Court affirmed the existence of a "linking point" in the case in question, stating that "indeed, this crime ['the killing of millions of Jews with intent to exterminate the Jewish people'] very deeply concerns the 'vital interests' of the State of Israel, and under the 'protective principle' this State has the right to punish the criminals".[291]

259. In the *Eichmann case* in 1962, Israel's Supreme Court, dealing with the question of the conformity of Israel's Nazis and Nazi Collaborators (Punishment) Law of 1950 with principles of international law and States' criminal jurisdiction over acts committed by foreign nationals abroad, quoted parts of the judgement of the PCIJ in the *Lotus case* and stated that:

This argument [of the defendant] is to the effect that the enactment of a criminal law applicable to an act committed in a foreign country by a national conflicts with the principle of territorial sovereignty. But here too we must hold that there is no such rule in customary international law, and that to this day it has not obtained general international agreement. Evidence of this is to be found in the Judgement of the [PCIJ] in the *Lotus* case . . .

Our principal object [is] to make it clear . . . that under international law no *prohibition* whatsoever falls upon the enactment of the Law of 1950 either because it created *ex post facto* offences or because such offences are of an extra-territorial character . . . The two propositions on which we propose to rely will . . . be as follows:

(1) The crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual responsibility.
(2) It is the peculiarly universal character of these crimes that vests in every State the authority to try and punish anyone who participated in their commission.[292] [emphasis in original]

Under a part of the judgement dealing with universal jurisdiction, the Supreme Court further stated that:

One of the principles whereby States assume, in one degree or another, the power to try and punish a person for an offence is the principle of universality. Its meaning is substantially that such power is vested in every State regardless of the fact that the

[290] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 24.
[291] Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 35.
[292] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, §§ 9 and 10.

offence was committed outside its territory by a person who did not belong to it, provided he is in its custody when brought to trial . . . But while general agreement exists as to [the offence of piracy], the question of the scope of its application is in dispute.

. . .

There is full justification for applying here the principle of universal jurisdiction, since the international character of "crimes against humanity" (in the wide meaning of the term) dealt with in this case is no longer in doubt, while the unprecedented extent of their injurious and murderous effects is not to be disputed at the present time. In other words, the basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences – notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence (the high seas) and the offender is a national of another State or is stateless – applies with even greater force to the above-mentioned crimes.

. . .

The truth is – and this further supports our conclusion – that the application of this principle has for some time been moving beyond the international crime of piracy. We have in mind its application to conventional war crimes as well . . . Whenever a "belligerent" country tries and punishes a member of the armed forces of the enemy for an act contrary to "the laws and customs of war", it does so because the matter involves an international crime in the prevention of which the countries of the whole world have an interest.[293]

Referring to a writer's opinion concerning the *Zyklon B case* decided by the British Military Court at Hamburg in 1946, and another British Military Court's decision in a case where a member of the Japanese army had been tried for unlawfully killing American POWs in what was then French Indo-China, the Supreme Court stated that:

Although the fact that the victims of the crimes in these cases were nationals of countries in alliance with the prosecuting State derogates in some degree from the universal character of the jurisdiction exercised, nevertheless, on the other hand, the cases indicate that substantial strides were made towards extending the use of the said principle . . . Moreover, according to [a writer's] opinion, even a neutral country has jurisdiction to try a person for a war crime.[294]

The Supreme Court also discussed "the limitation upon the exercise of universal jurisdiction imposed by most of those who support this principle, namely, that the State which has apprehended the offender must first offer to extradite him to the State in which the offence was committed", as well as the contention of the appellant that Israel was obliged to offer his extradition to Germany as his country of national origin, and stated that:

The requirement of making an offer to extradite the offender to the State of his national origin is supported neither by international law nor by the practice of States . . . The idea behind the above-mentioned limitation is not that the requirement to offer the offender to the State in which the offence was committed was

[293] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.
[294] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.

designed to prevent the violation of its territorial sovereignty. Its basis is rather a purely practical one. Normally, the great majority of the witnesses and the greater part of the evidence are concentrated in that State and it is therefore the most convenient place (*forum conveniens*) for the conduct of the trial . . . It is clear . . . that it is the State of Israel – not the State of Germany – that must be regarded as the *forum conveniens* for the conduct of the trial . . . It follows that the *aut dedere* rule cannot assist the appellant in the circumstances of this case.[295]

Referring to Article VI of the 1948 Genocide Convention, the Supreme Court held that:

Article 6 imposes upon the parties contractual obligations with future effect, that is to say, obligations which bind them to prosecute for crimes of genocide which may be committed within their territories in the future. This obligation, however, has nothing to do with the universal *power* vested in every State to prosecute for crimes of this type committed in the past – a power which is based on *customary* international law.[296] [emphasis in original]

The Supreme Court concluded that:

We sum up our views on this subject as follows: Not only are all the crimes attributed to the Appellant of an international character, but they are crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations. The State of Israel, therefore, was entitled, pursuant to the principle of universal jurisdiction, and acting in the capacity of guardian of international law and agents for its enforcement, to try the Appellant. This being the case, it is immaterial that the State of Israel did not exist at the time the offences were committed.

In regard to the crimes directed against the Jews the District Court found additional support for its jurisdiction in the connecting link between the State of Israel and the Jewish people – including that between the State of Israel and the Jewish victims of the holocaust – and the National Home in Palestine, as is explained in its judgement. It therefore upheld its criminal and penal jurisdiction by virtue also of the "protective" principle and the principle of "passive personality". It should be made clear that we fully agree with every word said by the Court on this subject.[297]

260. In the *Cavallo extradition case* in 2001, on the request of a Spanish judge, a Mexican court decided to allow the extradition of Ricardo Miguel Cavallo, a former Argentinean military officer, charged with genocide and acts of terrorism during the 1976–1983 "dirty war" in Argentina and based its decision on, *inter alia*, the principle of universal jurisdiction.[298]

261. In 2001, the Ministry of Foreign Affairs of Mexico issued a directive concerning the *Cavallo extradition case* stating that:

Based on Article 28, part XI, of the Federal Public Administration Law and in conformity with articles 30 of the International Law of Extradition, and articles 1, 9,

[295] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.
[296] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.
[297] Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.
[298] Mexico, Federal Court of the First Circuit, *Cavallo case*, Decision, 11 January 2001.

14 and 25 of the Treaty of Extradition and Mutual Assistance on Criminal Matters between the United Mexican States and the Kingdom of Spain, it is resolved . . . to grant the extradition of the individual in question, Ricardo Miguel Cavallo, known as Miguel Angel Cavallo, requested by the government of Spain through its embassy in Mexico, to face charges of genocide.[299]

262. In the *Ahlbrecht case* in 1947, the Special Court of Cassation of the Netherlands quashed the conviction of the accused imposed by the Lower Court on the ground that the latter lacked jurisdiction over war crimes alleged to have been committed by members of the enemy forces.[300] The Court reviewed the practice relating to trials of war criminals since the end of the First World War, including the relevant provisions of the Treaty of Versailles, the Declarations of St. James and Moscow and the Charters of the International Military Tribunals and concluded that it could no longer be said that the Netherlands lacked jurisdiction over enemy war criminals. It added, however, that it did not follow from this conclusion that in the actual state of legislation in the Netherlands any particular court would automatically have jurisdiction over enemy war criminals. For this, the Court considered, something more was required, such as a directly applicable international convention or national legislation conferring the jurisdiction which the State possessed under international law upon a municipal court. In the absence of such measures, no local courts had the necessary jurisdiction. As a result of the Special Court of Cassation's decision, an amendment was made to the Extraordinary Penal Law Decree which criminalised war crimes and crimes against humanity as defined in the 1945 IMT Charter (Nuremberg) committed during the Second World War regardless of the nationality of the offender, the victim or the place where the crime was perpetrated.[301]

263. The jurisdiction given to the courts of the Netherlands by the above-mentioned amendment formed the basis of the decision of the Special Court of Cassation in the *Rohrig and Others case* in 1950.[302] Here the Court rejected the arguments of the accused that the amendment limited the jurisdiction of the courts to crimes committed on the territory of the Netherlands. The Court also upheld the validity of the amendment on the ground that:

There was a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen (the so called theory of detention). This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind.[303]

264. In the *Knesević case* in 1997 involving a Bosnian Serb accused of having committed war crimes (murder, deportation to a concentration camp,

[299] Mexico, Ministry of Foreign Affairs, Communication No. 021/01, The Ministry of Foreign Affairs grants Spain's Request to extradite Ricardo Miguel Cavallo, Directive of 2 February 2001, § 2.
[300] Netherlands, Special Court of Cassation, *Ahlbrecht case*, Judgement, 17 February 1947.
[301] Netherlands, Special Court of Cassation, *Ahlbrecht case*, Judgement, 17 February 1947.
[302] Netherlands, Special Court of Cassation, *Rohrig and Others case*, Judgement, 15 May 1950.
[303] Netherlands, Special Court of Cassation, *Rohrig and Others case*, Judgement, 15 May 1950.

attempted rape) in the territory of the former Yugoslavia (Bosnia and Herzegovina), the Supreme Court of the Netherlands acknowledged universal criminal jurisdiction irrespective of whether the Netherlands was involved in the conflict. The Court referred to the explanatory memorandum submitted to the Dutch parliament in the context of the adoption of the Criminal Law in Wartime Act, which interpreted Article 3 of the Act so as to give the Dutch courts competence to try war crimes (including grave breaches and violations of common Article 3 of the 1949 Geneva Conventions), regardless of where or by whom they had been committed.[304]

265. In its judgement in the *Kuroda case* in 1949, the Supreme Court of the Philippines held that the government had the power to grant the jurisdiction to prosecute Japanese citizens accused of war crimes committed in the Philippines during the Second World War, since "the rules and regulations of the Hague and [the 1949] Geneva Conventions form part and were wholly based on the principles of international law".[305]

266. In the *Hissène Habré case* in 2000, Senegal's Dakar Regional Court indicted Chad's exiled former president on charges of torture and crimes against humanity, and placed him under house arrest.[306] In 2001, however, the Court of Cassation confirmed the ruling of the Dakar Court of Appeal that Habré could not be tried in Senegal for crimes allegedly committed in Chad. It stated that Senegalese courts lacked jurisdiction to prosecute and try aliens present on the territory of Senegal who had allegedly committed acts of torture outside Senegal. The decision was based on the absence of any legislative measure establishing such jurisdiction over torture-related offences, as required by Article 5(2) of the 1984 Convention against Torture, to which Senegal was a party.[307]

267. In the *Grabež case* in 1997, a person born in the former Yugoslavia was prosecuted by Switzerland's Military Tribunal at Lausanne for violations of the laws and customs of war under the Swiss Military Criminal Code as amended on charges of beating and injuring civilian prisoners in the camps of Omarska and Keraterm in Bosnia and Herzegovina. The Tribunal held that it had jurisdiction under Articles 108(2) and 109 of the Military Criminal Code as amended over violations of the laws and customs of war, grave breaches of GC III, GC IV and AP I and violations of AP II, but acquitted the accused for lack of sufficient evidence.[308]

268. In the *Musema case* in 1997, Switzerland agreed to surrender to the ICTR an accused of Rwandan nationality, arrested in Switzerland in 1995 for violations of the laws of war in Rwanda. The decision was taken, *inter alia*, pursuant

[304] Netherlands, Supreme Court, *Knesević case*, Judgement, 11 November 1997.
[305] Philippines, Supreme Court, *Kuroda case*, Judgement, 26 March 1949.
[306] Senegal, Dakar Regional Court, *Hissène Habré case*, Indictment, 3 February 2000.
[307] Senegal, Dakar Court of Appeal *Hissène Habré case*, Judgement on Appeal, 4 July 2000; Court of Cassation (First Chamber for Criminal Matters), *Hissène Habré case*, Judgement, 20 March 2001.
[308] Switzerland, Military Tribunal at Lausanne, *Grabež case*, Judgement, 18 April 1997.

to Article 109 of the Swiss Military Criminal Code as amended providing for the punishment of war crimes.[309]

269. In the *Niyonteze case* in 1999, Switzerland's Military Tribunal at Lausanne found a Rwandan citizen guilty of murder, incitement to murder and crime by omission in the context of the conflict in Rwanda in 1994. The Tribunal based its decision on Articles 2(9), 108(2) and 109 of the Swiss Military Penal Code as amended. However, the Tribunal refused to consider charges of genocide and crimes against humanity on the grounds that these crimes were not recognised as being subject to universal jurisdiction under Swiss law.[310] In its judgement in 2000, the Military Court of Appeals stated that:

> According to Article 2 § 9 of the Military Penal Code, civilians are subjected to the military criminal law if they are found guilty of violations of public international law during an armed conflict. (Articles 108 to 114 Military Penal Code)
>
> Switzerland adopted Article 2 § 9 of the Military Penal Code in order to meet its international obligations and to allow the application of international law. In this specific context, even if Switzerland is not in a state of war or in a danger of imminent war, it engaged in prosecuting individuals, regardless of their nationality, who are found [outside Switzerland] guilty of grave breaches of the [1949] Geneva Conventions.[311]

In its relevant parts, the Military Court of Cassation confirmed the judgement of the Military Court of Appeals.[312]

270. In the *Pinochet extradition case* in 1999 before the UK House of Lords, Lord Millett stated that:

> In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria.
>
> . . .
>
> In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984.[313]

Lord Phillips of Worth Matravers stated that:

> It is still an open question whether international law recognises universal jurisdiction in respect of international crimes – that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by the State of Israel,

[309] Switzerland, Federal Court, *Musema case*, Judgement, 28 April 1997.
[310] Switzerland, Military Tribunal at Lausanne, *Niyonteze case*, Judgement, 30 April 1999.
[311] Switzerland, Military Court of Appeals (Geneva), *Niyonteze case*, Judgement, 26 May 2000.
[312] Switzerland, Military Court of Cassation (Yverdon-les-Bains), *Niyonteze case*, Judgement, 27 April 2001.
[313] UK, House of Lords, *Pinochet extradition case*, Opinion of Lord Millett, 24 March 1999.

notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring.[314]

271. In the *Sawoniuk case* in 1999, a person was sentenced to life imprisonment at the Old Bailey in London for having murdered in 1942 two Jews in what is now Belarus. The sentence was laid down by virtue of the UK War Crimes Act of 1991.[315] In 2000, this judgement was confirmed by the Court of Appeal (Criminal Division), which stated, however, that:

The criminal jurisdiction of the English court is, generally speaking, territorial. Until enactment of the War Crimes Act 1991 the appellant could not be tried here for an offence of murder or manslaughter committed in Belorussia since he has never been a British subject and the exception made by section 9 of the Offences against the Person Act 1861 to the ordinary rule of territoriality was confined to offences of murder or manslaughter committed outside the United Kingdom by British subjects. It remains the law that the appellant could not be tried here for acts of violence committed in Belorussia if not causing death.[316]

272. In its judgement in the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg stated that:

As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State in whose hands the perpetrators fall. Those rules of international law were recognised as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned . . . However, enforcement of international law has been traditionally subject to practical limitations. Within territorial boundaries of a State having a recognised, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that State. The law is universal, but such a State reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions.

Thus, notwithstanding the paramount authority of the substantive rules of common international law the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorised jurisdiction.

[314] UK, House of Lords, *Pinochet extradition case*, Opinion of Lord Phillips of Worth Matravers, 24 March 1999.
[315] UK, Old Bailey (London), *Sawoniuk case*, Judgement, 1 April 1999.
[316] UK, Supreme Court of Judicature, Court of Appeal (Criminal Division), *Sawoniuk case*, Judgement on Appeal, 10 February 2000.

Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. Nor is the apparent immunity from prosecution of criminals in other States based on the absence there of the rules of international law which we enforce here. Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonised with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of common international law, a power which no international authority without consent could assume or exercise within a State having a national government presently in the exercise of its sovereign powers.[317]

273. In the *Demjanjuk case* in 1985, a US Court of Appeals recognised Israel's right to try a person accused of war crimes on the basis of universal jurisdiction and rejected an appeal to overturn an extradition order. The Court held that:

The universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences . . . Israel or any other nation . . . may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.[318]

Other National Practice

274. In its oral pleadings before the ICJ in the *Arrest Warrant case* in 2000, Belgium addressed the issues of compatibility of its law containing the principle of universality with international law as well as universal jurisdiction as such and stated that:

Article 7 of the Law enshrines the universal jurisdiction of the Belgian courts. They may deal with the offences referred to in the Law irrespective of the nationality of the perpetrator or where the offence was committed.

. . .

This jurisdiction is entirely consistent with the second paragraph of the Article common to the four 1949 Geneva Conventions (Articles 49, 50, 129 and 146 respectively) . . . The jurisdiction that the State must therefore exercise is a universal jurisdiction, which can today be regarded as generally accepted, as it is found in a number of international criminal law conventions.[319]

In later pleadings in the same case, Belgium stated that in its contention, "the permissive rules concerning the exercise of universal jurisdiction . . . in circumstances in which serious violations of international humanitarian law

[317] US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.
[318] US, Court of Appeals, *Demjanjuk case*, Judgement, 31 October 1985.
[319] Belgium, Oral pleadings before the ICJ, *Arrest Warrant case*, 21 November 2000, Verbatim Record CR 2000/33, § I.A (7).

are alleged, permit Belgium to take the course that it has followed".[320] Referring to Articles 49, 50, 129 and 146 of the 1949 Geneva Conventions, Belgium further stated that these provisions contained the obligation of States to prosecute the authors of crimes defined by the Conventions, regardless of their nationality and of the place of the crime, as long as they were present on the territory of the State exercising its jurisdiction. According to Belgium, such an obligation also existed as regards crimes against humanity, resulting from customary and treaty law.[321]

275. According to the Report on the Practice of Belgium, it is the *opinio juris* of Belgium that it has the right to consider "grave breaches" committed also in the context of non-international conflicts as punishable under Belgian penal law, regardless of the nationality of the alleged perpetrator or the victim or of the place where the act was committed, on the basis of universal jurisdiction.[322]

276. In a report in 1987, the Canadian Commission of Inquiry on War Criminals ("Commission Deschênes") held that "neither conventional international law nor customary international law *stricto sensu* could support the prosecution of [Second World War] war criminals in Canada".[323] The Commission added that:

> Prosecution of war criminals can, however, be launched on the basis of customary international law *lato sensu* inasmuch as war crimes are violations of the general principles of law recognized by the community of nations, which article 11(g) of the *Canadian Charter of Rights and Freedoms* has enshrined in the Constitution of Canada.[324]

277. In 1987, in parliamentary debates on the proposed amendment to Canada's Criminal Code, the Canadian Minister of Justice referred to changes already made in legislation in order to bring Canada in line with its international obligations and stated that "these amendments have also recognized the increasing acceptance in international law of the principle of according universal jurisdiction to the national courts in respect of internationally acknowledged offences".[325]

278. In 2000, in its application instituting proceedings in the *Arrest Warrant case* before the ICJ, the DRC requested that the ICJ "declare that (Belgium) shall annul the international arrest warrant".[326] The latter had been issued *in absentia* by a Belgian judge against the Minister for Foreign Affairs of the DRC on the basis of Belgium's Law concerning the Repression of Grave Breaches of the

[320] Belgium, Oral pleadings before the ICJ, *Arrest Warrant case*, 17 October 2001, Verbatim Record CR 2001/8, p. 50.
[321] Belgium, Oral pleadings before the ICJ, *Arrest Warrant case*, 18 October 2001, Verbatim Record CR 2001/9, § 10(6).
[322] Report on the Practice of Belgium, 1997, Chapter 6.4.
[323] Canada, Commission of Inquiry on War Criminals, Report, 1987, p. 132, § 20.
[324] Canada, Commission of Inquiry on War Criminals, Report, 1987, p. 132, § 21.
[325] Canada, Minister of Justice, Statement in the House of Commons, 12 March 1987, *Parliamentary Debates*, Vol. VII, 1987, pp. 8265–8266.
[326] DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § II, p. 3.

Geneva Conventions and their Additional Protocols as amended. In its application, the DRC criticised the fact that, under the terms of the arrest warrant, "the investigating judge claims jurisdiction in respect of offences purportedly committed on the territory of the DRC by a national of that State, without any allegation that the victims were of Belgian nationality or that these acts constituted violations of the security or dignity of the Kingdom of Belgium".[327] It further stated that the arrest warrant constituted a "violation of the principle that a State may not exercise [its authority] on the territory of another State and of the principle of sovereign equality among all Members of the United Nations".[328] The DRC further stated that:

> The universal jurisdiction ... contravenes the international jurisprudence established by the judgement of the Permanent Court of International Justice (PCIJ) in the Lotus case ... According to the judgement, this principle means that a State may not exercise its authority on the territory of another State. This rule is now corroborated by Article 2, § 1 of the Charter of the United Nations ... The only instances in which general international law allows, exceptionally, that a State may prosecute acts committed on the territory of another State by a foreigner are, first, cases involving violation of the security or dignity of the first State and, second, cases involving serious offences committed against its nationals.[329]

In its oral pleadings, the DRC further stated that "universal jurisdiction – in so far as domestic courts have such jurisdiction – can apply only if the person prosecuted is present on the territory of the prosecuting State. This is a well-established principle."[330] In later pleadings, the DRC made the point that:

> The real test of the concept of universal jurisdiction is the genuine universalization of the prosecution of crime. Further, that is precisely the meaning intended by those who drafted Article 146 [GC IV]. The idea was not that a single State should take responsibility for prosecuting and trying all international crimes. It was that all States should fulfil their obligation to search for, each on its own territory, the guilty parties, so that there is no territory left where they can escape judgment for their crimes ... Yes, States do have an obligation of universal jurisdiction, which arises in response to another obligation, that of contributing to the suppression of international crimes. Naturally, however, there must be identifiable grounds for the latter obligation ... We shall merely say that Article 146 [GC IV] imposes a clear obligation on all States both to enact appropriate legislation and to search for persons having committed grave breaches of the said Conventions ... The DRC takes note of the fact that Belgium does not claim that it indicted the DRC's Minister for Foreign Affairs when he was not present in the territory of Belgium as a result of an obligation on Belgium to do so. It is evident that the obligation of States to extend

[327] DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § III(A), p. 5.
[328] DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § IV(A), p. 7.
[329] DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § IV(A)(1), p. 7–9.
[330] DRC, Oral pleadings before the ICJ, *Arrest Warrant case*, 22 November 2000, Verbatim Record CR 2000/34, § 1.4.

their universal jurisdiction to encompass the punishment of some international crimes does not go so far as to include such an eventuality. Neither legislation nor practice provides grounds for such an extension. Article 146 [GC IV] without being fully explicit, would appear to confirm our view . . . It is therefore indeed the logic of international law which prevents the obligation on a State to establish its universal jurisdiction for the punishment of international crimes from being extended to encompass an obligation to exercise jurisdiction in all cases, including those in which the suspect is not present in its territory . . . Belgium agrees with the Democratic Republic of the Congo that in the present case universal jurisdiction is a freedom, not an obligation.[331]

In its final oral pleadings, the DRC stated that:

When it comes to the international scope of domestic jurisdictions in criminal matters for acts committed abroad by foreigners, in particular in cases of international crimes, their competencies will necessarily run against the sovereignty of another State; such procedure must have a conventional or customary foundation authorising its action . . . [and that] the extension of such a competence to the hypothesis that the person concerned is not in the territory lacks a confirmed legal basis.[332]

279. According to the Report on the Practice of Cuba, under Cuban law, criminal jurisdiction generally extends to offences committed by Cuban nationals abroad.[333]

280. In 1999, in its initial report to the CAT, the government of El Salvador, explained the reasons for universal jurisdiction over persons responsible for human rights violations and stated that:

El Salvador accepts the general interest of the international community in seeking and prosecuting criminal offenders who commit acts against property protected internationally by specific agreements or rules of international law or acts seriously undermining universally recognized human rights. It therefore considers it permissible to seek this type of criminal within the national territory, thereby avoiding the difficulties which would ensue were El Salvador to become a country of asylum for criminals from other countries, and to prosecute offences against internationally recognized human rights, as occur in cases of torture when they are committed elsewhere.[334]

281. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, the FRG declared that "the principle of universal jurisdiction should be reaffirmed

[331] DRC, Oral pleadings before the ICJ, *Arrest Warrant case*, 16 October 2001, Verbatim Record CR 2001/6.
[332] DRC, Oral pleadings before the ICJ, *Arrest Warrant case*, 19 October 2001, Verbatim Record CR 2001/10 (unofficial translation).
[333] Report on the Practice of Cuba, 1998, Chapter 6.4.
[334] El Salvador, Initial Report to CAT of 5 July 1999, UN Doc. CAT/C/37/Add.4, 12 October 1999, § 151.

in cases of grave breaches of the international rules applicable in armed conflicts".[335]

282. In an explanatory memorandum on ratification of the 1984 Convention against Torture presented during the 1986–1987 Session of the Dutch parliament, the Ministers of Justice and of Foreign Affairs of the Netherlands declared that the mere fact that very severe offences that caused indignation and anxiety were involved could not in themselves justify the application of the principle of universal jurisdiction to such offences. Repression of these violations should be left to the States that had a tie with the person or the place where the crime was committed. If not, a tendency to interfere could emerge and criminal law was not considered to be the most suitable instrument to resolve political conflicts.[336]

283. In 1999, in its third periodic report to the CAT, the Netherlands referred to its Criminal Law in Wartime Act as amended and to the 1997 ruling of the Supreme Court of the Netherlands in the *Knesevic case*, and stated that:

> Anyone in the Netherlands who is suspected of war crimes can be prosecuted [there]. A special National War Criminals Investigation Team – the NOVO – has been set up to target not only crimes under the Criminal Law in Wartime Act, but other crimes against humanity as well, such as torture.[337]

284. In 2001, during a meeting of the UN Commission on Human Rights, Senegal, in exercise of its right to reply, stated with regard to the *Hissène Habré case* that:

> Mr. Habré, who was in Senegal as a refugee, had been arrested and charged on 3 February 2000. He had been released, however, and the prosecution had not been pursued because it was found that the Senegalese courts were not competent to deal with the matter. The acts with which Mr. Habré was charged had been committed abroad and [the relevant provision of Senegalese criminal law] did not apply when an act was committed by a foreigner abroad, except where certain conditions were fulfilled. In the case in question, none of those conditions was fulfilled . . . The case in question did not . . . fall under article 5, paragraph 1, of [the 1984 Convention against Torture]. The [1968] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity . . . was inapplicable to Senegal, which had not ratified it. The Indictment Division had withdrawn the prosecution on the basis of [the relevant provisions of Senegalese criminal law] according to which the national courts were not competent. That judgement had been confirmed by the Court of Cassation.[338]

[335] FRG, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/28/SR.1452, 3 December 1973, § 43.

[336] Netherlands, Lower House of Parliament, Explanatory memorandum by the Minister of Justice and the Minister of Foreign Affairs on the ratification of the 1984 Convention against Torture, 1986–1987 Session, Doc. 20 042, No. 3, pp. 5 and 6.

[337] Netherlands, Third periodic report to the CAT, 27 December 1999, UN Doc. CAT/C/44/Add.8, 5 January 2000, § 15.

[338] Senegal, Statement of 6 April 2001 before the UN Commission on Human Rights, UN Doc. E/CN.4/2001/SR.43, 17 April 2001, §§ 78–79.

285. In 1990, during a debate in the House of Commons on the subject of Cambodia, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Under the auspices of the United Nations, a tribunal could be established [to try the Khmer Rouge]... Alternatively, Pol Pot and others could be brought to trial under the genocide convention, but the only courts with jurisdiction under that convention would be the Cambodian courts.[339]

286. In 1991, during a debate in the House of Commons on the prosecution of crimes committed during the Gulf War, the UK Minister of State, Home Office, stated that "all the states involved in the Gulf conflict are parties to the Geneva convention of 1949. We took that convention into our own law in 1957. So we have a wide jurisdiction over war crimes committed anywhere in the world after 1957 under international law."[340]

287. In 1991, during a debate in the House of Commons on the Middle East, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Anyone who breaks the provisions of the Geneva conventions may be held liable... Machinery already exists under [the Geneva Conventions Act as amended (1957)] for prosecuting grave breaches of them. The three avenues are: first, a trial before Iraqi courts; secondly, extradition for trial before courts of another party to the conventions, including other Arab states; and thirdly, the possibility of special international tribunals.[341]

288. In 1993, in a written reply to a question in the House of Commons on the subject of the possibility of a war crimes tribunal or special genocide commission to investigate the actions of the Khmer Rouge in Cambodia, the UK Secretary of State for Foreign and Commonwealth Affairs stated that:

In the absence of an international tribunal with jurisdiction to try Pol Pot and the Khmer Rouge for genocide, Pol Pot and his associates would have to be brought before a competent Cambodian court. It is therefore for the new Cambodian Government to decide whether to bring them to trial.[342]

III. Practice of International Organisations and Conferences

United Nations

289. In a resolution adopted in 1946 on extradition and punishment of war criminals, the UN General Assembly recommended that:

[339] UK, House of Commons, Statement by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 26 October 1990, Vol. 178, col. 690.

[340] UK, House of Commons, Statement by the Minister of State, Home Office, *Hansard*, 18 March 1991, Vol. 188, col. 112.

[341] UK, House of Commons, Statement by the Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 March 1991, Vol. 188, col. 1100.

[342] UK, House of Commons, Reply to a question by the Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 5 May 1993, Vol. 224, Written Answers, cols. 138–139.

Members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for of have taken a consenting part in [war crimes], and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries.[343]

The General Assembly called upon:

the governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries.[344]

290. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon:

all States to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trail and punished in accordance with the laws of those countries.[345]

291. In a resolution adopted in 1973 on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly proclaimed that "persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they have committed those crimes".[346]

292. In a resolution adopted in 1996 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights expressed its concern over the:

continuing unauthorized arrests by all parties of persons suspected of serious violations of international humanitarian law, despite the parties' agreement in Rome on 18 February 1996 that such arrests would be made only after the [ICTY] had reviewed and approved orders of arrest as consistent with international legal standards.[347]

293. In a resolution adopted in 1999, the UN Commission on Human Rights reminded all factions and forces in Sierra Leone that:

In any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international

[343] UN General Assembly, Res. 3 (I), 13 February 1946.
[344] UN General Assembly, Res. 3 (I), 13 February 1946.
[345] UN General Assembly, Res. 2712 (XXV), 15 December 1970, § 2.
[346] UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 5.
[347] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 6.

humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts.[348]

294. In a resolution on Rwanda adopted in 1995, the UN Sub-Commission on Human Rights deplored the fact that the efforts of the international community were still inadequate, "whereas the duty of trying those responsible for the genocide and war crimes does not devolve solely on the Government of Rwanda".[349]

295. In a resolution on Rwanda adopted in 1996, the UN Sub-Commission on Human Rights urged all States in whose territory there were persons allegedly responsible for acts of genocide to arrest those persons so that they could be tried by their own competent courts or extradited at the request of the ICTR or the Rwandan authorities.[350]

296. In a resolution adopted in 2000 on the role of universal or extraterritorial competence in preventive action against impunity, the UN Sub-Commission on Human Rights recalled "the principle of universal jurisdiction for crimes against humanity and for war crimes as recognized in international law and practice".[351]

297. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General recommended that the UN Security Council urge member States:

> to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council.[352]

298. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General pointed out that "a growing number of States have started to apply the principle of universal jurisdiction".[353]

299. In 1998, in the conclusions and recommendations of his report on the question of the human rights of all persons subjected to any form of detention or imprisonment, in particular, torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the UN Commission on Human Rights on Torture stated that:

> 229. . . . In respect of the crimes under consideration, such as torture, universal jurisdiction is applicable, that is, jurisdiction exercised on the basis simply of custody.

[348] UN Commission on Human Rights, Res. 1999/1, 6 April 1999, § 2.
[349] UN Sub-Commission on Human Rights, Res. 1995/5, 18 August 1995, § 3.
[350] UN Sub-Commission on Human Rights, Res. 1996/3, 19 August 1996, § 6.
[351] UN Sub-Commission on Human Rights, Res. 2000/24, 18 August 2000, preamble.
[352] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 6.
[353] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 12.

230. As regards grave breaches of the Geneva Conventions of 12 August 1949 and acts of torture committed in a State party to the [1984 Convention against Torture], States are required to bring to justice any perpetrators they find within their jurisdiction, regardless of their nationality or that of their victim(s) or of where they committed the crime, if they do not extradite them to another country wishing to exercise jurisdiction.
231. In respect of other pertinent crimes under international law, States are in any event permitted to exercise such jurisdiction . . .
232. The Special Rapporteur, therefore, urges all States to review their legislation with a view to ensuring that they can exercise criminal jurisdiction over any person in their hands suspected of torture or, indeed, of any crime falling within the notions of war crimes or crimes against humanity as understood above.[354]

300. In 1996, in a presentation to the sessional Working Group of the UN Sub-Commission on Human Rights on the Administration of Justice and the Question of Compensation, the Special Rapporteur of the UN Commission on Human Rights on the (then still draft) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law stated that "the notion of and term 'universal jurisdiction' contained in principle 5 related to crimes under international law, namely crimes of genocide, crimes against humanity and war crimes. Relevant instruments provided for universal jurisdiction."[355]
301. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

> 42. . . . In general, unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are "crimes against humanity" and genocide, which apply irrespective of the conflict's classification.
> . . .
> 45. "Grave breaches" are specified major violations of international humanitarian law which may be punished by any State on the basis of universal jurisdiction. Grave breaches are listed in article 50 [GC I], article 51 [GC II], article 130 [GC III], and article 147 [GC IV]. Grave breaches are also listed in articles 11, paragraph 4, and 85 [AP I].[356]

Other International Organisations

302. In a resolution on enforced disappearances adopted in 1984, the Parliamentary Assembly of the Council of Europe called on the governments of member

[354] UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, §§ 229–232.
[355] UN Sub-Commission on Human Rights, Sessional Working Group on the Administration of Justice and the Question of Compensation, Report, UN Doc. E/CN.4/Sub.2/1996/16, 13 August 1996, § 28.
[356] UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 42 and 45.

States to support the preparation and adoption by the UN of a declaration on enforced disappearances setting forth the following principle: "persons responsible for enforced disappearance may be prosecuted not only in the country in which the offence was committed, but in any country in which they have been arrested".[357]

303. In a recommendation adopted in 1999 concerning respect for IHL in Europe, the Parliamentary Assembly of the Council of Europe stated that:

> 6. ... No international tribunal can take the place of states in meeting their obligation to ensure the proper enforcement of international humanitarian law in regard to persons committing violations of that law, ordering others to commit them or condoning these actions, wherever they take place and irrespective of the nationality of their author.[358]

International Conferences

304. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

305. In its decision in the *Arrest Warrant case* in 2002, the ICJ did not rule on the issue of universal jurisdiction as such in the operative part of the judgement because of the final form of the DRC's submissions and because Belgium had referred to the *non ultra petita* principle.[359] However, in various separate and dissenting opinions and declarations, judges of the Court expressed their own opinion on the matter. As far as universal jurisdiction *in absentia* for war crimes and crimes against humanity was concerned, except for the question of possible immunities, five of the judges giving a separate or dissenting opinion thereby clearly expressed themselves in favour of the right of States to prosecute persons even if they were not present on their territory.[360] Four others took the view that a right of States to exercise such a universal jurisdiction without any territorial link did not (yet) exist.[361] In his separate opinion, President Guillaume stated that "universal jurisdiction *in absentia* is unknown to international conventional law" and that the same would be true for international customary law.[362] In his declaration, Judge Ranjeva stated that, even if the text of the judgement left the question open, it did not seem to him

[357] Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 13.
[358] Council of Europe, Parliamentary Assembly, Rec. 1427, 23 September 1999, § 6.
[359] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, § 43.
[360] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge Koroma, §§ 7 and 9; Joint and separate opinion of Judges Higgins, Kooijmans and Buergenthal, §§ 52 and 61; Dissenting opinion of Judge *ad hoc* Van den Wyngaert, § 51.
[361] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of President Guillaume, §§ 9 and 12; Declaration of Judge Ranjeva, §§ 5 and 9; Separate opinion of Judge Rezek, § 6; Separate opinion of Judge *ad hoc* Bula-Bula, § 74.
[362] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of President Guillaume, §§ 9 and 12.

that the law permitted the exercise of universal jurisdiction in the absence of a territorial or personal active or passive connection. However, he also stated that "without any doubt, the evolution in the contemporary world of political ideas and conditions were favourable to the weakening of the territorial approach to the jurisdiction and to the emergence of a more functional approach in the meaning of serving a superior common goal".[363] In his separate opinion, Judge Rezek stated that universal jurisdiction without any territorial link was not authorised by today's international law. He stated that there would be no customary law "in formation" deriving from the isolated action of one State.[364] Judge *ad hoc* Bula-Bula, while stating that the principle of so-called universal jurisdiction could not seriously be contested in the terms of the relevant provisions of the 1949 Geneva Conventions, was of the same opinion and furthermore found that Article 129, second paragraph, GC III did not envisage jurisdiction *in absentia*.[365] In his dissenting opinion, Judge Oda stated that:

> It is one fundamental principle that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law . . . The scope of extraterritorial criminal jurisdiction has been expanded over the past few decades . . . Belgium is known for taking the lead in this field and its [Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended (1993)] may well be at the forefront of a trend. There is some national case law and some treaty-made law evidencing such a trend.

He stated, however, that "the law is not sufficiently developed".[366] In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal stated that:

> There are . . . certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law.[367]

These judges also found that the ICJ judgement in the *Lotus case* supported the lawfulness of the exercise of universal jurisdiction *in absentia*. However, they found that it was necessary that "universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international

[363] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Declaration of Judge Ranjeva, §§ 2, 5 and 9.
[364] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge Rezek, § 6.
[365] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge *ad hoc* Bula-Bula, §§ 74 and 75.
[366] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Dissenting opinion of Judge Oda, §§ 12 and 13.
[367] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, § 46.

community". Besides piracy, "war crimes . . . may be added to the list".[368] In addition, the judges considered that crimes against humanity as defined in the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind fell within this "small category [of acts] in respect of which an exercise of universal jurisdiction is not precluded under international law".[369] Judge Koroma, in his separate opinion, stated that "the judgement implies that while Belgium can initiate criminal proceedings in its jurisdiction against anyone", it would have to abide by the rules on immunities. He further stated that "in my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide".[370] Judge *ad hoc* Van den Wyngaert stated in her dissenting opinion that "it follows from the 'Lotus' case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law". She stated that neither conventional nor customary law prohibited the exercise of universal jurisdiction *in absentia* and concluded that:

International law clearly permits universal jurisdiction for war crimes and crimes against humanity . . . For crimes *against humanity*, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction. In the case of *war crimes*, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 [GC IV], which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians.[371] [emphasis in original]

306. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber held that:

Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other

[368] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, §§ 49 and 60–61.
[369] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, § 65.
[370] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge Koroma, §§ 7 and 9.
[371] ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Dissenting opinion of Judge *ad hoc* Van den Wyngaert, §§ 51–59.

courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.[372]

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

307. In 1997, in a statement before the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC stated that:

Under the existing principle of universal jurisdiction, any State has the right to prosecute persons alleged to have committed war crimes and no consent is required from any other States. This principle simply reaffirms the fundamental notion that war criminals are not immune from prosecution; those responsible for the commission of war crimes are accountable for their acts and must be brought to justice.[373]

VI. Other Practice

308. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 [Bases of Jurisdiction to Prescribe] is present.[374]

309. In 1993, in a memorandum on the war crimes tribunal for the former Yugoslavia, Human Rights Watch considered that the establishment of the Ad Hoc International Tribunal solely on the basis of the UN Security Council's mandate and not on universal jurisdiction would undermine the recognition of the Tribunal in the future.[375]

310. The Hague Agenda for Peace and Justice for the 21st Century, adopted at the Hague Appeal for Peace Conference in 1999, states that:

15. . . . It is now generally recognized that war crimes, crimes against the peace and violations of universally recognized human rights principles are matters of global rather than merely national concern . . . Civil society and domestic courts must do their part, as those of Spain are endeavoring to do in the case

[372] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 156.
[373] ICRC, Statement before the Preparatory Committee for the Establishment of an International Criminal Court, New York, 4–15 August 1997.
[374] The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 404.
[375] Human Rights Watch, Memorandum on the War Crimes Tribunal for Former Yugoslavia, New York, 26 April 1993, pp. 5 and 6.

of Pinochet. The Hague Appeal will call upon national legislative and judicial systems worldwide to incorporate the principle of universal jurisdiction for such crimes as well as torts into their laws in order to ensure that serious violations of human rights, especially against children, are not treated with impunity.

. . .

20. Recent trends in national and regional litigation and prosecution make it possible for victims of gross human rights and humanitarian law violations to hold abusers accountable. This right exists in some domestic courts and regional tribunals, including the European and Inter-American Courts of Human Rights, and has led to litigation against members of the private sector, such as mercenaries and arms manufacturing and other corporations. The Hague Appeal for Peace will advocate for the extension of this right throughout the international legal order.[376]

311. In 2000, in a report entitled "The *Pinochet* Precedent. How Victims Can Pursue Human Rights Criminals Abroad", Human Rights Watch identified the crimes in respect of which international law recognised universal jurisdiction. In its discussion of war crimes, the report stated that:

Serious violations of the laws and customs applicable in international armed conflict, even if not considered "grave breaches" of the [1949] Geneva Conventions, probably also give rise to universal jurisdiction, allowing but not always requiring a state to prosecute those responsible . . . In recent years, the concept of war crimes has been extended to internal conflicts as well, giving third states the right (but not necessarily the duty) to exercise universal jurisdiction.[377]

312. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

The competent authorities of a State on the territory of which is found a person against whom is alleged a serious violation of international humanitarian law committed in a non-international armed conflict are entitled to prosecute and try such a person before their courts; they are urged to do so.[378]

313. In 2000, in its Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, the ILA's Committee on International Human Rights Law and Practice stated that:

Parties to the Geneva Conventions are required to enact legislation to enable them to try persons alleged to have committed such offences, regardless of their nationality, to search for and prosecute such offenders and to assist each other in criminal

[376] Hague Appeal for Peace Conference, Hague Agenda for Peace and Justice for the 21st Century, May 1999, Points 15 and 20.

[377] Human Rights Watch, The *Pinochet* Precedent: How Victims Can Pursue Human Rights Criminals Abroad, New York, March 2000, p. 7.

[378] Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § VIII.

proceedings in connection with these offences. The exercise of universal jurisdiction is not permissive but clearly mandatory . . . [Serious violations of Common Article 3 of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character] have traditionally not been considered as criminal offences that are subject to universal jurisdiction. However, there is increasing support for the view that this position is no longer tenable. The atrocities committed during the armed conflicts in the former Yugoslavia and Rwanda have obviously contributed to this shift . . . It is difficult to see why domestic courts would not have the competence to try these same offences on the basis of universal jurisdiction . . . It is fair to assume . . . that [Article 8 of the 1998 ICC Statute] will also be regarded as an authoritative pronouncement on the violations of the law of war that qualify as war crimes under customary international law. A corollary then is that these offences are covered by the principle of universal jurisdiction.[379]

314. The Princeton Principles on Universal Jurisdiction, adopted by an expert meeting convened by the Princeton Project on Universal Jurisdiction at Princeton University in 2001, states that:

1. For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.
3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.
4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").
5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.[380]

[379] ILA, Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, Report of the 69th Conference, London, 25–29 July 2000, pp. 408–409.

[380] Princeton Principles on Universal Jurisdiction, adopted by an expert meeting convened by the Princeton Project on Universal Jurisdiction, Princeton University, 27 January 2001, Principle 1.

C. Prosecution of War Crimes

General

I. Treaties and Other Instruments

Treaties

315. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

316. Article VI of the 1948 Genocide Convention provides that:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

317. Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV provide that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV].

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV].

318. Article 28 of the 1954 Hague Convention provides that:

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

319. Article 85(1) AP I provides that "the provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol". The grave breaches of AP I are defined in Articles 11(4), 85(3) and 85(4) AP I. Articles 11 and 85 AP I were adopted by consensus.[381]

[381] CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69; *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

320. Article 8(1) of the 1979 International Convention against the Taking of Hostages provides that:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

However, Article 12 of the Convention states that:

In so far as the [1949] Geneva Conventions . . . or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the [1949] Geneva Conventions . . . and the Protocols thereto, including armed conflicts mentioned in [Article 1(4) AP I], in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

321. Article 5 of the 1984 Convention against Torture provides that:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.[382]

322. Article 7 of the 1984 Convention against Torture emphasises States' duty to prosecute or extradite alleged offenders, stating that:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases

[382] Similar requirements to prosecute or extradite are also found in: 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Article 4; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 7; 1971 Convention on Psychotropic Substances, Article 22(2)(a)(iv); 1971 OAS Convention to Prevent and Punish Acts of Terrorism, Article 5; 1972 Protocol Amending the 1961 Single Convention on Narcotic Drugs, Article 14; 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, Article V; 1973 Convention on Crimes against Internationally Protected Persons, Article 7; 1977 European Convention on the Suppression of Terrorism, Article 7; 1979 Convention on the Physical Protection of Nuclear Material, Article 9; 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Article 10; 1989 UN Mercenary Convention, Article 12.

contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

323. Article 7(1) of the 1993 CWC provides that:

Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

324. Article 9(2) of the 1994 Convention on the Safety of UN Personnel provides that "each State Party shall make the crimes set out in paragraph 1 [of Article 9] punishable by appropriate penalties which shall take into account their grave nature".

325. Article IV of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that:

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
b. When the accused is a national of that state;
c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

However, Article XV excludes the application of the Convention in international armed conflicts governed by the 1949 Geneva Conventions and their Additional Protocols.

326. Article 14 of the 1996 Amended Protocol II to the CCW provides that:

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction and control.
2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol,

wilfully kill or cause serious injury to civilians and to bring such persons to justice.

327. Article 9 of the 1997 Ottawa Convention provides that:

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

328. The preamble to the 1998 ICC Statute provides that:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,

. . .

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

329. Article 12 of the 1998 ICC Statute provides that:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
   (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

330. Article 13 of the 1998 ICC Statute provides that:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

331. Article 15(2) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Serious violations of this Protocol" provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article [i.e. serious violations of the Protocol] and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

332. Article 16(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Jurisdiction" provides that:

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

(a) when such an offence is committed in the territory of that State;
(b) when the alleged offender is a national of that State;
(c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

333. Article 17(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Prosecution" provides that:

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

334. Article 21 of the 1999 Second Protocol to the 1954 Hague Convention concerning "Measures regarding other violations" provides that:

Each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

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

335. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that "this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".

336. Article 1 of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities".

337. Article 4(1) and (2) of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

338. Article 6(1) of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that "each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction".

Other Instruments

339. Article 19 of the 1956 New Delhi Draft Rules provides that:

All States or Parties concerned are under the obligation to search for and bring to trial any person having committed, or ordered to be committed, an infringement of the present rules, unless they prefer to hand the person over for trial to another State or Party concerned with the case.

340. Paragraph 18 of the 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that:

Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespectively of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

341. Article 6(1) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, dealing with the "Obligation to try or extradite", provides that "a State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him".

342. Article 10 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that "the Parties . . . shall repress any misuse of the [red cross] emblem and attacks on persons or property under its protection".

343. Article 11 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

Each party undertakes, when it is officially informed of [an allegation of violations of IHL] made or forwarded by the ICRC, to open an inquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

344. Article 3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the Parties . . . shall repress any misuse of the [red cross] emblem or attacks on persons or property under its protection".
345. Article 5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that:

> Each party undertakes, when it is informed, in particular by the ICRC, of an allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

346. Article 1 of the 1993 ICTY Statute provides that "the International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".
347. Article III(1) of the 1994 Comprehensive Agreement on Human Rights in Guatemala provides that "the Parties agree on the need for a firm action against impunity. The Government shall not sponsor the adoption of legislative or any other type of measures designed to prevent the prosecution and punishment of persons responsible for human rights violations". Article III(3) provides that "no special law or exclusive jurisdiction may be invoked to uphold impunity in respect of human rights violations".
348. Paragraph 20 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that "in the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches".
349. Article 1 of the 1994 ICTR Statute provides that:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

350. Article 9 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Obligation to extradite or prosecute", provides that:

> Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] is found shall extradite or prosecute that individual.

351. Section 4 of the 1999 UN Secretary-General's Bulletin states that "in cases of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts".

352. Article 3 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

> The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, *inter alia*, a State's duty to:
> (a) Take appropriate legal and administrative measures to prevent violations;
> (b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;
> (c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;
> (d) Afford appropriate remedies to victims; and
> (e) Provide for or facilitate reparation to victims.

353. Article 4 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that "violations of international ... humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish the perpetrators adjudged to have committed these violations".

354. Paragraph 52 of the 2000 Cairo Plan of Action urges States "to implement international humanitarian law in full, in particular by adopting national legislation to tackle the culture of impunity and to bring to justice the perpetrators of war crimes, crimes against humanity and genocide".

II. National Practice

Military Manuals

355. Argentina's Law of War Manual states that:

> In the [Geneva] Conventions and [AP I], it is provided that the governments shall take such legislative measures as may be necessary to determine adequate penal sanctions to be applied to persons committing or ordering the commission of any of the grave breaches; the persons accused of having committed, or of having ordered to commit, those breaches ... shall be searched for.
> ... It is also possible to hand the author of the violations over to an international tribunal, in case such a tribunal has been established.[383]

The manual also provides that:

> At the request of one of the parties to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged

[383] Argentina, *Law of War Manual* (1989), § 8.02.

violation of the [Geneva] Conventions. If an agreement is not reached as to the procedure of investigation, the parties shall agree to elect an arbitrator who shall decide the procedure to be followed.

If a violation is established, the parties to the conflict must put an end to it and repress it with the least possible delay.[384]

In addition, the manual states that "the contracting parties and the parties to the conflict shall repress grave breaches and adopt the measures necessary to ensure that any violation of the Conventions or of Protocol I cease".[385]

356. Australia's Commanders' Guide states that:

Nations are required to search out, prosecute, and if necessary, extradite individuals who are suspected of breaches of LOAC. Other war crimes may be so serious as to warrant or justify instituting criminal prosecutions. In some cases serious war crimes will result in a formal war crimes trial.[386]

The manual further states that:

Notwithstanding the practical difficulties that may be experienced in bringing enemy war criminals to trial, ADF members should not underestimate the resolve of the Australian Government to vigorously prosecute war criminals. Given Australia's demonstrated support for human rights, ADF members can expect that appropriate action will be taken should they violate LOAC. An international fact-finding commission has been established to investigate LOAC breaches. Australia has accepted the operation of this commission.[387]

357. Belgium's Law of War Manual states that "the Nuremberg and Tokyo trials, following the Second World War, ... only confirmed what had happened after the First World War, i.e., prosecution of foreigners before national tribunals for violations of the law of war".[388] It adds that "the application of the criminal law of war remains in the hands of national communities ... Since the Second World War, national tribunals have ... judged members of their own armed forces for 'war crimes' or other punishable acts which cannot be justified by the situation of war."[389] The manual further states that:

The States signatory to the [Geneva] Conventions undertook to take a series of measures to promote respect thereof.

These measures can be summarized as follows:

...

2) criminalisation of grave breaches of the Geneva Conventions ...
3) search for, identification of and prosecution by the national courts of the authors of grave breaches, regardless of their nationality, or delivery (extradition) of those authors to the State asking for them, within the limits of the legislation in force.[390]

[384] Argentina, *Law of War Manual* (1989), § 8.06.
[385] Argentina, *Law of War Manual* (1989), § 8.07.
[386] Australia, *Commanders' Guide* (1994), § 1306.
[387] Australia, *Commanders' Guide* (1994), § 1310.
[388] Belgium, *Law of War Manual* (1983), p. 18, see also p. 54.
[389] Belgium, *Law of War Manual* (1983), p. 19.
[390] Belgium, *Law of War Manual* (1983), p. 55.

358. Cameroon's Disciplinary Regulations provides that violators of IHL are "war criminals who may be brought before military tribunals".[391]
359. Cameroon's Instructors' Manual states that "any act contrary to respect for the Law of War must be sanctioned".[392]
360. Canada's Unit Guide notes that the Geneva Conventions "impose an obligation on all nations which have ratified them to search for and try all persons who committed or ordered to be committed grave breaches of the Conventions".[393]
361. Canada's LOAC Manual provides that:

> Parties to the conflict shall take such measures as may be necessary to suppress and punish all breaches of [GC III]. If a breach amounts to a grave breach all persons responsible therefor, or having ordered such acts, shall, regardless of their nationality, be liable to be tried by any party to [GC III]. They may also be handed over by the latter for trial by any other party to [GC III] able to prosecute effectively.[394]

The manual also provides that:

> At the request of a party to the conflict, an enquiry shall be instituted in a manner to be decided between the interested parties, concerning any alleged violation of the Geneva Conventions. If a violation is established, parties to the conflict must put an end to it and punish those responsible with the least possible delay.[395]

The manual further states that "States have the obligation to repress grave breaches (i.e., ensure perpetrators are accused and tried) and to take measures necessary to suppress (i.e., bring to an end) all other violations".[396] In addition, it states that:

> 37. The Criminal Code of Canada contains several provisions that allow Canadian courts to assume jurisdiction over and try alleged war criminals in a wide variety of circumstances.
> 38. Any state into whose hands a person who has allegedly committed a grave breach falls is entitled to institute criminal proceedings, even though that state was neutral during the conflict in which the offence was alleged to have been committed. Since 1945, it has been generally accepted that if a state is unwilling to institute its own proceedings, it may hand the person over to a claimant state on presentation of *prima facie* evidence that the alleged offender has committed the offence in question . . .
> 43. The four Geneva Conventions obligate the parties thereto to enact such legislation as may be necessary to provide effective sanctions for persons committing or ordering any of the acts which would constitute grave breaches under the Conventions. They also provide that the parties will take the measures

[391] Cameroon, *Disciplinary Regulations* (1975), Article 35.
[392] Cameroon, *Instructors' Manual* (1992), p. 25, § 121.1.
[393] Canada, *Unit Guide* (1990), § 702.1.
[394] Canada, *LOAC Manual* (1999), p. 10-6, § 52.
[395] Canada, *LOAC Manual* (1999), p. 15-3, § 18.
[396] Canada, *LOAC Manual* (1999), p. 16-2, § 11.

necessary to suppress any violation of the Conventions not amounting to grave breaches.[397]

362. Canada's Code of Conduct states that:

It is essential that any alleged breaches of these rules [of the Code of Conduct] and the Law of Armed Conflict be investigated rapidly in as impartial a manner as possible. An impartial investigation will not only assist in bringing violators to justice, thereby maintaining discipline, but will also provide the best opportunity to clear anyone who has not acted improperly. In most cases that investigation will be carried out by the military police or National Investigation Service.[398]

363. Colombia's Basic Military Manual provides that "war crimes shall be repudiated and sanctioned by the international community, by States through their legislation and by civil society".[399] It specifies that, before conflicts, States are obliged "to establish in national legislation, especially in criminal law, rules which define and punish crimes . . . against IHL".[400] The manual further states that "violations committed by officials [of the State or] . . . soldiers . . . shall be sanctioned in compliance with the disciplinary, administrative and criminal legislation of the State".[401] This is also the case for violations committed by members of organised armed groups.[402]

364. The Military Manual of the Dominican Republic reminds soldiers that they "may be tried and convicted for crimes committed in combat even after they have left the service. Furthermore, criminal acts may make your mission harder and thereby endanger your life."[403]

365. Ecuador's Naval Manual states that "in the event of a clearly established violation of the law of armed conflict, the aggrieved State may: . . . punish individual offenders either during the conflict or upon cessation of hostilities".[404] It adds that:

Belligerent States have the obligation, under international law, to punish their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that belligerent States have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offences.[405]

366. France's LOAC Summary Note provides that "grave breaches of the law of war are war crimes which must be investigated, brought before each party's courts and punished under criminal law".[406]

[397] Canada, *LOAC Manual* (1999), pp. 16-5 and 16-6, §§ 37–38 and 43.
[398] Canada, *Code of Conduct* (2001), Rule 11, § 3.
[399] Colombia, *Basic Military Manual* (1995), p. 31.
[400] Colombia, *Basic Military Manual* (1995), p. 27.
[401] Colombia, *Basic Military Manual* (1995), p. 36.
[402] Colombia, *Basic Military Manual* (1995), p. 37.
[403] Dominican Republic, *Military Manual* (1980), p. 12.
[404] Ecuador, *Naval Manual* (1989), § 6.2.
[405] Ecuador, *Naval Manual* (1989), § 6.2.5.
[406] France, *LOAC Summary Note* (1992), § 3.4.

367. France's LOAC Teaching Note, in a part dealing with "grave breaches of the rules of the law of armed conflict", states that:

> On the criminal level, persons charged with [grave breaches of the Geneva Conventions] may be prosecuted before French judicial courts, but also before foreign courts or international criminal courts having jurisdiction over war crimes: today this means the International Criminal Tribunals for the Former Yugoslavia and Rwanda for the crimes committed solely on the occasion of these two conflicts; tomorrow, this will mean . . . the International Criminal Court which will have jurisdiction over all war crimes and crimes against humanity in case of the failure of national tribunals.[407]

368. Germany's Military Manual provides that "each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he can be prosecuted according to penal or disciplinary provisions".[408] The manual refers to Articles 49 and 50 GC I, 50 and 51 GC II, 129 and 130 GC III, 146 and 147 GC IV and 85 AP I and states that "the four Geneva Conventions and Additional Protocol I oblige the contracting parties to make grave breaches of the protective provisions liable to punishment and to take all suitable measures to ensure compliance with the Conventions".[409]

369. Germany's IHL Manual provides that "under public international law, every State has the duty to hold responsible, in a criminal and in a disciplinary way, the members even of its own armed forces who have violated the rules of international humanitarian law".[410]

370. Italy's IHL Manual provides that "war crimes . . . are punished by the military penal code applicable in times of war, and international cooperation for the pursuit, arrest, extradition and punishment of the persons who have allegedly committed [such crimes] is established".[411]

371. South Korea's Operational Law Manual provides that persons who have committed a grave breach of IHL "shall be tried or extradited".[412]

372. The Military Manual of the Netherlands refers to Article 86 AP I, noting the duty to repress grave breaches and to take measures necessary to suppress all other breaches which result from a failure to act when under a duty to do so.[413]

373. The Military Handbook of the Netherlands provides that "hostile persons who have committed a war crime and fall into the hands of [one's] own troops must be tried".[414]

374. New Zealand's Military Manual states that:

[407] France, *LOAC Teaching Note* (2000), p. 7.
[408] Germany, *Military Manual* (1992), § 1207.
[409] Germany, *Military Manual* (1992), § 1208.
[410] Germany, *IHL Manual* (1996), § 803.
[411] Italy, *IHL Manual* (1991), Vol. I, § 86.
[412] South Korea, *Operational Law Manual* (1996), p. 193, § 4.
[413] Netherlands, *Military Manual* (1993), pp. IX-3/IX-6.
[414] Netherlands, *Military Handbook* (1995), p. 7-45.

The [Geneva] Conventions make one further departure of significance. For the first time they provide in treaty form a clear obligation upon States to punish what the Conventions describe as "grave breaches", even if those States are not parties to the conflict, the offenders and the victims not their nationals, and even though the offences were committed outside the territorial jurisdiction of the State concerned. In other words, the Conventions have introduced the concept of universal jurisdiction in so far as grave breaches are concerned, and if the State in question is unwilling to try an offender found within its territory, it is obliged to hand him over for trial to any party to the Convention making out a *prima facie* case.[415]

The manual also notes that "in the event of 'any alleged violations' of the 1949 [Geneva] Conventions an enquiry must be instituted at the request of a Party to the conflict. If a violation be established, the Parties to the conflict must put an end to it and punish it with the least possible delay."[416] It further provides that:

The four Geneva Conventions require the parties to them to enact such legislation as may be necessary to provide effective sanctions for persons committing or ordering any of the acts which would constitute grave breaches under the Conventions. They also provide that the parties will take the measures necessary to suppress any violation of the Convention not amounting to grave breaches.[417]

The manual adds that "any grave breach described as such in the [Geneva] Conventions and the first protocol [AP I] shall be an indictable offence".[418]

375. Nigeria's Military Manual recalls that "the High Contracting Parties [to AP I] and the parties to the conflict shall repress breaches, and take measures necessary to suppress all other breaches of the [Geneva] conventions or of [AP I] which result from a failure to act when under a duty to do so".[419]

376. According to Nigeria's Manual on the Laws of War, "the Geneva Conventions stipulate that a contracting party shall enact all necessary legislation to prohibit acts which contravene their provisions".[420]

377. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that:

All human rights-related incidents allegedly committed by members of the AFP and PNP in the course of security/police operations shall be immediately investigated and if evidence warrants, charges shall be filed in the proper courts. Reports of investigation as well as actions taken shall be submitted to GHQ or PNP HQs fifteen (15) days after receipt of information about the alleged human rights violation. [The] same shall be forwarded to the Department of National Defense or Department of Interior and Local Government.[421]

[415] New Zealand, *Military Manual* (1992), § 117.5.
[416] New Zealand, *Military Manual* (1992), § 1609.
[417] New Zealand, *Military Manual* (1992), §§ 1711.1 and 1711.4.
[418] New Zealand, *Military Manual* (1992), § 1712.
[419] Nigeria, *Military Manual* (1994), p. 9, § 9e.
[420] Nigeria, *Manual on the Laws of War* (undated), § 7.
[421] Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(b)(1).

378. South Africa's LOAC Manual states that "signatory States [of the Geneva Conventions] are required to treat as criminals under domestic law anyone who commits or orders a grave breach [of the Geneva Conventions]".[422] It adds that:

Grave breaches of the law of war are regarded as war crimes. They shall be repressed by penal sanctions . . .

Grave breaches are indictable offence[s] under Section 7 of the Geneva Conventions Act, RSA, 1957. South Africa is obliged to search out and prosecute or extradite those who have committed a grave breach. For all breaches (i.e. violations of the law of war), South Africa has an obligation to take steps to ensure that the offences do not happen again . . . If breaches went unpunished, it would signify the degradation of human values and the regression of the entire concept of humanity.[423]

379. Spain's LOAC Manual states that "the Geneva Conventions and Additional Protocol I impose on States parties the obligation to adopt in their domestic legislation all the legislative measures necessary to determine adequate penal sanctions against those who commit, or order to be committed, any kind of grave breaches".[424] It states that "Spain has complied with the obligation undertaken when ratifying the Geneva Conventions and dedicated Title II of Volume II of the Military Criminal Code to categorize and sanction the offences against the laws and customs of war".[425] The manual also provides that:

States have the obligation to search for persons accused of having committed, or having ordered to be committed, grave breaches, being obliged to make them appear before their own tribunals, regardless of their nationality. They can also agree to the extradition of those persons in order for them to be judged by other States, in accordance with the legal obligations which regulate the said extradition.

. . .

With regard to breaches that are not of a grave nature, the necessary measures must be taken for their immediate cessation.[426]

380. Sweden's IHL Manual provides that:

It is incumbent upon parties to the Conventions to enact legislation necessary to apply effective sanctions to persons committing, or ordering to be committed, breaches of the Conventions. Each State is obliged to search for persons accused of committing or ordering a grave breach and shall bring them, regardless of their nationality, before its own courts. A permitted alternative is to hand over the wanted person to another contracting party, provided that this state has an interest in punishing the breach and has made out a *prima facie* case.

For breaches not considered as grave, the contracting parties' obligations are limited to taking any steps needed to ensure that the transgressions cease.[427]

[422] South Africa, *LOAC Manual* (1996), § 35.
[423] South Africa, *LOAC Manual* (1996), §§ 41 and 42.
[424] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1), see also § 1.1.d.(6).
[425] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1)
[426] Spain, *LOAC Manual* (1996), Vol. I, §§ 11.8.b.(1) and 11.8.b.(2).
[427] Sweden, *IHL Manual* (1991), Section 4.2, pp. 93 and 94.

381. Switzerland's Basic Military Manual provides that:

1. Violations of the laws and customs of war must be punished. Those responsible may be brought either before the courts of their own country or before the courts of the injured State, or before an international tribunal.
2. Each Contracting Party is also bound to search for and prosecute in its own courts persons who have committed grave breaches of the provisions of the law of nations in time of war.[428]

382. The UK Military Manual notes that "the Regulations [1907 HR] themselves . . . provide that the perpetrators of the particular offences of seizure, damage or wilful destruction of churches, hospitals, schools, museums, historic monuments, works of art, *etc.*, shall be prosecuted".[429] It also states that:

In the case of "any alleged violations" of the 1949 [Geneva] Conventions an inquiry must be instituted at the request of a party to the conflict. If a violation be established, the parties to the conflict must put an end to it and punish it with the least possible delay. These provisions form an important method of ensuring that the laws of war are observed by belligerents.[430]

The manual further states that:

All parties to the 1949 [Geneva] Conventions undertook to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the "grave breaches" of the Conventions. Parties are also bound to search for persons alleged to have committed, or ordered, "grave breaches", and regardless of their nationality, to bring them to trial in their own courts. If a party so prefers, and in accordance with the provisions of its own legislation, it may hand such persons over for trial to another State concerned which is a party to the Conventions, provided that that other State has made out a *prima facie* case against those persons.[431]

383. The US Field Manual states that:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the [Geneva] Convention[s] . . . Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.[432]

The manual adds that:

The High Contracting Parties [to the Geneva Conventions] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the [Geneva] Conventions . . .

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches

[428] Switzerland, *Basic Military Manual* (1987), Article 198.
[429] UK, *Military Manual* (1958), § 618.
[430] UK, *Military Manual* (1958), § 621.
[431] UK, *Military Manual* (1958), § 639.
[432] US, *Field Manual* (1956), § 496.

and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case ...

[These] principles ... are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces ...

Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.[433]

384. The US Air Force Pamphlet states that:

Domestic tribunals have the competence and, under the grave breaches articles of the Geneva Conventions, the strict obligation to punish certain violations ... Ad hoc international tribunals, such as those established in Germany and Japan following World War II, did punish individuals for their personal actions violating the law of armed conflict. However, the importance of criminal responsibility ... primarily relates to a state's own efforts to enforce the law of armed conflict with respect to its *own* armed forces.[434] [emphasis in original]

It further states that:

There are express obligations to search for persons alleged to have committed grave breaches, to bring them to trial or extradite them, to take all measures necessary to suppress all acts contrary to the Conventions and to implement all obligations ... The United States has for many years urged measures on the international scene to improve the implementation and better observance of the law of armed conflict ...

Within the Geneva Conventions system, state responsibility to repress breaches is stressed, and no provision is made for international tribunals within the Conventions ...

In the United States, jurisdiction is not limited to offenses against US nationals but extends to offenses against victims of other nationalities. Violations by adversary personnel, when appropriate, are tried as offenses against international law which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in regular military courts, military commissions, provost courts, military government courts, and other military tribunals of the United States, as well as in international tribunals.[435]

385. The US Soldier's Manual reminds soldiers that they "may be tried and convicted for crimes committed in combat even after they have left the service. Furthermore, criminal acts may make your mission harder and thereby endanger your life".[436]

386. The US Instructor's Guide notes that "nearly all nations have signed the Geneva Conventions and have agreed in doing so to search out, to bring to trial,

[433] US, *Field Manual* (1956), §§ 506(a) and (b) and 507(b).
[434] US, *Air Force Pamphlet* (1976), § 10-6.
[435] US, *Air Force Pamphlet* (1976), §§ 15-2(b), 15-3(a) and 15-4(a).
[436] US, *Soldier's Manual* (1984), p. 27.

and to punish all persons who commit a grave breach of the conventions. You may be tried and convicted even after leaving the service".[437]

387. The US Naval Handbook provides that "in the event *of a clearly established violation* of the law of armed conflict, the aggrieved nation may: . . . punish individual offenders either during the conflict or upon cessation of hostilities".[438] (emphasis in original) The Handbook further states that:

> Belligerents have the obligation under international law to punish their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that belligerents have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offenses.[439]

388. The YPA Military Manual of the SFRY (FRY) provides that:

> The parties to a conflict have a duty to prevent violations of the laws of war by all available means and to call to account and punish perpetrators, regardless of their nationality. States are obliged, in peace time, to provide in their legislation that serious violations of the laws of war are crimes.[440]

The manual also states that "parties to a conflict are authorised and obliged to determine the criminal responsibility of members of their own or enemy armed forces, that is, their own or enemy citizens who ordered the commission or committed war crimes or other serious violations of the laws of war".[441] It further states that:

> Persons who commit a war crime or other serious violations of the laws of war shall be brought to justice before their own national courts or, if they fall into enemy hands, before his courts. The perpetrators of such criminal acts may also be brought to justice before an international court if such court is established.[442]

National Legislation

389. Argentina's Law on the Creation of a National Committee to Investigate War Crimes Committed during the War in the South Atlantic establishes:

> within the Ministry of National Defence the National Committee to investigate War Crimes which aims at clarifying the facts related to the possible commission of war crimes during the period of the belligerent incidents which occurred in the South Atlantic between the months of April and June of [1982].[443]

390. Argentina's Draft Code of Military Justice provides for the introduction of the title "Offences against protected persons and objects in case of armed conflict" in the Code of Military Justice as amended.[444] This title provides for

[437] US, *Instructor's Guide* (1985), p. 13.
[438] US, *Naval Handbook* (1995), § 6.2.
[439] US, *Naval Handbook* (1995), § 6.2.5.
[440] SFRY (FRY), *YPA Military Manual* (1988), § 18.
[441] SFRY (FRY), *YPA Military Manual* (1988), § 32.
[442] SFRY (FRY), *YPA Military Manual* (1988), § 20.
[443] Argentina, *Law on the Creation of a National Committee to Investigate War Crimes Committed during the War in the South Atlantic* (1995), Article 1.
[444] Argentina, *Draft Code of Military Justice* (1998), Article 287, introducing a new Title XVIII, Chapter I in the *Code of Military Justice as amended* (1951).

the punishment of specified prohibited acts "committed in the event of armed conflict".[445] As to this title scope of application, the Draft Code states that:

> [The present title applies to the following protected persons:]
> 1) The wounded, sick and shipwrecked and medical or religious personnel protected by [GC I and II or AP I];
> 2) Prisoners of war protected by [GC III or AP I];
> 3) The civilian population and [individual] civilian persons protected by [GC IV or AP I];
> 4) Persons *hors de combat* and the personnel of the protecting power and of its substitute, protected by [the Geneva Conventions or AP I];
> 5) *Parlementaires* and the persons accompanying them, protected by [the 1899 Hague Convention II];
> 6) Any other person [to which AP II] or any other international treaty to which Argentina is a party applies.[446]

The Draft Code further provides that:

> A soldier who, at the occasion of an armed conflict, commits . . . any other violation or act contrary to the provisions of the international treaties to which Argentina is a party and relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property in case of armed conflict, will be punished.[447]

391. In its Chapter 33 entitled "Crimes against the peace and security of mankind", Armenia's Penal Code provides for the punishment of certain acts, committed during armed conflicts, which violate the laws and customs of war, including "Serious breaches of international humanitarian law during armed conflict", crimes against humanity and genocide.[448]

392. Australia's War Crimes Act as amended gives Australian courts jurisdiction over individuals accused of war crimes committed during the Second World War. The Act defines a war crime as a serious crime committed "in the course of hostilities in a war", "in the course of an occupation", "in pursuing a policy associated with the conduct of a war or with an occupation" or, "on behalf of, or in the interests of, a power conducting a war or engaged in an occupation". War is defined as "a) a war, whether declared or not; b) any other armed conflict between countries; or c) a civil war or similar armed conflict (whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945".[449]

[445] Argentina, *Draft Code of Military Justice* (1998), Articles 289-296, introducing new Articles 873-880 in *the Code of Military Justice as amended* (1951).
[446] Argentina, *Draft Code of Military Justice* (1998), Article 288, introducing a new Article 872 in the Code of *Military Justice as amended* (1951).
[447] Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the *Code of Military Justice as amended* (1951).
[448] Armenia, *Penal Code* (2003), Articles 383, 386–387 and 390–397.
[449] Australia, *War Crimes Act as amended* (1945), Sections 5, 7 and 9.

393. Australia's Geneva Conventions Act as amended provides for the punishment of grave breaches of the Geneva Conventions and AP I. It states that:

> A person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence.
> . . .
> This section applies to persons regardless of their nationality or citizenship.[450]

394. Australia's ICC (Consequential Amendments) Act contains a list of acts qualified as "Genocide" (Sections 268.3-268.7), "Crimes against humanity" (Sections 268.8–268.23), "War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions" (Sections 268.24–268.34), "Other serious war crimes that are committed in the course of an international armed conflict" (Sections 268.35–268.68), "War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict" (Sections 268.69–268.76), "War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict" (Sections 268.77–268.94), "War crimes that are grave breaches of Protocol I to the Geneva Conventions" (Sections 268.95–268.101). The Act also includes the penalty to be imposed by Australian courts for each of these crimes.[451]

395. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War, which establishes disciplinary, administrative and criminal liability, is applicable in international and non-international armed conflicts.[452]

396. Azerbaijan's Criminal Code provides for punishment, *inter alia*, in case of war crimes (Article 57). In the chapter entitled "War crimes", the Code contains further provisions criminalising: the use of "mercenaries" (Article 114); "violations of [the] laws and customs of war" (Article 115); "violations of the norms of international humanitarian law in time of armed conflict" (Article 116); "negligence or giving criminal orders in time of armed conflict" (Article 117); "pillage" (Article 118); and "abuse of protected signs" (Article 119).[453]

397. Bangladesh's International Crimes (Tribunal) Act provides that:

> (1) A Tribunal shall have the power to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed in the territory of Bangladesh, whether before or after the commencement of this act, any of the following crimes.

[450] Australia, *Geneva Conventions Act as amended* (1957), Section 7(1) and (3).
[451] Australia, *ICC (Consequential Amendments) Act* (2002), Sections 268.3–268.101.
[452] Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 8 and 31.
[453] Azerbaijan, *Criminal Code* (1999), Articles 57 and 114–119.

(2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely: –
(a) Crimes against Humanity . . .
(b) Crimes against Peace . . .
(c) Genocide . . .
(d) War Crimes . . .
(e) Violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949 . . .
(f) Any other crimes under international law;
(g) Attempt abatement or conspiracy to commit any such crimes;
(h) Complicity in or failure to prevent commission of any such crimes.[454]

398. The Geneva Conventions Act of Barbados provides that:

A grave breach of any of the Geneva Conventions of 1949 that would, if committed in Barbados, be an offence under any law of Barbados, constitutes an offence under that law when committed outside Barbados.
. . . A person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados.[455]

399. The Criminal Code of Belarus, in a chapter entitled "War crimes and other violations of the laws and customs of war", provides, *inter alia*, for the punishment of specified acts, such as "mercenary activities" (Article 133), "use of weapons of mass destruction" (Article 134), "violations of the laws and customs of war" (Article 135), "criminal offences against the norms of international humanitarian law during armed conflicts" (Article 136), or "abuse of signs protected by international treaties" (Article 138).[456]

400. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides for the punishment of genocide and crimes against humanity.[457] It further provides that acts defined as:

grave breaches . . . which cause injury or damage, by act or omission, to persons or objects protected by the [Geneva Conventions] and by Protocols I and II additional to those Conventions . . . shall . . . constitute crimes under international law and be punishable in accordance with the provisions of the present Act.[458]

The Law lists such grave breaches, stating, however, that this list is "without prejudice to the criminal provisions applicable to other breaches of the Conventions referred to in the present Act and without prejudice to criminal provisions

[454] Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3.
[455] Barbados, *Geneva Conventions Act* (1980), Section 3(1)–(2).
[456] Belarus, *Criminal Code* (1999), Articles 132–138.
[457] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Articles 1(1) and 1(2).
[458] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).

applicable to breaches committed out of negligence".[459] In addition, it provides that:

> Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.
>
> In respect of breaches committed abroad by a Belgian national against a foreigner, no filing of complaint by the foreigner or his family or official notice by the authority of the country in which the breach was committed shall be required.[460]

401. The Criminal Code of the Federation of Bosnia and Herzegovina contains provisions regarding the punishment of certain acts, some of them committed "in time of war or armed conflict", such as: "war crimes against civilians" (Article 154); "war crimes against the wounded and sick" (Article 155); "war crimes against prisoners of war" (Article 156); "organizing a group and instigating the commission of genocide and war crimes" (Article 157); "unlawful killing or wounding of the enemy" (Article 158); "marauding" (Article 159); "using forbidden means of warfare" (Article 160); "violating the protection granted to bearers of flags of truce" (Article 161); "cruel treatment of the wounded, sick and prisoners of war" (Article 163); "destruction of cultural and historical monuments" (Article 164); and "misuse of international emblems" (Article 166).[461] The Criminal Code of the Republika Srpska contains the same provisions.[462]

402. Botswana's Geneva Conventions Act provides that:

> Any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say [Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV] shall be guilty of an offence and [be punished].
>
> In the case of an offence under this section [i.e. a grave breach in the meaning of Articles 50 GC I, 51 GC II, 130 GC and 147 GC IV] committed outside Botswana, a person may be proceeded against, indicted, tried and punished therefor in any place in Botswana as if the offence had been committed in that place.[463]

403. Bulgaria's Penal Code as amended provides for the punishment of a list of specified acts entitled "Crimes against the laws and customs of waging war".[464]

404. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes aims at "integrating into Burundian legislation the crime of genocide, the crimes against humanity and war crimes, and to organize the procedure of

[459] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).
[460] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 7.
[461] Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154–161 and 163–166.
[462] Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433–445.
[463] Botswana, *Geneva Conventions Act* (1970), Section 3(1) and (2).
[464] Bulgaria, *Penal Code as amended* (1968), Articles 410–415.

prosecution and of bringing to trial of persons accused for such crimes".[465] It provides for the punishment of a list of acts defined as genocide, crimes against humanity and war crimes.[466] The Draft Law also provides that:

The crime of genocide, crimes against humanity and war crimes shall be the subject of an inquiry, and the persons against whom clues of guilt exist are searched for, arrested, brought before the competent courts and, if they are found guilty, punished in conformity with the procedure foreseen by the criminal procedure code or by other specific provisions foreseen by the law.[467]

405. The express purpose of Cambodia's Law on the Khmer Rouge Trial is to:

bring to trial senior leaders of Democratic Kampuchea and those who were responsible for crimes and serious violations of Cambodian penal law, international law and custom, and international conventions recognized by Cambodia, and which were committed during the period from April 17, 1975 to January 6, 1979.[468]

It therefore provides for the establishment of "Extraordinary Chambers . . . in the existing courts, namely the trial court, the appeals court, and the supreme court" (Article 2) in order to permit the prosecution and punishment of persons having committed "any of the crimes set forth in the 1956 Penal Code" such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the Convention on Crimes against Internationally Protected Persons (Article 8), committed during the relevant period.[469]

406. Canada's Geneva Conventions Act as amended provides that:

Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 [GC I], Article 51 [GC II], Article 130 [GC III] Article 147 [GC IV] or Article 11 or 85 [AP I] is guilty of an indictable offence and [is liable to punishment].

Where a person is alleged to have committed an offence [in the meaning of the above], proceedings in respect of that offence may, whether or not the person is in Canada, be commenced in any territorial division in Canada and that person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.[470]

407. Canada's Crimes against Humanity and War Crimes Act provides that for offences within Canada "every person is guilty of an indictable offence who

[465] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 1.
[466] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Articles 2–5 and 8–19.
[467] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 22.
[468] Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 1.
[469] Cambodia, *Law on the Khmer Rouge Trial* (2001), Articles 2–8.
[470] Canada, *Geneva Conventions Act as amended* (1985), Section 3(1) and (2).

commits (a) genocide; (b) a crime against humanity; or (c) a war crime".[471] It adds that for offences outside Canada, "every person who, either before or after coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime is guilty of an indictable offence and may be prosecuted".[472] It further adds that "war crime means an act or omission committed during an armed conflict that . . . constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts" and it specifies that the crimes described in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law".[473]

408. Chile's Code of Military Justice, under the heading "Offences against international law", provides, *inter alia*, for the punishment of certain war crimes.[474]

409. China's Law Governing the Trial of War Criminals contains a list of offences regarded as war crimes and also provides for the punishment of "other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights".[475]

410. Colombia's Penal Code, under the heading "Crimes against persons and objects protected by international humanitarian law", contains a list of provisions concerning the punishment of specified crimes committed "in the event and during an armed conflict". The persons protected are: the civilians, the persons not taking part in the hostilities and the civilians in the power of the adverse party, the wounded, sick and shipwrecked placed *hors de combat*, the combatants who have laid down their arms, because of capture, surrender, or any similar reason, the persons considered as stateless or refugees before the beginning of the conflict, and the persons protected under the 1949 Geneva Conventions and AP I and AP II.[476]

411. The DRC Code of Military Justice as amended contains provisions for the punishment of a list of offences such as war crimes which are applicable "in time of war or in an area where a state of siege or a state of emergency has been proclaimed".[477]

412. Congo's Genocide, War Crimes and Crimes against Humanity Act provides for the punishment of the authors and perpetrators of acts such as:

a) grave breaches of the Geneva Conventions . . .
b) other grave breaches of the laws and customs applicable to international armed conflicts in the scope established by international law;

[471] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4.
[472] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 6.
[473] Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4(3) and (4).
[474] Chile, *Code of Military Justice* (1925), Articles 261–264.
[475] China, *Law Governing the Trial of War Criminals* (1946), Article 3.
[476] Colombia, *Penal Code* (2000), Articles 135–164.
[477] DRC, *Code of Military Justice as amended* (1972), Articles 436, 455, 472 and 522–526.

c) grave breaches of article 3 common to the four Geneva Conventions . . .
d) and other grave breaches recognized as applicable to armed conflicts which are not of an international character, within the scope established by international law.[478]

413. The Geneva Conventions and Additional Protocols Act of the Cook Islands, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV and Articles 11(4) and 85(2), (3) and (4) AP I, provides that:

(1) Any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of the First [1977 Additional] Protocol is guilty of an offence.
. . .
(3) This section applies to persons regardless of their nationality or citizenship.[479]

414. Costa Rica's Penal Code as amended provides for the punishment of offences such as acts of genocide and "other punishable acts against human rights and international humanitarian law, provided for in the treaties adhered to by Costa Rica or in this Code".[480] Under another provision entitled "War crimes", it also provides for the punishment of:

Whoever, in the event of an armed conflict, commits or orders to be committed acts which can be qualified as grave breaches or war crimes, in conformity with the provisions of international treaties to which Costa Rica is a party, regarding the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property, [applicable] in cases of armed conflict, and under any other instrument of international humanitarian law.[481]

The Code as amended further provides for the punishment of crimes against humanity.[482]

415. Côte d'Ivoire's Penal Code as amended, in a chapter dealing with offences against the law of nations, provides for the punishment of certain acts committed "in time of war or occupation", such as "crimes against the civilian population (Article 138) and "crimes against prisoners of war" (Article 139). It further provides for the punishment of the illegal use of distinctive signs and emblems (Article 473).[483]

416. Croatia's Criminal Code, in a chapter entitled "Criminal offences against values protected by international law", provides for a list of punishable acts committed by "whoever" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against the civilian population" (Article 158);

[478] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Articles 4, 5, 10 and 11.
[479] Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1) and (3).
[480] Costa Rica, *Penal Code as amended* (1970), Article 7.
[481] Costa Rica, *Penal Code as amended* (1970), Article 378.
[482] Costa Rica, *Penal Code as amended* (1970), Article 379.
[483] Côte d'Ivoire, *Penal Code as amended* (1981), Articles 138–139 and 473.

"war crimes against the wounded and sick" (Article 159); "war crimes against prisoners of war" (Article 160); "unlawful killing and wounding of the enemy" (Article 161); "unlawful taking of the belongings of those killed or wounded on the battlefield" (Article 162); "forbidden means of combat" (Article 163); "injury of an intermediary" (Article 164); "brutal treatment of the wounded, sick and prisoners of war" (Article 165); "unjustified delay in the repatriation of prisoners of war" (Article 166); "destruction of cultural objects or of facilities containing cultural objects" (Article 167); and "misuse of international symbols" (Article 168).[484]

417. Cuba's Military Criminal Code, in a chapter entitled "Offences committed during combat actions", contains provisions criminalising certain acts such as "mistreatment of prisoners of war" (Article 42), "plundering" (Article 43), "violence against the population of the area of military activities" (Article 44) and "prohibited use of banners or symbols of the Red Cross" (Article 45).[485]

418. Cyprus's Geneva Conventions Act, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, provides for the prosecution and punishment of "any person who, in spite of nationality, commits any serious violation ... of the Geneva Conventions in or outside of the Republic". It further provides that:

> In case an offence provided by this Article has been committed outside the Republic, a person may be prosecuted, charged with the offence, be tried and punished anywhere within the territory of the Republic, as if the offence had been committed in this territory; for all purposes relative or relevant to the trial or punishment, the offence is considered being committed in this territory.[486]

419. Cyprus's AP I Act, with respect to "a serious violation of the provisions of the [AP I]", contains a provision similar to the one in the Geneva Conventions Act.[487]

420. The Czech Republic's Criminal Code as amended, under the heading "Crimes against humanity", provides for the punishment of certain offences such as: "genocide" (Article 259); "torture and other inhuman and cruel treatment" (Article 259a); "use of a forbidden weapon or an unpermitted form of combat" (Article 262); "wartime cruelty" (Article 263); "persecution of a population" (Article 263a); "plunder in a theatre of war" (Article 264); and "misuse of internationally recognized insignia and state insignia" (Article 265).[488]

421. The Code of Military Justice of the Dominican Republic provides for the punishment of a soldier who infringes certain rules of the LOAC, notably against prisoners of war, hospitals, temples or parlementaires.[489]

[484] Croatia, *Criminal Code* (1997), Articles 158-168.
[485] Cuba, *Military Criminal Code* (1979), Articles 42–45.
[486] Cyprus, *Geneva Conventions Act* (1966), Sections 4 (1) and (2).
[487] Cyprus, *AP I Act* (1979), Sections 4 (1) and (2).
[488] Czech Republic, *Criminal Code as amended* (1961), Articles 259–259(a) and 262–265.
[489] Dominican Republic, *Code of Military Justice* (1953), Article 201.

422. El Salvador's Code of Military Justice provides for the punishment of various offences committed "in time of international or civil war", such as arson, destruction of property, plundering of inhabitants or acts of violence against persons (Article 68). It also provides for the punishment of other acts committed "in time of international war", including offences against prisoners of war, attacks on medical units, transports or personnel, abuse of the red cross, destruction of cultural property, offences against parlementaires (Article 69), despoliation of the wounded or prisoners (Article 70), despoliation of the dead (Article 71), and unnecessary requisition of buildings and objects (Article 72).[490]

423. El Salvador's Penal Code provides for the punishment of acts of "Genocide" (Article 361), "Violations of the laws and customs of war" committed "during an international or a civil war" (Article 362), "Violations of the duties of humanity" (Article 363), and "Enforced disappearance of persons" (Article 364).[491]

424. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of a list of crimes committed during an international or internal armed conflict.[492]

425. Estonia's Penal Code provides for the punishment of a list of crimes, including crimes against humanity (paragraph 89), genocide (paragraph 90), crimes against peace (paragraphs 91-93) or war crimes (paragraphs 94–109).[493]

426. Ethiopia's Penal Code, under the heading "Offences against the law of nations", provides for a list of punishable acts committed by "whosoever" such as: "war crimes against the civilian population" (Article 282); "war crimes against wounded, sick or shipwrecked persons" (Article 283); "war crimes against prisoners and interned persons" (Article 284); "pillage, piracy and looting" (Article 285); "provocation and preparation [of the above-mentioned acts]" (Article 286); "dereliction of duty towards the enemy" (Article 287); "use of illegal means of combat" (Article 288); "maltreatment of, or dereliction of duty towards, wounded, sick or prisoners" (Article 291); "denial of justice" (Article 292); "hostile acts against international humanitarian organizations" (Article 293); "abuse of international emblems and insignia" (Article 294); and "hostile acts against the bearer of a flag of truce" (Article 295). Some of these provisions specify that the acts concerned be committed "in time of war, armed conflict (or occupation)" and/or "in violation of the rules of public international law".[494]

427. In 1992, the transitional government of Ethiopia adopted the Special Public Prosecutor's Office Establishment Proclamation which provides that "it is essential that higher officials of the WPE and members of the security and armed forces who have been detained at the time the EPRDF assumed control

[490] El Salvador, *Code of Military Justice* (1934), Articles 68–72.
[491] El Salvador, *Penal Code* (1997), Articles 361–364.
[492] El Salvador, *Draft Amendments to the Penal Code* (1998), Title XIX.
[493] Estonia, *Penal Code* (2001), §§ 89–109.
[494] Ethiopia, *Penal Code* (1957), Articles 282–288 and 291–295.

of the Country and thereafter and who are suspected of having committed offences . . . must be brought to trial". Furthermore, the proclamation provides that "it is necessary to provide for the establishment of a Special Public Prosecutor's Office that shall conduct prompt investigation and bring to trial detainees as well as those persons who are responsible for having committed offences".[495]

428. Finland's Revised Penal Code, in a chapter dealing with "War crimes and offences against humanity", provides that:

> Any person who in an act of war
>
> (1) uses a prohibited means of warfare or weapon;
> (2) abuses an international symbol designated for the protection of the wounded and sick; or
> (3) otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law
>
> shall be sentenced for a war crime.[496]

429. France's Ordinance on Repression of War Crimes provides for the prosecution of certain persons having committed specific acts from the opening of hostilities.[497]

430. France's Code of Military Justice provides for the punishment of acts of pillage (Articles 427 and 428) and illegal use, in times of war, of "distinctive signs and emblems defined by international conventions" (Article 439).[498]

431. France's Penal Code provides for the punishment of a list of certain acts such as genocide and crimes against humanity and also provides for a special norm in case such crimes are committed "in times of war".[499]

432. France's Laws on Cooperation with the ICTY and ICTR provide for the punishment of authors and accomplices of serious violations of IHL.[500]

433. Georgia's Criminal Code, in a part entitled "Crimes against peace and security of mankind and international humanitarian law", provides for a list of punishable offences such as: "genocide" (Article 407); "crimes against humanity" (Article 408); "mercenaries" (Article 410); "wilful breaches of norms of international humanitarian law committed in armed conflict" (Article 411); "wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury" (Article 412); and "other breaches of norms of international humanitarian law" (Article 413), the latter including "any other war crime provided for in the [1998 ICC Statute]".[501] For some of these offences, the Code

[495] Ethiopia, *Special Public Prosecutor's Office Establishment Proclamation* (1992), preamble
[496] Finland, *Revised Penal Code* (1995), Chapter 11, Section 1(1).
[497] France, *Ordinance on Repression of War Crimes* (1944), Article 1.
[498] France, *Code of Military Justice* (1982), Articles 427, 428 and 439.
[499] France, *Penal Code* (1994), Articles 211(1)–212(3).
[500] France, *Law on Cooperation with the ICTY* (1995), Article 2; *Law on Cooperation with the ICTR* (1996), Article 2.
[501] Georgia, *Criminal Code* (1999), Articles 407–408 and 410–413.

specifies that the acts be committed "in an international or internal armed conflict".[502]

434. Germany's Law Introducing the International Crimes Code applies "to all criminal offences against international law designated under this Act, to serious offences designated therein even when the offence was committed abroad and bears no relation to Germany".[503] It provides for the punishment of, *inter alia*, genocide (Article 1, paragraph 6), crimes against humanity (Article 1, paragraph 7) and war crimes, including "War crimes against persons" (Article 1, paragraph 8), "War crimes against property and other rights" (Article 1, paragraph 9), "War crimes against humanitarian operations and emblems" (Article 1, paragraph 10), "War crimes consisting in the use of prohibited methods of warfare" (Article 1, paragraph 11) and "War crimes consisting in employment of prohibited means of warfare" (Article 1, paragraph 12).[504] Some of these crimes must be punished when committed "in connection with an international armed conflict or with an armed conflict not of an international character", some others when committed "in connection with an international armed conflict".[505] It further provides that "the prosecution of serious criminal offences pursuant to this Act [*inter alia*, genocide, crimes against humanity and war crimes] and the execution of sentences imposed on their account shall not be subject to any statute of limitations".[506]

435. Guatemala's Penal Code provides for the punishment of certain war crimes, namely those committed against prisoners of war, the civilian population and certain objects.[507]

436. Guinea's Criminal Code provides for the punishment of certain acts constitutive of violations of IHL, such as pillage, the despoliation of the dead, wounded, sick and shipwrecked in a zone of military operations and the use, in an area of military operations and in violation of the laws and customs of war, of distinctive insignia or emblems defined under international conventions.[508]

437. Hungary's Criminal Code as amended, under the title "Crimes against humanity", provides for the punishment of a list of certain acts including genocide and war crimes, such as "Violence against the civilian population" (Article 158), "War-time looting" (Article 159), "Wanton warfare" (Article 160), "Use of weapons prohibited by international treaty" (Article 160/A), "Battlefield looting" (Article 161), "Violence against a war emissary" (Article 163) and "Misuse

[502] Georgia, *Criminal Code* (1999), Articles 411–412.
[503] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 1.
[504] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 6–12.
[505] Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 8(1)–(2), 9(1), 10(1)–(2), 11(1)–(2) and 12 (international and non-international armed conflict); Article 1, §§ 8(3), 9(2) and 11(3) (international armed conflict).
[506] Germany, *Law introducing the International Crimes Code* (2002), Article 1, § 5.
[507] Guatemala, *Penal Code* (1973), Article 378.
[508] Guinea, *Criminal Code* (1998), Articles 569, 570 and 579.

of the red cross" (Article 164), some of them when committed "in an operational or occupied area" or "violating the rules of the international law of warfare".[509]

438. India's Geneva Conventions Act provides that:

If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions [i.e. the 1949 Geneva Conventions] he shall be punished . . .

When an offence under this chapter [i.e. a grave breach of the 1949 Geneva Conventions] is committed by any person outside India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found.[510]

439. Ireland's Geneva Conventions Act as amended provides that:

Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] Conventions or [AP I] shall be guilty of an offence and on conviction on indictment [be liable to punishment].[511]

It also provides for the punishment of "minor breaches" of the Geneva Conventions and Additional Protocols in the following terms:

Any person, whatever his nationality, who, in the State, commits, or aids, or abets or procures the commission in the State by any other person of any other minor breach of any of the [Geneva] Conventions or of Protocol I or Protocol II shall be guilty of an offence.

. . .

Any person, whatever his nationality, who, outside the State, commits, or aids, or abets or procures the commission outside the State by any other person of any other minor breach of any of the [Geneva] Conventions or of [AP I] or [AP II] shall be guilty of an offence.

Any person who is guilty of an offence under this section shall be liable [to punishment].[512]

440. Israel's Nazis and Nazi Collaborators (Punishment) Law provides for the punishment of:

a person who has committed one of the following offences –

(1) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against the Jewish people;
(2) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against humanity;
(3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime.[513]

[509] Hungary, *Criminal Code as amended* (1978), Sections 155–165.
[510] India, *Geneva Conventions Act* (1960), Sections 3 and 4.
[511] Ireland, *Geneva Conventions Act as amended* (1962), Section 3.
[512] Ireland, *Geneva Conventions Act as amended* (1962), Section 4.
[513] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(a).

441. Italy's Wartime Military Penal Code provides for the punishment of various offences related to wartime activity.[514]

442. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", contains a list of offences "committed in time of armed conflicts" with respect to which it provides for punishment.[515]

443. Kazakhstan's Penal Code, in a special part entitled "Crimes against the peace and security of mankind", provides a list of punishable acts such as: "the use of prohibited means and methods of warfare" in an armed conflict (Article 159); "genocide" (Article 160); "ecocide" (Article 161); "mercenaries" (Article 162); and "attacks against persons or organisations beneficiaries of an international protection" (Article 163).[516]

444. Kenya's Geneva Conventions Act provides that:

> Any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions such as is referred to in the following Articles [i.e. Article 50 GC I, Article 51 GC II, Article 130 GC III and Article 147 GC IV] is guilty of an offence and [shall be sentenced].
>
> Where an offence under this section is committed outside Kenya, a person may be proceeded against, indicted, tried and punished therefor in any place in Kenya, as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[517]

445. Kyrgyzstan's Criminal Code provides for the punishment of acts such as: "intentional destruction of historical and cultural monuments" (Article 172); "capture of hostages" (Article 224); "ecocide" (Article 374); the participation of mercenaries "in an armed conflict or in hostilities" (Article 375); and "attacks against persons or institutions under international protection" (Article 376).[518]

446. Latvia's Criminal Code contains a chapter entitled "Crimes against humanity and peace, war crimes and genocide" in which it provides for certain punishable offences such as "genocide" (Section 71), "war crimes" (Section 74), "pillage" (Section 76) and "destruction of cultural and national heritage" (Section 79).[519]

447. The Draft Amendments to the Code of Military Justice of Lebanon provide for the punishment of persons committing acts listed under a new article on war crimes. They also provide that "the crimes provided for in this law are not subject to statutes of limitation". Furthermore, they state that "the Lebanese tribunals have jurisdiction for the war crimes provided for in this

[514] Italy, *Wartime Military Penal Code* (1941), Articles 167–230.
[515] Jordan, *Draft Military Criminal Code* (2000), Article 41.
[516] Kazakhstan, *Penal Code* (1997), Articles 156–164.
[517] Kenya, *Geneva Conventions Act* (1968), Section 3(1) and (2).
[518] Kyrgyzstan, *Criminal Code* (1997), Articles 172, 224 and 374–376.
[519] Latvia, *Criminal Code* (1998), Sections 71–79.

law, regardless of the nationality of the author and the place where they have been committed".[520]

448. Lithuania's Criminal Code as amended, in a chapter entitled "War crimes", contains a list of punishable offences. Some of these offences are to be punished when committed in "violation of humanitarian law in time of war, during an international armed conflict or occupation". Some others are to be punished when committed "in time of war, during an armed conflict or occupation".[521]

449. Luxembourg's Law on the Repression of War Crimes provides for the prosecution and sentencing of non-Luxembourg nationals having committed war crimes

> if such infringements have been committed at the occasion or under the pretext of war and if they are not justified by the laws and customs of war, these agents either being found within the Grand-Duché or on enemy territory, or the Government having obtained their extradition.[522]

450. Luxembourg's Law on the Punishment of Grave Breaches provides for the prosecution and punishment of persons having committed or being involved in the commission of grave breaches of the 1949 Geneva Conventions.[523] It also provides that "any individual who has committed an offence under this law outside the territory of the Grand-Duché can be prosecuted in the Grand-Duché even though he may not be present there".[524]

451. Malawi's Geneva Conventions Act provides that:

> Any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by another person of any such grave breach of any of the Conventions as is referred to in [Article 50 GC I, Article 51 GC II, Article 130 GC III and Article 147 GC IV] shall without prejudice to his liability under any other written law be guilty of an offence and [be liable to imprisonment].
>
> Where an offence under this section is committed without Malawi a person may be proceeded against, tried and punished therefor in any place in Malawi as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[525]

452. Malaysia's Geneva Conventions Act provides that:

> Any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by another person of any such grave breach of [Article 50 GC I, Article 51 GC II, Article 130 GC III

[520] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146 and 149–150.
[521] Lithuania, *Criminal Code as amended* (1961), Articles 333–344.
[522] Luxembourg, *Law on the Repression of War Crimes* (1947), Article 1.
[523] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Articles 1–8.
[524] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 10.
[525] Malawi, *Geneva Conventions Act* (1967), Section 4(1) and (2).

and Article 147 GC IV], shall be guilty of an offence and on conviction thereof [be punished].

In the case of an offence under this section committed outside the Federation, a person may be proceeded against, charged, tried and punished therefor in any place in the Federation as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[526]

453. Mali's Penal Code provides for the punishment of the perpetrators of certain crimes such as "crimes against humanity" (Article 29), "genocide" (Article 30) and a list of "war crimes" covering the grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict (Article 31).[527]

454. The Geneva Conventions Act of Mauritius provides that:

Any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions shall commit an offence ...

This section applies to persons regardless of their nationality or citizenship.

Any person who commits an offence against this section shall, on conviction, be liable [to punishment].[528]

455. Mexico's Penal Code as amended, under the heading "Offences against the duties of humanity", provides for the punishment of a number of offences committed against certain protected persons and objects.[529]

456. Mexico's Code of Military Justice, under the headings "Crimes against the laws of nations" and "Crimes committed in the exercise of military duties or with relation to them" provides for the punishment of perpetrators of a number of offences related to war operations.[530]

457. Moldova's Penal Code provides sanctions for perpetrators of certain acts such as "genocide" (Article 135), "ecocide" (Article 136), "inhuman treatments" (Article 137), "violations of international humanitarian law" committed "during an armed conflict or hostilities" (Article 138), "mercenary activity ... in an armed conflict or military hostilities" (Article 141), "use of prohibited means and methods of warfare ... during an armed conflict" (Article 143), "unlawful use of the red cross signs" (Article 363), "pillage of the dead on the battlefield" (Article 389), "acts of violence against the civilian population in the area of military hostilities" (Article 390), "grave breaches of international humanitarian law ... committed during international and internal armed conflicts" (Article 391) and "perfidious use of the red cross emblem as a protective sign during armed conflict" (Article 392).[531]

[526] Malaysia, *Geneva Conventions Act* (1962), Section 3(1) and (2).
[527] Mali, *Penal Code* (2001), Articles 29–31.
[528] Mauritius, *Geneva Conventions Act* (1970), Section 3(1), (3) and (4).
[529] Mexico, *Penal Code as amended* (1931), Article 149.
[530] Mexico, *Code of Military Justice as amended* (1933), Articles 208–215 and 324–337.
[531] Moldova, *Penal Code* (2002), Articles 135–138, 141, 143, 363 and 389–392.

458. Mozambique's Military Criminal Law provides for the punishment of persons committing crimes listed thereunder, some of them being committed "in an armed confrontation [and in violation of] generally accepted international rules" or "in times of war" and/or "in the theatre of operations".[532]

459. The aim of the Criminal Law in Wartime Act as amended of the Netherlands is "to establish provisions concerning offences committed in the event of war and their prosecution".[533] The term "war" is considered to include civil war.[534] According to the Act, "the special courts may . . . take cognisance of crimes defined in the International Crimes Act [genocide, crimes against humanity, war crimes and torture]".[535]

460. The International Crimes Act of the Netherlands provides for the punishment of genocide (Article 3), crimes against humanity (Article 4), war crimes committed in international armed conflicts (Article 5) or non-international armed conflicts (Article 6), and torture (Article 8). The Act also punishes "anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in Articles 5 and 6".[536]

461. New Zealand's Geneva Conventions Act as amended provides that:

> Any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of the First Protocol is guilty of an indictable offence.
> . . .
> This section applies to persons regardless of their nationality or citizenship.[537]

462. New Zealand's International Crimes and ICC Act provides that "every person is liable on conviction on indictment to the penalty specified in subsection (3) who, in New Zealand or elsewhere, commits a war crime". The Act includes similar provisions with respect to genocide and crimes against humanity. War crimes, genocide and crimes against humanity are defined as the acts specified in the 1998 ICC Statute.[538]

463. Nicaragua's Military Penal Law provides for the punishment of persons who commit "mistreatment of prisoners of war (Article 80), "looting" (Article 81), "abuses at the occasion of military activities" (Article 82) and "unlawful use of the symbols of the Red Cross" (Article 83).[539]

464. Nicaragua's Military Penal Code, under the headings "Crimes against international humanitarian law" and "Specific crimes against the laws and customs of war", provides for the punishment of certain offences, for some of

[532] Mozambique, *Military Criminal Law* (1987), Articles 83–89.
[533] Netherlands, *Criminal Law in Wartime Act as amended* (1952), preamble.
[534] Netherlands, *Criminal Law in Wartime Act as amended* (1952), Article 1, § 3.
[535] Netherlands, *Criminal Law in Wartime Act as amended* (1952), Article 12, § 3.
[536] Netherlands, *International Crimes Act* (2003), Articles 3–8.
[537] New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1) and (3).
[538] New Zealand, *International Crimes and ICC Act* (2000), Sections 9–11.
[539] Nicaragua, *Military Penal Law* (1980), Articles 80–83.

them specifying that they be committed "during an international or civil war" and/or "in times of war".[540]

465. Nicaragua's Revised Penal Code provides for the punishment of "anyone who, during an international or a civil war, commits serious violations of the international conventions relating to the use of prohibited weapons, the treatment of prisoners and other norms related to war".[541]

466. Nicaragua's Draft Penal Code, in a part entitled "Crimes against the international order", provides for the punishment of a list of offences, stating in the case of most of them that they be committed "at the occasion", "in times of" and/or "during an international or internal armed conflict".[542]

467. Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes", provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes defined as serious offences against the persons and objects protected under the 1949 Geneva Conventions, AP I and AP II.[543]

468. Nigeria's Geneva Conventions Act provides that:

> If, whether in or outside the Federation, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva Conventions] . . . he shall, on conviction thereof [be punished].
>
> A person may be proceeded against, tried and sentenced in the Federal territory of Lagos for an offence under this section committed outside the Federation as if the offence had been committed in Lagos, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in Lagos.[544]

469. Norway's Military Penal Code as amended provides for the punishment of "anyone who uses a weapon or means of combat which is prohibited by any international agreement to which Norway has acceded, or who is accessory thereto" and of "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property" laid down in the 1949 Geneva Conventions or AP I or AP II.[545]

470. Papua New Guinea's Geneva Conventions Act provides that:

> A person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions is guilty of an offence.
>
> This section applies to persons regardless of their nationality or citizenship.[546]

471. Paraguay's Military Penal Code, under the heading "Provisions with regard to times of war", provides for the punishment of a list of offences.[547]

[540] Nicaragua, *Military Penal Code* (1996), Articles 47–61.
[541] Nicaragua, *Revised Penal Code* (1997), Article 551.
[542] Nicaragua, *Draft Penal Code* (1999), Articles 444–472.
[543] Niger, *Penal Code as amended* (1961), Articles 208.1–208.8.
[544] Nigeria, *Geneva Conventions Act* (1960), Section 3(1) and (2).
[545] Norway, *Military Penal Code as amended* (1902), §§ 107–108.
[546] Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2) and (3).
[547] Paraguay, *Military Penal Code* (1980), Articles 282–296.

472. Paraguay's Penal Code provides for the punishment of offences such as "torture" (Article 309), "genocide" (Article 319) and a list of "war crimes" (Article 320), stating in the case of "war crimes" that they be committed "in violation of international laws of war, armed conflict or military occupation".[548]

473. Peru's Code of Military Justice, in a part entitled "Violations of the law of nations", provides for the punishment of a list of offences, some of them when committed "in times of war".[549]

474. The War Crimes Trial Executive Order of the Philippines provides for a list of punishable offences including "violations of the laws and customs of war" and other specified acts committed "before or during the war . . . whether or not in violation of the local laws".[550]

475. Poland's Penal Code, in a specific part entitled "Offences against peace, humanity and war offences", provides for the punishment of certain acts, some of them when committed "during hostilities" or "in violation of international law", such as internationally prohibited acts against certain specific protected persons – including persons "who, during hostilities, enjoy international protection" – and objects, as well as the use of means or methods of combat prohibited by international law.[551]

476. Portugal's Penal Code, under the headings "War crimes against civilians" and "Destruction of monuments", provides for the punishment of certain offences when committed "in times of war, of armed conflict or occupation".[552]

477. Romania's Law on the Punishment of War Criminals provides for the punishment of precisely defined "criminals of war".[553]

478. Romania's Penal Code, in provisions entitled "[Unlawful] use of the emblem of the Red Cross" (Article 294), "Use of the emblem of the Red Cross during military operations" (Article 351), "Inhuman treatment" (Article 358) and "Destruction of objects and appropriation of property" (Article 359), provides for the punishment of offences listed thereunder, stating for some of those offences that they be committed "in times of war and in relation with military operations" or "in times of war".[554]

479. Russia's Decree on the Punishment of War Criminals states that:

> The peoples of the Soviet Union that suffered losses during the war cannot let fascist barbarians go unpunished. The Soviet State has always proceeded from the universally recognised rules of international law that provide for the inevitable prosecution of Nazi criminals, no matter where and for how long they have been hiding from justice.[555]

[548] Paraguay, *Penal Code* (1997), Articles 309 and 319–320.
[549] Peru, *Code of Military Justice* (1980), Articles 91–96.
[550] Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2) and (3).
[551] Poland, *Penal Code* (1997), Articles 117–126.
[552] Portugal, *Penal Code* (1996), Articles 241–242.
[553] Romania, *Law on the Punishment of War Criminals* (1945), Articles I and III.
[554] Romania, *Penal Code* (1968), Articles 294, 351 and 358–359.
[555] Russia, *Decree on the Punishment of War Criminals* (1965), preamble.

It also provides that "Nazi criminals, guilty of most serious crimes against peace and humanity and war crimes, are subject to prosecution and punishment".[556]

480. Russia's Criminal Code, in a chapter entitled "Crimes against the peace and security of mankind" and under a provision entitled "Use of banned means and methods of warfare", provides for the punishment of "cruel treatment of prisoners of war, deportation of the civilian population, plunder of the national property in the occupied territory and use in a military conflict of means and methods of warfare banned by [international treaties to which Russia is a party]".[557] The Code further provides for the punishment of offences such as genocide, ecocide, use of, and participation by, mercenaries in an armed conflict or hostilities and assaults on persons or institutions enjoying international protection.[558]

481. Rwanda's Law Setting up Gacaca Jurisdictions aims:

to organize the putting on trial of persons prosecuted for having, between 1 October 1990 and 31 December 1994, committed acts qualified and punished by the Penal Code and which constitute:

a) ... crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by the [1949 GC IV and the 1977 Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity].[559]

482. The Geneva Conventions Act of the Seychelles provides that:

Any person, whatever his nationality, who, whether in or outside Seychelles, commits, or aids, abets or procures the commission by another person of, any such grave breach of any of the [Geneva] Conventions ... is guilty of an offence and ... shall on conviction [be punished].

Where an offence under this section is committed outside Seychelles, a person may be proceeded against, charged, tried and punished therefor in any place in Seychelles, as if the offence had been committed in that place, and the offence is, for all purposes incidental to or consequential on the trial or punishment thereof, deemed to have been committed in that place.[560]

483. Singapore's Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [of the Geneva Conventions] shall be guilty of an offence under this Act and on conviction thereof ... [be punished].

In the case of an offence under this section committed outside Singapore, a person may be proceeded against, charged, tried and punished therefor in any place in Singapore as if the offence had been committed in that place, and the offence shall,

[556] Russia, *Decree on the Punishment of War Criminals* (1965).
[557] Russia, *Criminal Code* (1996), Article 356.
[558] Russia, *Criminal Code* (1996), Articles 357–360.
[559] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1.
[560] Seychelles, *Geneva Conventions Act* (1985), Section 3(1) and (2).

for the purposes incidental to or consequential on the trail or punishment thereof, be deemed to have been committed in that place.[561]

484. Slovakia's Criminal Code as amended, under the heading "Crimes against humanity", provides for the punishment of certain offences such as: "genocide" (Article 259); "torture and other inhuman and cruel treatment" (Article 259a); "use of a forbidden weapon or an unpermitted form of combat" (Article 262); "wartime cruelty" (Article 263); "persecution of a population" (Article 263a); "plunder in a theatre of war" (Article 264); and "misuse of internationally recognised insignia and state insignia" (Article 265).[562]

485. Slovenia's Penal Code, in a chapter entitled "Criminal offences against humanity and international law", criminalises certain acts, committed by "whoever" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against the civilian population" (Article 374); "war crimes against the wounded and sick" (Article 375); "war crimes against prisoners of war" (Article 376); "use of unlawful weapons" (Article 377); "unlawful killing and wounding of the enemy" (Article 379); "unlawful plundering on the battlefield" (Article 380); "infringement of the rights of parlementaires" (Article 381); "maltreatment of the sick and wounded, and of prisoners of war" (Article 382); "unjustified delay in the repatriation of prisoners of war" (Article 383); "destruction of cultural and historical monuments and natural sites" (Article 384); and "abuse of international symbols" (Article 386).[563]

486. Under Spain's Law on Judicial Power, Spanish criminal courts have jurisdiction over offences committed by Spanish nationals and aliens, on Spanish territory or outside it, which constitute genocide or any other offence that, according to international treaties or conventions, must be prosecuted in Spain.[564]

487. Spain's Military Criminal Code contains a part on "Crimes against the laws and customs of war" and provides for the punishment of soldiers committing acts listed thereunder.[565]

488. Spain's Penal Code, in chapters entitled "Genocide" and "Offences against protected persons and objects in the event of armed conflict", criminalises offences listed thereunder. Protected persons in the meaning of the chapter on "Offences against protected persons and objects in the event of armed conflict" are those protected by the 1949 Geneva Conventions and both Additional Protocols, as well as those falling within the scope of "whatever other international treaty to which Spain is a party". The chapter contains several provisions regarding the punishment of certain acts "committed in the event of an armed conflict".[566]

[561] Singapore, *Geneva Conventions Act* (1973), Section 3(1) and (2).
[562] Slovakia, *Criminal Code as amended* (1961), Articles 259–259(a) and 262–265.
[563] Slovenia, *Penal Code* (1994), Articles 374–386.
[564] Spain, *Law on Judicial Power* (1985), Article 23(4).
[565] Spain, *Military Criminal Code* (1985), Articles 69–78.
[566] Spain, *Penal Code* (1995), Articles 607–614.

489. Sri Lanka's Draft Geneva Conventions Act provides that:

> A person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any person to commit
> (a) a grave breach of any of the [Geneva] Conventions; or
> (b) a breach of common Article 3 of the [Geneva] Conventions
>
> is guilty of an indictable offence.[567]

It further provides that such a person "is liable to [punishment]".[568]

490. Sweden's Penal Code as amended provides for the punishment of "a person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts".[569]

491. Switzerland's Military Criminal Code as amended states that the provisions of its chapter dealing with "Offences committed against the law of nations in case of armed conflict" are "applicable in case of declared war and other armed conflicts between two or more States", and also provide for "the punishment of violations of international agreements if these agreements provide for a wider scope of application" (Article 108). The Code provides for the punishment of offences listed under this chapter, and especially – among other more specific offences – of "anyone who contravenes the prescriptions of international conventions relating to the conduct of hostilities, as well as to the protection of persons and objects, [and] anyone who violates other recognised laws and customs of war".[570] Other offences, such as pillage committed in time of war or marauding on the battlefield are also to be punished.[571]

492. Tajikistan's Criminal Code provides for the punishment of: "illegal use of emblems and signs of the Red Cross and Red Crescent" (Article 333); "genocide" (Article 398); "biocide" (Article 399); "ecocide" (Article 400); "mercenarism" (Article 401); "attacks against persons and establishments under international protection" (Article 402); "wilful breaches of norms of international humanitarian law committed in [an international or internal] armed conflict" (Article 403); "wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury" (Article 404); and "other breaches of the norms of international humanitarian law" (Article 405).[572]

493. Thailand's Prisoners of War Act provides for the punishment of persons committing offences listed under the heading "Offences with respect to prisoners of war" and offences specified under the heading "Offences in the case of armed conflict not of an international character".[573]

[567] Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 3(1).
[568] Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 4(1).
[569] Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.
[570] Switzerland, *Military Criminal Code as amended* (1927), Articles 108–114.
[571] Switzerland, *Military Criminal Code as amended* (1927), Articles 139–140.
[572] Tajikistan, *Criminal Code* (1998), Articles 333 and 398–405.
[573] Thailand, *Prisoners of War Act* (1955), Sections 12–19.

494. Trinidad and Tobago's Draft ICC Act states that:

Any person who commits any of the crimes specified in Articles 6 [of the ICC Statute – genocide], 7 [of the ICC Statute – crimes against humanity] and 8 [of the ICC Statute – war crimes] outside Trinidad and Tobago, may be prosecuted and punished for that crime in Trinidad and Tobago as if the crime had been committed in Trinidad and Tobago.[574]

495. Uganda's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions . . . commits an offence and on conviction thereof [shall be punished].

Where an offence under this section is committed without Uganda a person may be proceeded against, indicted, tried and punished therefor in any place in Uganda as if the offence had been committed in that place, and the offence shall, for all purposes incidental or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[575]

496. Ukraine's Criminal Code provides for a list of punishable offences such as, *inter alia*: "looting" (Article 432); "violence against the civilian population in areas of war operations" (Article 433); "bad treatment of prisoners of war" (Article 434); "unlawful use or misuse of the Red Cross and Red Crescent symbols" (Article 435); "violations of the laws and customs of war", notably those provided for in international instruments to which Ukraine is a party (Article 438); "use of weapons of mass destruction" (Article 439); "ecocide" (Article 441); "genocide" (Article 442); "illegal use of the symbols of the red cross and red crescent" (Article 445); and "mercenarism" (Article 447).[576]

497. The UK Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] conventions or the first protocol shall be guilty of an offence and on conviction on indictment [shall be punished].

In the case of an offence under this section committed outside the United Kingdom, a person may be proceeded against, indicted, tried and punished therefor in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[577]

498. The UK War Crimes Act grants the UK courts jurisdiction over war crimes committed in Germany or German-occupied territory during the Second World War by persons who are now UK citizens or residents, irrespective of their nationality at the time of the alleged offence. The act only applies to crimes such as murder and manslaughter, which "constituted a violation of the laws

[574] Trinidad and Tobago, *Draft ICC Act* (1999), Part II, Section 5(2).
[575] Uganda, *Geneva Conventions Act* (1964), Section 1(1) and (2).
[576] Ukraine, *Criminal Code* (2001), Articles 432–447.
[577] UK, *Geneva Conventions Act as amended* (1957), Section 1(1) and (2).

and customs of war", and were considered war crimes during the Second World War.[578]

499. The UK UN Personnel Act provides that:

> If a person commits, outside the United Kingdom, any act to or in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of [murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping, abduction or false imprisonment], he shall in that part of the United Kingdom be guilty of that offence.[579]

This Act does not apply to any UN operation "which is authorised by the Security Council of the United Nations as an enforcement action under Chapter VII of the Charter of the United Nations, . . . in which UN workers are engaged as combatants against organised armed forces, and . . . to which the law of international armed conflict applies".[580]

500. The UK ICC Act includes as offences under domestic law, the acts of genocide, crimes against humanity and war crimes as defined in the 1998 ICC Statute.[581] Thus, it provides that "it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime".[582] There is a similar provision for Northern Ireland.[583]

501. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established provisions for the punishment of the perpetrators of a list of specific offences and also of "all other offences against the laws or customs of war", to be pronounced by the military commissions.[584]

502. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established provisions for the punishment of the perpetrators of a list of "violations of the laws and customs of war" and other more specific acts committed "against any civilian population before or during the war", to be pronounced by the military commissions.[585]

503. The US War Crimes Act as amended provides that:

> (a) Offence. – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be [punishable].
> (b) Circumstances. – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

[578] UK, *War Crimes Act* (1991), Section 1; see also annexed Report of the War Crimes Inquiry, which preceded the 1991 Act, and related documents.
[579] UK, UN *Personnel Act* (1997), Section 1.
[580] UK, UN *Personnel Act* (1997), Section 4(3).
[581] UK, *ICC Act* (2001), Part 5, Section 50.
[582] UK, *ICC Act* (2001), Part 5, Section 51.
[583] UK, *ICC Act* (2001), Part 5, Section 58.
[584] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.
[585] US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b) and (c).

(c) Definition. – As used in this section the term "war crime" means any conduct –
  (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
  (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
  (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
  (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.[586]

504. Uruguay's Military Penal Code as amended, under the heading "Crimes which affect the moral strength of the army and of the naval forces", lists a number of acts, such as the violation of the rule of humane treatment of POWs, looting, attacks against certain specific objects, for which it provides punishment.[587]

505. Uzbekistan's Criminal Code, in a chapter entitled "Crimes against the peace and security of mankind", criminalises "violations of laws and customs of war" (Article 152), "genocide" (Article 153) and the participation of "mercenaries" in "armed conflict or military actions" (Article 154).[588]

506. Vanuatu's Geneva Conventions Act provides that:

Any grave breach of any of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu.

Where a person has committed an act or omission that is an offence by virtue of [the above], the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in Vanuatu.[589]

507. Venezuela's Code of Military Justice as amended, under a chapter dealing with "crimes against international law", provides for the punishment of the offenders of a list of certain war crimes.[590]

508. Venezuela's Revised Penal Code provides for the punishment of Venezuelan nationals and foreigners who have committed certain acts "during a war

[586] US, *War Crimes Act as amended* (1996), Section 2441.
[587] Uruguay, *Military Penal Code as amended* (1943), Article 58.
[588] Uzbekistan, *Criminal Code* (1994), Articles 152–154.
[589] Vanuatu, *Geneva Conventions Act* (1982), Sections 4 and 5.
[590] Venezuela, *Code of Military Justice as amended* (1998), Article 474.

between Venezuela and another nation" or who "violate the conventions or treaties [to which Venezuela is a party] in a way which entails the responsibility of the latter".[591]

509. Vietnam's Penal Code provides for the punishment of anyone who commits, *inter alia*, one of the offences listed under the following headings: "Violation of policy concerning soldiers killed or wounded in combat" (Article 271); "Theft or destruction of war booty" (Article 272); "Harassment of civilians" (Article 273); "Exceeding military need in performance of a mission" (Article 274); "Mistreatment of a prisoner of war or of a soldier who has surrendered" (Article 275); "Crimes against humanity" committed in time of peace or in time of war (Article 278); "War crimes", such as "acts seriously breaching international norms contained in the treaties to which Vietnam is a party" (Article 279); and "Recruitment of mercenaries and service as a mercenary" (Article 280).[592]

510. Yemen's Military Criminal Code provides for the punishment of a list of offences such as war crimes committed in a "zone of military operations" (Article 20) or "during a war [and] against persons and objects protected under the international conventions to which the Republic of Yemen is a party" (Article 21).[593]

511. The Criminal Offences against the Nation and State Act of the SFRY (FRY) provides for the punishment of "any person who commits a war crime, *i.e.*, who during the war or the enemy occupation acted as an instigator or organiser, or who . . . assisted or otherwise was the direct executor of [one of the acts listed thereunder]".[594]

512. The Penal Code as amended of the SFRY (FRY), in a chapter entitled "Criminal acts against humanity and international law", provides for a list of punishable acts committed by "any person" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against civilians" (Article 142); "war crimes against the wounded and the ill" (Article 143); "war crimes against prisoners of war" (Article 144); "unlawful killing and wounding of the enemy" (Article 146); "unlawful seizure of belongings from the killed and wounded in a theatre of war" (Article 147); "use of prohibited means of combat" (Article 148); "harming a parlementaires" (Article 149); "cruel treatment of the wounded, the ill and prisoners of war" (Article 150); "unjustified delay in the repatriation of prisoners of war" (Article 150-a); "destruction of cultural and historic monuments" (Article 151); and "misuse of international emblems" (Article 153).[595] A commentary on these Code's provisions emphasises that these crimes can be committed in time of war, armed conflict (or

[591] Venezuela, *Revised Penal Code* (2000), Article 156.
[592] Vietnam, *Penal Code* (1990), Articles 271–280.
[593] Yemen, *Military Criminal Code* (1998), Articles 5 and 20–23.
[594] SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).
[595] SFRY (FRY), *Penal Code as amended* (1976), Articles 142–153.

occupation).[596] The Report on the Practice of the SFRY (FRY) notes that the term "armed conflict" in this context should be interpreted as including internal conflicts.[597]

513. Zimbabwe's Geneva Conventions Act as amended provides that:

> Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [the Geneva Conventions or AP I]... shall be guilty of an offence.
>
> A person guilty of an offence in terms of [the above] shall be liable...[to punishment].
>
> Where an offence in terms of this section has been committed outside Zimbabwe, the person concerned may be proceeded against, indicted, tried and punished therefor in any place in Zimbabwe as if the offence had been committed in that place and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.[598]

National Case-law

514. In the *Priebke case* in 1995, Argentina's Public Prosecutor of First Instance pointed out that owing to the far-reaching implications of war crimes, the international community was obliged to hunt down and punish war criminals.[599]

515. In the *Polyukhovich case* before Australia's High Court in 1991, in which the accused, charged with crimes committed during the Second World War, challenged the validity of the War Crimes Act to the imputed crimes, the Australian government argued that the War Crimes Act codified the customary law obligation to search for persons suspected of having committed serious war crimes, to bring them to trial and, if found guilty, to punish them.[600]

516. In the *Violations of IHL in Somalia and Rwanda case* in 1997, a Belgian Military Court acquitted two Belgian soldiers accused of having injured and threatened the civilian population whilst performing duties as part of the UNOSOM II peacekeeping operation in Somalia. The Court concluded that the 1949 Geneva Conventions and their Additional Protocols were not applicable to the armed conflict in Somalia and that, therefore, the civilian population could not be granted protection on this basis. The Court also held that common Article 3 of the 1949 Geneva Conventions did not apply to the situation, as the Somali militia did not have an organised military structure, a responsible leadership or exercise authority over a specific part of the territory. Consequently, Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended was also inapplicable. The Court further stated that the members of the UNOSOM II mission could

[596] SFRY (FRY), *Penal Code as amended* (1976), Commentary to Articles 142–144, 146, 148–151 and 153.
[597] Report on the Practice of the SFRY (FRY), 1997, Chapter 6.4.
[598] Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1), (2) and (3).
[599] Argentina, Court of Bariloche, *Priebke case*, Judgement, 23 August 1995, Point V.3.
[600] Australia, High Court, *Polyukhovich case*, Judgement, 14 August 1991.

not be considered as "combatants" since their primary task was not to fight against any of the factions, nor could they fall into the category of an "occupying force".[601]

517. In *The Four from Butare case* in 2001, a Belgian court found four Rwandan nationals individually responsible and guilty of war crimes during the 1994 genocide in Rwanda. The four Rwandans were arrested under Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended. They were charged with violations or grave breaches of provisions of the 1949 Geneva Conventions and AP I, as well as with violations of common Article 3 of the 1949 Geneva Conventions and Articles 1, 2 and 4 AP II.[602] The judgement was confirmed by the Belgian Court of Cassation in 2002.[603]

518. In the *Brocklebank case* in 1996, Canada's Court Martial Appeal Court acquitted a Canadian soldier accused of torture and negligent performance of a military duty in respect of acts committed while serving as a member of the peacekeeping mission in Somalia. The Court held that there was no evidence that the soldier had formed the necessary *mens rea* to commit the offences charged. It was further held that no armed conflict existed in Somalia at the relevant time, nor were the Canadian forces to be considered as a party to the conflict, as they were engaged in a peacekeeping mission. As a result, the Court concluded that neither the 1949 Geneva Conventions nor the Canadian Unit Guide to the Geneva Conventions were applicable.[604]

519. In the *Sarić case* in 1994, a Danish court found a Bosnian Croat guilty on numerous charges of war crimes.[605]

520. In the *Javor case* in 1994, in a civil suit filed by Bosnian nationals alleging ill-treatment in a Serb-run detention camp, France's Tribunal de Grande Instance of Paris found that it had jurisdiction over the claims of war crimes. In its consideration of the charge, the Court focused on the grave breaches provisions of the 1949 Geneva Conventions.[606] The Court of Appeal reversed this decision and held, *inter alia*, the absence of direct applicability of the 1949 Geneva Conventions.[607]

521. In the *Djajić case* in 1997 involving a national of the former Yugoslavia, Germany's Supreme Court of Bavaria referred to GC IV and the grave breaches regime. It considered the conflict to be an international conflict (in June 1992)

[601] Belgium, Military Court, *Violations of IHL in Somalia and Rwanda case*, Judgement, 17 December 1997.
[602] Belgium, Cour d'Assises de Bruxelles, *The Four from Butare case*, Judgement, 7/8 June 2001.
[603] Belgium, Court of Cassation, *The Four from Butare case*, Judgement, 9 January 2002.
[604] Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996; see also Court Martial Appeal Court, *Brown case*, Judgement, 6 January 1995, *Boland case*, Judgement, 16 May 1995 and *Seward case*, Judgement, 16 May 1995.
[605] Denmark, High Court, *Sarić case*, Judgement, 25 November 1994.
[606] France, Tribunal de Grande Instance of Paris, *Javor case*, Order establishing partial lack of jurisdiction and the admissibility of a civil suit, 6 May 1994.
[607] France, Court of Appeal of Paris, *Javor case*, Judgement, 24 November 1994.

and regarded the victims as "protected persons" in the meaning of Article 4 GC IV. The accused was found guilty of complicity in 14 counts of murder and 1 count of attempted murder.[608] The Court based its jurisdiction on Article 6(9) of the German Penal Code which extends the jurisdiction of German courts to acts which are committed abroad and which are prosecuted in Germany on the basis of an international agreement binding on Germany. It also stated that the prosecution of war criminals was "in the interest of the international community as a whole" and not only in the particular interest of Germany. It further noted that "Article 146 [GC IV], in its paragraph 2, obliges each State party to the Convention 'to search for persons alleged to have committed . . . such grave breaches'. It has to 'bring such persons, regardless of their nationality, before its own courts'".[609]

522. In the *Jorgić case* in 1997, Germany's Higher Regional Court at Düsseldorf, a Bosnian Serb was tried for acts committed in 1992 in Bosnia and Herzegovina which were punishable under the German Penal Code. In its judgment, the Court referred, *inter alia*, to Article 147 GC IV. It based its jurisdiction on Article 6(1) and (9) of the Penal Code, which criminalises genocide and acts the prosecution of which was made compulsory under the terms of an international agreement, and stated that "Geneva Convention IV serves as a basis for penal prosecution". Moreover, the Court referred to Article 146, second paragraph, GC IV under which, as the Court confirmed, the States party to the Convention "have engaged to bring persons who are alleged to have committed, or to have ordered to be committed, such grave breaches, before their own courts, regardless of their nationality". The accused was found guilty of complicity in genocide, in conjunction with dangerous bodily harm, deprivation of liberty and murder.[610] In 1999, the Federal Supreme Court upheld the conviction for the most part.[611] In its judgement in 2000, the Federal Constitutional Court confirmed that the accused could be tried by German courts and under German penal law. Moreover, it stated that:

A norm of international customary law prohibiting the extension of German competence to legislate in criminal matters . . . was at variance with Art. VI of the [1948] Genocide Convention. With regard to the principle of non-interference recognised in international customary and international treaty law (Art. 2(1) of the United Nations Charter), the Federal Constitutional Court required that jurisdiction over events occurring in the territory of another State and therefore outside German territorial sovereignty be predicated on a meaningful link . . . Whether such a link exists depends on the subject matter. In criminal law, a meaningful link is constituted not only by the principles of territoriality, protection, active and passive personality, and criminal representation, but also by the principle of universal jurisdiction . . . The principle of universal jurisdiction applied to conduct deemed

608 Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.
609 Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.
610 Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997.
611 Germany, Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

to constitute a threat to the protected interests of the international community. It therefore differs from the principle of criminal representation, codified in Article 7(2)(2) of the [German Penal Code], in that the conduct does not need to be punishable by the law of the place where it occurred and no failure to extradite is required.[612]

523. In the *Sokolović case* before Germany's Higher Regional Court at Düsseldorf in 1999, a Bosnian Serb accused of acts committed in 1992 in Bosnia and Herzegovina was sentenced for complicity in genocide, deprivation of liberty and dangerous bodily injury. The Court held that, according to Article 6(9) of the German Penal Code and in connection with the provisions of the Geneva Conventions, German domestic courts had jurisdiction over grave breaches of the Geneva Conventions committed in the course of the conflict in the former Yugoslavia.[613] In 2001, the Federal Supreme Court upheld this judgement and referred, *inter alia*, to Articles 146 and 147 GC IV and provisions of the German Penal Code. It held that "a duty to prosecute arises from [GC IV] at least when an international armed conflict takes place and when the criminal offences fulfil the requirements of a 'grave breach' in the meaning of Article 147 of this Convention".[614] Referring to the apparent requirement of a specific link to Germany which, according to the judgement in the trial of first instance, had been established in the case and therefore gave it jurisdiction, the Federal Supreme Court moreover noted that not only had the Higher Regional Court at Düsseldorf correctly found such link to be established, but that:

> The Senate is nevertheless inclined not to require such additional link, in any case with regard to [Article 6(9) of the German Penal Code]... Indeed, the prosecution and punishment in accordance with German penal law by the Federal Republic of Germany, acting in fulfilment of an internationally binding obligation accepted under agreement between States, of an act committed abroad by a foreigner against foreigners, can hardly be said to be an infringement of the principle of non-interference.[615]

However, the Federal Supreme Court stated that in this case it did not fall to it to reach a decision in the matter.[616]

524. In the *Kusljić case* in 1999, Germany's Supreme Court of Bavaria tried a Bosnian national for crimes committed during 1992 in the territory of Bosnia and Herzegovina. The accused was sentenced to life imprisonment for, *inter alia*, genocide in conjunction with six counts of murder. The Court found that a specific link to Germany, necessary for the prosecution under German penal law of acts committed abroad by a non-German national and against non-German victims, was established.[617] In 2001, the German Federal Supreme

[612] Germany, Federal Constitutional Court, *Jorgić case*, Decision, 12 December 2000.
[613] Germany, Higher Regional Court at Düsseldorf, *Sokolović case*, Judgement, 29 November 1999.
[614] Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.
[615] Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.
[616] Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.
[617] Germany, Supreme Court of Bavaria, *Kusljić case*, Judgement, 15 December 1999.

Court revised this judgement into a life sentence for, *inter alia*, six counts of murder. It considered the acts of the accused to be grave breaches in the meaning of Articles 146 and 147 GC IV. Referring to its judgement of the same day in the *Sokolović case*, the Court ruled that German courts, on the ground of Article 6(9) of the German Penal Code, had jurisdiction over grave breaches in the meaning of Articles 146 and 147 GC IV.[618]

525. In the *Eichmann case* in 1961, Israel's District of Court of Jerusalem rejected arguments that the acts of which Eichmann was accused constituted acts of State for which Germany alone was responsible. The Court held that the repudiation of the doctrine of act of State was one of the principles of international law acknowledged by the IMT Charter and Judgement in Nuremberg as well as by the UN General Assembly in Resolution 96(I).[619] The Supreme Court upheld the lower court's decision, holding, *inter alia*, that there was no scope for the application of the doctrine in respect of acts prohibited by the law of nations, and especially with regard to international crimes.[620]

526. In the *Grabež case* in 1997, a person born in the former Yugoslavia was prosecuted by a Swiss Military Tribunal for violations of the laws and customs of war under the Swiss Military Penal Code as amended on charges of beating and injuring civilian prisoners in the camps of Omarska and Keraterm in Bosnia and Herzegovina. The Tribunal held that it had jurisdiction under Articles 108(2) and 109 of the Military Penal Code as amended over violations of the laws and customs of war, grave breaches of GC III, GC IV and AP I, and violations of AP II, but acquitted the accused for lack of sufficient evidence.[621]

527. In the *Niyonteze case* in 1999, a Swiss Military Tribunal convicted a Rwandan national for, *inter alia*, grave breaches of IHL committed in Rwanda on the basis of common Article 3 of the 1949 Geneva Conventions and AP II.[622]

528. In the *Quirin case* in 1942, the US Supreme Court held that "from the very beginning of its history this Court has applied the law of war, including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals". It then went on to give a list of cases in which individual offenders had been charged with offences against the law of nations.[623]

529. In the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg rejected arguments by the defendants that international law was concerned with the actions of sovereign States and did not provide punishment for individuals, holding that it had long been established that international law imposed duties and liabilities upon individuals as well as upon States.[624]

618 Germany, Federal Supreme Court, *Kusljić case*, Decision, 21 February 2001.
619 Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.
620 Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.
621 Switzerland, Military Tribunal at Lausanne, *Grabež case*, Judgement, 18 April 1997.
622 Switzerland, Military Tribunal at Lausanne, *Niyonteze case*, Judgement, 30 April 1999.
623 US, Supreme Court, *Quirin case*, Judgement, 31 July 1942; see also Supreme Court, *Yamashita case*, Judgement, 4 February 1946.
624 US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

530. In the *Flick case* in 1947, the US Military Tribunal at Nuremberg noted that "it can no longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals". The Tribunal also rejected the argument that the fact that the defendants were private individuals rather than public officials representing the State meant that they could not be criminally responsible for a violation of international law. Instead, it held that "international law . . . binds every citizen just as does ordinary municipal law . . . The application of international law to individuals is no novelty."[625]

531. In the *Karadžić case* in 1995, a US Court of Appeals considered a civil action brought by Bosnian victims of atrocities against Radovan Karadžić under, *inter alia*, the US Alien Tort Claims Act which gives the US courts jurisdiction over claims by aliens for torts committed in violation of the law of nations or treaties to which the US is party. The Court emphasised that individuals could be held responsible, both criminally, and, as in this case, civilly, for violations of international law and noted that "the liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, and remains today an important aspect of international law".[626]

532. In the *Trajković case* in 2001, a Kosovan Serb and former chief of police, was convicted, *inter alia*, of having participated in crimes committed against the civilian population in 1999, acts which the District Court of Gnjilan in Kosovo (FRY) found had to be qualified as war crimes under Article 142 of the FRY Penal Code as well as crimes against humanity. The Court also found that the acts had been committed "in time of war".[627] However, on appeal, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial.[628] In a written opinion, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

> Article 146 of Geneva Convention IV requires states party to the Convention to criminalize the commission and ordering of grave breaches of the Convention during armed conflict . . . Article 142 of the Yugoslav Penal Code appears most directly derived from this provision of international law.[629]

Other National Practice

533. During the Algerian war of independence, it is reported that the ALN Command had stigmatised and punished acts deemed to be contrary to the

[625] US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947. (Similar statements were made by the Tribunal in *Krauch (I. G. Farben Trial) case*, Judgement, 14 August 1947–29 July 1948, and in *Von Leeb case (The High Command Trial)*, Judgement, 30 December–28 October 1948.)
[626] US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.
[627] SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.
[628] SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.
[629] SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections IV and IV(A).

laws of war.[630] In the same context, it commented on the execution of three French prisoners after their trial for war crimes by an ALN military tribunal. The ALN Command reiterated that it would continue to try French prisoners accused of war crimes and execute the sentences of those convicted.[631]

534. In 2000, during a debate in the UN Security Council on the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, the representative of Australia stated that:

> Governments must also denounce – and denounce strongly – attacks against United Nations personnel and humanitarian workers and take all measures to bring perpetrators of violence to justice. Impunity, as so many of my colleagues have emphasized in this discussion, cannot be allowed.[632]

535. An explanatory memorandum submitted to the Belgian Senate in 1991 in the context of the adoption of the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols stated that the draft law extended to the grave breaches enunciated in the 1949 Geneva Conventions and AP I, in accordance with Belgium's obligations. However, it also stated that IHL contained other infringements which it did not qualify as "grave breaches", but which had to be suppressed nevertheless. The memorandum therefore stated that such offences would be dealt with in a separate law, noting, however, that in the meantime, "the repression of all violations of the laws and customs of war is covered by 'ordinary' national penal law" insofar as the violations corresponded to offences punishable under national (penal) law.[633] An early draft of this law was amended in order to include acts committed in the context of non-international conflicts and which corresponded to the grave breaches of the 1949 Geneva Conventions and AP I. The authors of the amendment mentioned that one of the reasons for the inclusion of acts committed in the context of non-international conflicts was the fact that international law did not prohibit such criminalisation. The Belgian government supported the amendment and noted that although the proposals "go further than required by the Conventions and Protocols, they remain within the scope of the – admittedly extensive – application of an international instrument ratified by Belgium".[634]

536. It is reported that the Chief of Staff of the armed forces of Bosnia and Herzegovina, in response to the international reaction to the destruction of the

630 *El Moudjahid*, Vol. 1, p. 440.
631 "Le problème des prisonniers de guerre", *El Moudjahid*, Vol. 1, pp. 474 and 476.
632 Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.
633 Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 6.
634 Belgium, Senate, Complementary report submitted on behalf of the Commission of Justice, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1991–1992 Extraordinary Session, Doc. 481-5, 22 December 1992, pp. 2 ff.

Mostar Bridge by HVO forces in 1993, had distributed a brochure describing international provisions regarding IHL, war crimes, cultural heritage and POWs, and promised the severest punishment to members of the armed forces who did not respect the laws of war.[635]

537. According to the Report on the Practice of Canada, following the report of the Canadian Commission of Inquiry on War Criminals in 1987, a section for war crimes was created in the Canadian Police and in the Ministry of Justice. A special unit was also established in the Ministry of Immigration to search for immigrants alleged to have committed war crimes or crimes against humanity. The report states that this reflects the belief held by the Canadian authorities in the necessity of setting up appropriate legal mechanisms to meet Canadian obligations regarding the search for war criminals on Canadian territory.[636]

538. In 1981, during a debate in the Sixth Committee of the UN General Assembly in relation to the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the GDR stated that "in connexion with the enforcement of individual criminal responsibility, States were obliged under international law to take appropriate measures and enact legislation ensuring prosecution and punishment of persons guilty of international offences". It added that "it was therefore necessary to establish a universal duty to prosecute offences, which included the obligation to co-operate in combating international offences".[637]

539. In a statement at the International Conference for the Protection of War Victims in 1993, Germany's Minster of State stated that "crimes against international humanitarian law are mostly war crimes. Crimes against international humanitarian law are internationally banned. These crimes must have criminal prosecution as consequences." He added that guaranteeing prosecution was the task not only of individual States but of the international community as a whole.[638]

540. According to a representative of the German Central Office for the Investigation of National-Socialist Atrocities at Ludwigsburg (*Zentrale Stelle zur Aufklärung nationalsozialistischer Gewaltverbrechen*) established by the judicial administrations of the German States in 1958, by September 1999, Germany had investigated against more than 100,000 accused and suspected persons for crimes committed during the Nazi regime. In all, 7,225 of the proceedings were handed over to the public prosecution and about 6,500 individuals were convicted.[639]

[635] Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Fourth information report on war damage to the cultural heritage in Croatia and Bosnia and Herzegovina, Doc. 6999, 19 January 1994, § 71.

[636] Report on the Practice of Canada, 1998, Chapter 6.3.

[637] GDR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.60, 26 November 1981, § 26.

[638] Germany, Minister of State, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August 1–September 1993, *Bulletin*, No. 69, Presse- und Informationsamt der Bundesregierung, Bonn, 4 September 1993, p. 733.

[639] Willi Dressen, "Eine Behörde gegen das Vergessen", *Die Welt*, 2 September 1999.

541. In its third periodic report to the CAT in 1998, Italy referred to allegations of violations committed by members of Italian armed forces participating in a multinational peacekeeping operation in Somalia in 1993 and 1994, and stated that:

> 76. Thorough and complex investigations are currently being carried out by various Italian judicial authorities in connection with the acts of violence committed by Italian soldiers in Somalia. Four such investigations are currently in progress at the Public Prosecutor's Office attached to the Court of Livorno.
> 77. As regards the proceedings for alleged torture suffered by a Somali man arrested at Jhoar and the alleged rape of a Somali woman by soldiers at a roadblock in Mogadishu, a probatory hearing was arranged so as to have the testimonies of the victims and a witness collected directly by the judge. Expert examinations are being carried out to ascertain the after-effects of the violence on the victims and also to see whether they corresponded to the photographs published by a weekly journal. The expert work is now in progress. Investigations are also being continued in the other two proceedings.
> 78. The Public Prosecutor's Office attached to the Court of Milan, for its part, is diligently continuing its investigations regarding an alleged case of carnal violence committed by an Italian soldier in Mogadishu.
> 79. By means of a decree dated 9 February 1997, the Preliminary Examination Judge of the Court of Leghorn ordered that the case based on the facts denounced by Abdi Hasn Addò be filed. Addò had accused Italian soldiers of having shot and killed three Somalis in a car on 3 June 1993. But the investigations showed that on the day in question the soldiers had been engaged in a military operation known as "Illach 26" that was taking place in another part of Somalia from that indicated by Addò.[640]

542. At the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the President of the National Assembly of Niger committed the National Assembly and the deputies of Niger:

> 1) To make approaches to the government in order that Niger:
> a) becomes a party to the following treaties in 2002: the Statute of the International Criminal Court (1998);
> . . .
> 2) To ensure that legislative measures required by International Humanitarian Law be adopted . . . in particular for punishment of violations of International Humanitarian Law treaties and of protection of the emblem of the Red Cross and the Red Crescent.[641]

543. In 2000, during a debate in the UN Security Council on the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Slovenia stated that:

[640] Italy, Third periodic report to the CAT, UN Doc. CAT/C/44/Add.2, 15 December 1998, §§ 77–79.

[641] Niger, Pledge made on 20 February 2002 at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, §§ 1–2.

States have the primary responsibility to ensure the safety and security of all personnel [i.e. UN personnel, associated personnel and humanitarian personnel in conflict areas]. The Security Council for its part should insist on the responsibility of all parties to a conflict to respect international humanitarian law, and should take appropriate action in that regard. Attacks against such personnel clearly represent breaches of norms of international law. Every incident must be fully investigated, and the perpetrators must be brought to justice.[642]

544. In 1998, in its report on "gross violations of human rights" committed between 1960 and 1993, South Africa's Truth and Reconciliation Commission stated that:

Those combatants who were killed or seriously injured while they were unarmed or out of combat, executed after they had been captured, or wounded when they clearly could have been arrested were held to be victims of gross violations of human rights, and those responsible were held accountable.[643]

545. In a resolution adopted on the occasion of the 25th Anniversary of the Additional Protocols in 2002, Switzerland's Conseil des Etats invited "national parliaments to examine the totality of the most appropriate legislative and judicial means in order to ... better prevent and repress violations of this law".[644]

546. According to the Report on the Practice of Syria, Syria considers that the duty to try or extradite persons alleged to have committed grave breaches, as defined in the Geneva Conventions and AP I, is part of customary law. It considers that no such duty exists in regard to violations committed in non-international conflicts.[645]

547. In the aftermath of the war in the South Atlantic, the UK Metropolitan Police investigated allegations according to which criminal offences had been committed by UK soldiers during that conflict. However, in 1994, in reply to a question in the House of Lords, the Lord Chancellor stated that:

The Director of Public Prosecution has ... announced that she has concluded her consideration of the inquiries carried out by the Metropolitan Police into allegations that criminal offences had been committed by members of the Parachute Regiment during their operations in the Falkland Islands in 1982 ... She has concluded that the evidence is not such as to afford a realistic prospect of conviction of any person for any criminal offence and has therefore decided that no criminal proceedings should be instituted.[646]

642 Slovenia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 8.
643 South Africa, Report of the Truth and Reconciliation Commission, 1998, Vol. 1, p. 76, § 102.
644 Switzerland, Conseil des Etats, Declaration concerning the Protocols additional to the Geneva Conventions, 12 June 2002, Summer Session 2002, Seventh Session, *Official Bulletin*, No. 02.048 (provisional version of the text).
645 Report on the Practice of Syria, 1997, Chapter 6.3.
646 UK, House of Lords, Reply by the Lord Chancellor to a question, *Hansard*, 14 July 1994, Vol. 556, col. 1961.

548. In July 1997, UK special forces arrested a leading Bosnian war crime suspect, in order to bring him before the ICTY.[647]

549. At the CDDH, the US stated with respect to a proposal to characterise the use of certain prohibited weapons as a grave breach under Article 85 AP I that "grave breaches were meant to be the most serious type of crime; Parties have an obligation to punish or extradite those guilty of them".[648]

550. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that:

> It is the policy of the Department of Defense to ensure that:
>
> . . .
>
> 2. A program, designed to prevent violations of the law of war, is implemented by the U.S. Armed Forces.
> 3. Alleged violations of the law of war, whether committed by or against U.S. or enemy personnel, are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.[649]

The Directive also stated that "the Armed Forces of the U.S. shall institute and implement programs to prevent violations of the law of war".[650]

551. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 80–85 AP I, affirmed that "we support the principle that all necessary measures for the implementation of the rules of humanitarian law be taken without delay". Referring to Articles 85–89 AP I, he added that "we support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have wilfully committed such acts".[651]

552. In 1991, in a diplomatic note to Iraq, the US stated that:

> The Government of the United States reminds the Government of Iraq that under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time . . . This includes members of the Iraqi armed forces and civilian government officials.[652]

[647] Marcus Tanner and Fran Abrams, "Commando swoop on Serbs", *The Independent*, 11 July 1997, p. 1.

[648] US, Statement at the CDDH, *Official Records*, Vol. VI, Doc. CDDH/SR.44, 30 May 1977, p. 280, § 7.

[649] US, Department of Defense, Directive on the Law of War Program No. 5100.77, 10 July 1979, Section C(2) and (3).

[650] US, Department of Defense, Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E(b).

[651] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

[652] US, Department of State, Diplomatic note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

In another such diplomatic note, the US reiterated that "Iraqi individuals who are guilty of . . . war crimes . . . are . . . subject to prosecution at any time".[653]

553. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

[Department of Defense Directive on the Law of War Program No. 5100.77] is the foundation for the US military law of war program. It contains four policies:

. . .

- A program, designed to prevent violations of the law of war . . . [will be] implemented by the US Armed Forces.
- Alleged violations of the law of war, whether committed by or against US or enemy personnel . . . [will be] promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.[654]

The report also stated that "each service has issued directives to implement [Department of Defense Directive on the Law of War Program No. 5100.77] with respect to the reporting and investigation of suspected violations of the law of war committed by or against its personnel".[655]

554. The 1998 version of the US Department of Defense Directive on the Law of War Program, reissuing the one of 1979, provides that:

It is the DoD policy to ensure that:

. . .

4.2 An effective program to prevent violations of the law of war is implemented by the DoD Components.

4.3 All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.[656]

It further stated that "the Heads of the DoD Components shall . . . institute and implement effective programs to prevent violations of the law of war".[657]

555. The Report on US Practice states that:

It is the *opinio juris* of the US that all nations are obligated to punish members of their armed forces guilty of serious violations of the laws of war. As to other persons suspected of war crimes, there is a general obligation to try them or to cooperate with another state willing to try them in accordance with international fair trial standards.[658]

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

[654] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

[655] US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

[656] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 4(2) and (3).

[657] US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(2).

[658] Report on US Practice, 1997, Chapter 6.3.

The report also states that it is the *opinio juris* of the US that "there is a general obligation to try [persons suspected of war crimes other than members of its own armed forces] or to cooperate with another state willing to try them in accordance with international fair trial standards".[659]

556. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that:

1. YPA units have the duty to secure in the area of their operations full and unconditional implementation of rules of international humanitarian law of armed conflicts and suppress violations of those rules.
2. War crimes and other grave breaches of norms of law on warfare are serious criminal offences and call for criminal liability of all perpetrators. Appropriate measures should be carried out immediately against all perpetrators aimed at suppressing unnecessary and excessive suffering of [the] civilian population, wounded, prisoners and all other persons affected by military operations.
3. In order to prevent violations of international law of warfare, officers and all other members of [the] YPA are authorized to apply all measures, including use of force, against all perpetrators, regardless of their affiliation to different existing forces.[660]

557. In 1995, the Presidential Adviser for Military Affairs of a State party to a non-international armed conflict explained to the ICRC that there were problems of discipline in the armed forces. In his view, the absence of a credible system of military justice and, consequently, of sanctions, explained the conduct of members of the armed forces during military operations. The Military Penal Code of this State did not contain provisions expressly prohibiting certain types of conduct which violated IHL. The adviser added that, to end these multiple and serious violations, there had to be a threat of sanction. As long as there was a "climate of impunity" it was not likely that IHL would be respected.[661]

III. Practice of International Organisations and Conferences

United Nations

558. In a resolution on Rwanda adopted in 1995, the UN Security Council expressed its determination "to put an end to violations of international humanitarian law and serious acts of violence directed against refugees, and that effective measures be taken to bring to justice the persons who are responsible for such crimes". It therefore urged States:

to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against

[659] Report on US Practice, 1997, Chapter 6.4.
[660] SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, §§ 1–3.
[661] ICRC archive document.

whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda.[662]

The Security Council also urged States on whose territory serious acts of violence in the refugee camps had taken place

to arrest and detain, in accordance with their national law and relevant standards of international law, and submit to the appropriate authorities for the purpose of prosecution persons against whom there is sufficient evidence that they have incited or participated in such acts.[663]

559. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council called upon the Taliban:

to investigate urgently [the attacks on the United Nations personnel in the Taliban-held territories of Afghanistan, including the killing of the two Afghan staff members of the World Food Programme and of the United Nations High Commissioner for Refugees in Jalalabad, and of the Military Adviser to the United Nations Special Mission to Afghanistan in Kabul], and to keep the United Nations informed about the results of the investigation.[664]

560. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council underlined "the need for the authorities of the Federal Republic of Yugoslavia to bring to justice those members of the security forces who have been involved in the mistreatment of civilians and the deliberate destruction of property".[665]

561. In April 1994, a statement by its President on the situation in Rwanda, the UN Security Council required that "the interim Government of Rwanda and the Rwandese Patriotic Front take effective measures to prevent any attacks on civilians in areas under their control". It called on "the leadership of both parties to condemn publicly such attacks and to commit themselves to ensuring that persons who instigate or participate in such attacks are prosecuted and punished".[666]

562. In October 1994, in a statement by its President on the situation in Rwanda, the UN Security Council welcomed "the speed with which the United Nations and the Government of Rwanda responded to allegations that some RPA soldiers might have been responsible for systematic killings" and underlined "the importance it attaches to the thorough and expeditious investigation of these allegations". The Security Council further reaffirmed its view that "those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice".[667]

[662] UN Security Council, Res. 978, 27 February 1995, preamble and § 1.
[663] UN Security Council, Res. 978, 27 February 1995, § 5.
[664] UN Security Council, Res. 1193, 28 August 1998, § 6.
[665] UN Security Council, Res. 1199, 23 September 1998, § 14.
[666] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994.
[667] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/59, 14 October 1994.

563. In 1994, in a statement by its President in connection with events in Burundi, the UN Security Council stated that it fully supported the efforts of the Burundian authorities "in seeking to ensure that those committing or inciting the commitment of acts of violence are held accountable for their actions".[668]

564. In September 1995, in a statement by its President on the situation in Croatia, the UN Security Council demanded that the Croatian government "immediately investigate all [reports of human rights violations including the burning of houses, looting of property and killings] and take appropriate measures to put an end to such acts".[669]

565. In September 1995, in a statement by its President on the situation in Croatia, the UN Security Council demanded that the Croatian government "investigate all reports of human rights violations and take appropriate measures to put an end to such acts".[670]

566. In 1997, in a statement by its President, the UN Security Council voiced its deep concern at "continuing reports of massacres, other atrocities and violations of IHL in eastern Zaire" and pointed out that it attached great importance to the "commitment of the leader of the ADFL to take appropriate action against members of the ADFL who violate the rules of international humanitarian law concerning the treatment of refugees and civilians".[671]

567. In 1998, in a statement by its President concerning the conflict in the DRC, the UN Security Council stated that it:

> recognizes the necessity to investigate further the massacres, other atrocities and violations of international humanitarian law and to prosecute those responsible. It deplores the delay in the administration of justice. The Council calls on the Governments of the Democratic Republic of the Congo and Rwanda to investigate without delay, in their respective countries, the allegations contained in the report of the Investigative Team and to bring to justice any persons found to have been involved in these or other massacres, atrocities and violations of international humanitarian law. The Council takes note of the stated willingness of the Government of the Democratic Republic of the Congo to try any of its nationals who are guilty of or were implicated in the alleged massacres . . . Such action is of great importance in helping to bring an end to impunity and to foster lasting peace and stability in the region.[672]

568. In 1998, in two statements by its President concerning the situation in Afghanistan, the UN Security Council stated that it supported "the steps of

[668] UN Security Council, Statement by the President, UN Doc. S/PRST/1994/82, 22 December 1994.
[669] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 1.
[670] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/49, 17 September 1995.
[671] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/24, 30 April 1997.
[672] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, pp. 1-2.

the Secretary-General to launch investigations into alleged mass killings of prisoners of war and civilians in Afghanistan".[673]

569. In 2000, in a statement by its President on the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, the UN Security Council urged "States to fulfil their responsibility to act promptly and effectively in their domestic legal systems to bring to justice all those responsible for attacks and other acts of violence against such personnel, and to enact effective national legislation as required for that purpose".[674]

570. In a resolution adopted in 1946 on the extradition and punishment of war criminals, the UN General Assembly recommended that members of the UN take all the necessary measures:

> to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in [crimes as defined, *inter alia*, in the Moscow Declaration of 1943 and the Charter of the International Military Tribunal of 1945], and to cause them to be sent back to the countries to which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries.

It also called upon governments of non-member States to take all necessary measures for the apprehension and removal of war criminals.[675]

571. In a resolution adopted in 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon the States concerned:

> to take the necessary measures for the thorough investigation of war crimes and crimes against humanity . . . and for the detection, arrest, extradition and punishment of all war criminals and persons guilty of crimes against humanity who have not yet been brought to trial or punished.[676]

572. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly urged States "to take measures to ensure the punishment of all persons guilty of war crimes and crimes against humanity, including their extradition to those countries where they have committed such crimes".[677]

573. In a resolution adopted in 1973 on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly declared that "war crimes and crimes against humanity, wherever they are committed, shall

[673] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2; Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 3.
[674] UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 9 February 2000.
[675] UN General Assembly, Res. 3 (I), 13 February 1946, § 3.
[676] UN General Assembly, Res. 2583 (XXIV), 15 December 1969, § 1; see also Res. 2712 (XXV), 15 December 1970, §§ 2 and 5.
[677] UN General Assembly, Res. 2840 (XXVI), 18 December 1971, § 1.

be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment".[678]

574. In a resolution adopted in 1994, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict and invited all States:

> to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.[679]

575. In a resolution adopted in 1995 on rape and abuse of women in the former Yugoslavia, the UN General Assembly reaffirmed that rape in the conduct of armed conflict constituted a war crime and called upon "States to take all measures required for the protection of women and children from such acts and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice".[680]

576. In a resolution adopted in 1997 on the rights of the child, the UN General Assembly called upon all States to:

> take all measures required for the protection of women and children from all acts of gender-based violence, including rape, sexual exploitation and forced pregnancy, and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.[681]

577. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that "the international community will exert all efforts to bring them [all persons who perpetrate or authorize violations of international humanitarian law] to justice in accordance with internationally recognized principles of due process".[682]

578. In a resolution adopted in 1994 on the rape and abuse of women in the territory of the former Yugoslavia, the UN Commission on Human Rights urged UN member States "to exert every effort to bring to justice, in accordance with internationally recognized principles of due process, all those individuals directly or indirectly involved in these outrageous international crimes".[683]

579. In a resolution adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights demanded "immediate, firm and resolute action by all concerned parties and the international

[678] UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 1.
[679] UN General Assembly, Res. 49/50, 9 December 1994, § 11.
[680] UN General Assembly, Res. 50/192, 22 December 1995, § 3, see also Res. 51/77, 12 December 1996, § 28.
[681] UN General Assembly, Res. 52/107, 12 December 1997, § 12.
[682] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 17.
[683] UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 6.

community" to bring to trial those responsible for human rights violations and breaches of international law. It also reaffirmed that "all persons who perpetrate or authorize violations of international humanitarian law . . . should be brought to justice in accordance with internationally recognized principles of due process".[684]

580. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights recognised that the practice of rape as a weapon of war constituted a war crime and called for the "protection and care of rape victims, respect for the special needs of victims of sexual violence in the investigation and prosecution of alleged violations, and punishment of those responsible".[685] The Commission also expressed "its outrage over the failure of parties to arrest and surrender persons indicted by the [ICTY] in violation of the peace agreement".[686]

581. In a resolution on the situation of human rights in 1996, the UN commission on Human Rights reaffirmed that "the international community will exert every effort, in cooperation with national and International tribunals, to bring those responsible [for grave violations of international humanitarian law] to justice in accordance with international principles of due process.[687]

582. In resolutions adopted in 1994, 1995 and 1996, the UN Commission on Human Rights reminded the government of Myanmar of its obligations:

> to put an end to the impunity of perpetrators of violations of human rights, including members of the military, and its responsibility to investigate alleged cases of human rights violations committed by its agents on its territory, to bring them to justice, prosecute them and punish those found guilty, in all circumstances.[688]

583. In a resolution adopted in 1995, the UN Commission on Human Rights called "once more upon the Government of the Sudan to ensure a full and thorough investigation by the independent judicial inquiry commission of the killings of Sudanese employees of foreign relief organizations, to bring to justice those responsible for the killings".[689]

584. In a resolution adopted in 1995, the UN Commission on Human Rights welcomed the commitments made by the government of Rwanda "to protect and promote respect for human rights and fundamental freedoms and to eliminate impunity by investigating and prosecuting those responsible for acts of retribution".[690] In a further resolution adopted in 1996, the Commission encouraged the government of Rwanda to ensure investigation and prosecution

[684] UN Commission on Human Rights, Res. 1995/89, 8 March 1995, §§ 13 and 19.
[685] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 2.
[686] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 6.
[687] UN Commission on Human Rights, Res. 1996/76, 23 April 1996, § 4.
[688] UN Commission on Human Rights, Res. 1994/85, 9 March 1994, § 8; Res. 1995/72, 8 March 1995, § 12; Res. 1996/80, 23 April 1996, § 12.
[689] UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 17.
[690] UN Commission on Human Rights, Res. 1995/91, 8 March 1995, preamble and § 6

of those responsible for genocide and other serious violations of international law.[691]

585. In a resolution on Sierra Leone adopted in 1999, the UN Commission on Human Rights reminded "all factions and forces in Sierra Leone that in any armed conflict, including an armed conflict not of an international character . . . all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches [of IHL] and to bring such persons, regardless of their nationality, before their own courts".[692]

586. In a resolution adopted in 1999, the UN Commission on Human Rights invited the government of Burundi "to take more measures, including in the judicial sphere, to put an end to impunity, in particular by bringing to trial those responsible for violations of human rights and of international humanitarian law".[693]

587. In a resolution on Chechnya adopted in 2000, the UN Commission on Human Rights called upon the Russian government to:

> establish urgently, according to recognized international standards, a national, broad-based and independent commission of inquiry to investigate promptly alleged violations of human rights and breaches of international humanitarian law committed in the Republic of Chechnya in order to establish the truth and identify those responsible, with a view to bringing them to justice and preventing impunity.[694]

588. In a resolution on Chechnya adopted in 2001, the UN Commission on Human Rights called upon the Russian government to:

> ensure that all necessary measures are taken to investigate and solve all cases of forced disappearance as recorded and reported, *inter alia*, by the Office of the Special Representative of the President of the Russian Federation, and to ensure where necessary that criminal prosecutions are undertaken.[695]

589. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights stated that it:

> *Emphasizes* the importance of combating impunity to the prevention of violations of international human rights and humanitarian law and urges States to give necessary attention to the question of impunity for violations of international human rights and humanitarian law, including those perpetrated against women and children, and to take appropriate measures to address this important issue;
> . . .
> *Emphasizes* the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law, recognizes that amnesties should not be

[691] UN Commission on Human Rights, Res. 1996/76, 23 April 1996, § 6.
[692] UN Commission on Human Rights, Res. 1999/1, 6 April 1999, § 2.
[693] UN Commission on Human Rights, Res. 1999/10, 23 April 1999, § 8.
[694] UN Commission on Human Rights, Res. 2000/58, 25 April 2000, § 4.
[695] UN Commission on Human Rights, Res. 2001/24, 20 April 2001, § 10.

granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take action in accordance with their obligations under international law;
...
Recognizes that crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and that perpetrators of such crimes should be prosecuted or extradited by States, and urges all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes.[696]

590. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN Sub-Commission on Human Rights, "dismayed at the continued extremely unsatisfactory capacity of the judicial system to punish those guilty of violations of human rights", strongly urged the government of El Salvador "to take all necessary measures to ensure that those responsible for the murder of Monsignor Romero, Archbishop of San Salvador, be brought to trial".[697]

591. In a resolution adopted in 1993 on the punishment of the crime of genocide, the UN Sub-Commission on Human Rights urged States "to make every effort to bring to justice ... all those individuals directly or indirectly involved in the unspeakable crimes committed in Bosnia and Herzegovina, elsewhere in the territory of the former Yugoslavia or in any other part of the world".[698]

592. In a resolution adopted in 1993 on the situation in Peru, the UN Sub-Commission on Human Rights, condemning the violations of human rights by the Sendero Luminoso (Shining Path) and the MRTA and regretting the violations of human rights by some members of the forces of law and order, urged the Peruvian authorities "to adopt the necessary measures to guarantee full compliance with the State's obligations to investigate and penalize those responsible for human rights violations".[699]

593. In a resolution on Rwanda adopted in 1994, the UN Sub-Commission on Human Rights called for "action to investigate, identify and establish the responsibilities, both national and international, of the individuals implicated in the war crimes, including ... crimes against humanity and genocide in the tragedy of Rwanda, for the purpose of punishing those responsible".[700]

594. In a resolution on Rwanda adopted in 1995, the UN Sub-Commission on Human Rights deplored the fact that the efforts of the international community were still inadequate, "whereas the duty of trying those responsible for the genocide and war crimes does not devolve solely on the Government of Rwanda".[701]

[696] UN Commission on Human Rights, Res. 2002/79, 25 April 2002, §§ 1, 2 and 11.
[697] UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble and § 5.
[698] UN Sub-Commission on Human Rights, Res. 1993/8, 20 August 1993, § 4.
[699] UN Sub-Commission on Human Rights, Res. 1993/23, 23 August 1993, §§ 2, 3 and 8.
[700] UN Sub-Commission on Human Rights, Res. 1994/1, 9 August 1994, § 7.
[701] UN Sub-Commission on Human Rights, Res. 1995/5, 19 August 1995, § 3.

595. In a resolution adopted in 1998 on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the UN Sub-Commission on Human Rights stated that it:

> 5. Calls upon all States to enact and enforce legislation incorporating relevant international criminal law into their municipal legal systems to allow for the effective prosecution in municipal courts of all acts of sexual violence committed during armed conflict;
> 6. Also calls upon all States to consider enacting legislation as required by the Geneva Conventions of 12 August 1949 to provide jurisdiction in their municipal courts for serious international crimes committed in other States, thereby increasing the potential venues in which acts of sexual violence may be prosecuted;
> 7. Affirms at the same time that all States must ensure that their legal systems at all levels conform to their international obligations and are capable of adjudicating international crimes and administering justice without gender bias;
> . . .
> 9. Reiterates that States must respect their international obligations to prosecute perpetrators . . . of human rights and humanitarian law violations.[702]

596. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights stated that it:

> 6. Calls upon all States to enact and enforce legislation incorporating relevant international criminal law into their national legal systems to allow for the effective prosecution in national courts of acts of sexual violence committed during armed conflicts;
> 7. Affirms at the same time that all States must ensure that their legal systems at all levels conform to their international obligations and are capable of adjudicating international crimes and administering justice without gender bias;
> . . .
> 9. Reiterates that States must respect their international obligations to prosecute perpetrators and compensate all victims of human rights and humanitarian law violations;
> 10. Recognizes that to give effect to rules applicable in conflict situations requires the adoption and implementation of measures in peacetime;
> 11. Calls upon States to make possible respect for their obligations in situations of conflict by, inter alia:
> . . .
> (b) Putting in place effective mechanisms for the investigation and prosecution of such offences by their own armed forces and for the protection of the victims of such offences;
> . . .
> 12. Calls upon States to provide effective criminal penalties . . . in order to end the cycle of impunity with regard to sexual violence committed during armed conflicts.[703]

[702] UN Sub-Commission on Human Rights, Res. 1998/18, 21 August 1998, §§ 5–7 and 9.
[703] UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, §§ 6–7 and 9–12.

597. In 1996, in a report concerning UNAMIR in Rwanda, the UN Secretary-General stated that:

The [Rwandan] authorities took some significant steps to address reported human rights violations. Four soldiers were tried and convicted by a military court in late December 1995 for their involvement in an incident in which four civilians were shot, and three killed. The Rwandan Patriotic Army cooperated with the Field Operation in its investigation of the 25 November killings by soldiers of civilians at a temporary settlement in Nyungwe forest. The official investigation is now in the hands of the Military Prosecutor . . . However, the Field Operation remained concerned that official investigations were carried out only in some of the cases of possible human rights violations reported to it, including killings of civilians allegedly by members of the security forces.[704]

598. In 2001, in a recommendation in his report on the protection of civilians in armed conflict, the UN Secretary–General encouraged member States "to introduce or strengthen domestic legislation and arrangements providing for the investigation, prosecution and trial of those responsible for the systematic and widespread violations of international criminal law".[705]

599. In 1996, in a report on a mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, its Causes and Consequences recommended, *inter alia*, that, at the national level the government of Japan should "identify and punish, as far as possible, perpetrators involved [during the Second World War] in the recruitment and institutionalization of comfort stations".[706]

600. In 1998, in a report on systematic rape, sexual slavery and slavery-like practices during armed conflict submitted to the UN Sub-Commission of Human Rights, the Special Rapporteur recommended that:

States should enact special legislation incorporating international criminal law into their municipal legal systems. Domestic law codifications of international criminal law should specifically criminalize slavery and acts of sexual violence, including rape, as grave breaches of the Geneva Conventions, war crimes, torture and constituent acts of crimes against humanity and genocide. Military regulations, codes of conduct, and training materials for the uniformed and armed services must explicitly address the prohibition of sexual violence and sexual slavery during armed conflict. States should search for and bring to justice all perpetrators of grave breaches of the Geneva Conventions, pursuant to article 146 of the Fourth Geneva Convention. States should, for example, follow the examples of Belgium and Canada and enact legislation providing universal jurisdiction for violations of

[704] UN Secretary-General, Progress report on the UN Assistance Mission for Rwanda, UN Doc. A/50/868-S/1996/61, 30 January 1996, § 11.

[705] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 3.

[706] UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 137(f).

jus cogens norms and other international crimes including sexual slavery and sexual and gender violence committed by State and non-State actors, including armed groups not under State authority.[707]

601. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) noted that it had been informed by the Rwandan Minister of Defence that the government had detained 70 FPR soldiers and intended to try and punish them for private acts of revenge exacted against Hutus. The government emphasised that these acts were not only unauthorised, but subject to heavy military discipline and punishment. The Commission of Experts considered that "the armed conflict between 6 April and 15 July 1994 qualifies as a non-international armed conflict".[708]

602. In 1995, in his second report concerning the conflict in Guatemala, the Director of MINUGUA observed that:

Verification has uncovered cases in which the Government failed to guarantee the right to integrity and security of person in terms of freedom from torture or cruel, inhuman or degrading treatment, or the threat of such treatment. Cases have been verified in which State officials appear to be implicated, but they have not been promptly or thoroughly investigated and the guilty parties have not been prosecuted.[709]

603. In its report in 1993, the UN Commission on the Truth for El Salvador stated with respect to an incident which had occurred at El Junquillo that:

On 12 March 1981, soldiers and members of the Cacaopera military defence unit attacked the population, consisting solely of women, young children and old people. They killed the inhabitants and raped a number of women and little girls under the age of 12. They set fire to houses, cornfields and barns.

The Commission finds that: . . . the Government and the judiciary of El Salvador failed to conduct investigations into the incident. The State thus failed in its duty under international human rights law to investigate, bring to trial and punish those responsible and to compensate the victims or their families.[710]

With respect to the killing of more than 200 civilians committed by units of the Atlacatl Battalion of the armed forces of El Salvador, the Commission deplored the fact that:

Although it received news of the massacre, which would have been easy to corroborate because of the profusion of unburied bodies, the Armed Forces High Command

[707] UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 102.

[708] UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, §§ 99 and 108.

[709] MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 179.

[710] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 67.

did not conduct or did not give any word of an investigation and repeatedly denied that the massacre had occurred. There is full evidence that General José Guillermo García, then Minister of Defence, initiated no investigations that might have enabled the facts to be established. There is sufficient evidence that General Rafael Flórez Lima, Chief of the Armed Forces Joint Staff at the time, was aware that the massacre had occurred and also failed to undertake any investigation.

The High Command also took no steps whatsoever to prevent the repetition of such acts, with the result that the same units were used in other operations and followed the same procedures.

The El Mozote massacre was a serious violation of international humanitarian law and international human rights law.

The President of the Supreme Court of Justice of El Salvador, Mr. Mauricio Gutiérrez Castro, has interfered unduly and prejudicially, for biased political reasons, in the ongoing judicial proceedings on the case.[711]

Referring to the massacre of more than 300 unarmed civilians on the banks of the Sumpul river by troops of a military detachment, members of the National Guard and members of the paramilitary Organización Nacional Democrática (ORDEN) for which it found sufficient evidence, the Commission stated that:

The Commission believes that the Salvadorian military authorities were guilty of a cover-up of the incident. There is sufficient evidence that Colonel Ricardo Augusto Peña Arbaiza, Commander of Military Detachment No. 1 in May 1980, made no serious investigation of the incident.

The Sumpul river massacre was a serious violation of international humanitarian law and international human rights law.[712]

Turning to the activities of the death squads in El Salvador, the Commission stated that:

It is especially important to call attention to the repeated abuses committed by the intelligence services of the security forces and the armed forces . . . Any investigation must result both in an institutional clean-up of the intelligence services and in the identification of those responsible for this aberrant practice.

The lack of effective action by the judicial system was a factor that reinforced the impunity that shielded and continues to shield members and promoters of the death squads in El Salvador.

. . .

The issue of the death squads in El Salvador is so important that it requires special investigation. More resolute action by national institutions, with the cooperation and assistance of foreign authorities who have any information on the subject, is especially needed. In order to verify a number of specific violations and ascertain who was responsible, it will be necessary to investigate the serious acts of violence committed by the death squads on a case-by-case basis.[713]

[711] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 121.

[712] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 124.

[713] UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 137–138.

604. In 1993, in its report to the UN General Assembly, the ILC recognised the creation of the ICTY as a step towards the creation of a system of universal penal jurisdiction.[714]

Other International Organisations

605. In a declaration adopted in 1993 on the rape of women and children in the territory of former Yugoslavia, the Council of Ministers of the Council of Europe appealed to "member States and the international community at large to ensure that these atrocities cease and that their instigators and perpetrators are prosecuted by an appropriate national or international penal tribunal".[715]

606. In a recommendation adopted in 1979 calling for the ratification of the 1974 European Convention on the Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes, the Parliamentary Assembly of the Council of Europe stated that it believed that: "Council of Europe member states should do everything they can, both individually and in close co-operation, to search for and prosecute the most serious of the surviving criminals of the Second World War, and to bring them to trial".[716]

607. In 1995, in a report on the human rights situation in Chechnya, the Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe noted that violations of IHL and/or human rights law committed by members of the Russian troops had not been prosecuted. Referring to acts such as robbery and looting, wanton destruction, extortion, arson, rape, disappearances and hostage-taking, he concluded that:

> It can be summarised that in principle there seems to be no investigation or prosecution of human rights abuses committed by Russian federal troops against the Chechen population, either through military discipline, or through the ordinary judicial system. This is an unacceptable situation.[717]

The Rapporteur recommended that the Russian authorities "tighten military discipline and introduce the principle of accountability into the armed forces" and "prosecute individual criminal acts committed during the last six months . . . through the judicial system".[718]

608. In a recommendation adopted in 1999 concerning respect for IHL in Europe, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers "invite the governments of the member

[714] ILC, Report to the UN General Assembly, UN Doc. A/48/10, 1 November 1993, p. 1.
[715] Council of Europe, Council of Ministers, Declaration on the rape of women and children in the territory of former Yugoslavia, 18 February 1993.
[716] Council of Europe, Parliamentary Assembly, Rec. 855, 2 February 1979, § 9.
[717] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on the Human Rights Situation in Chechnya, Doc. 7384, 15 September 1995, Appendix I, §§ 40–41 and 68–69.
[718] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on the Human Rights Situation in Chechnya, Doc. 7384, 15 September 1995, Appendix I, §§ 69 and 75.

states: . . . to introduce the *aut dedere aut iudicare* principle in their criminal law".[719]

609. In a resolution adopted in 1982 on the situation in Lebanon, the European Parliament noted "the establishing, albeit belated, of an official Israeli inquiry into the [killings of Palestinians] in the camps in Sabra and Chatila and hopes that responsibility for them is to be fully and clearly established".[720]

610. In a resolution adopted in 1993, the European Parliament affirmed that "there should be no question of impunity for those responsible for war crimes in the former Yugoslavia".[721]

611. At the first OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1994, the participants concluded that "it is necessary to bring to the attention of OAU Member States the importance of improving national legislation, particularly in integrating penal and disciplinary measures to repress violation[s] of International Humanitarian Law (IHL)".[722] The OAU Council of Ministers took note of the recommendations of the seminar.[723]

612. At the fourth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1997, the participants noted that they appreciated "the national measures taken by the Government of Ethiopia, launched toward repression of war crimes and crimes against humanity" and called upon "the International Community to render appropriate support with a view to make them more effective".[724]

613. Addressing the President of the UN Security Council as members of the Contact Group of OIC in 1992, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey stated that:

> Steps should be taken to bring before an international tribunal those responsible for the abhorrent practice of "ethnic cleansing", for mass killings and the commission of other grave breaches of international humanitarian law and in particular the Geneva Conventions of 12 August 1949.[725]

International Conferences

614. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the application of the Geneva Conventions by the United Nations Emergency Forces in which it recommended that "the authorities

[719] Council of Europe, Parliamentary Assembly, Rec. 1427, 23 September 1999, § 8(ii)(i).
[720] European Parliament, Resolution on the situation in the Lebanon, 15 October 1982, § 3.
[721] European Parliament, Resolution on Human Rights in the world and Community human rights policy for the years 1991/92, 26 April 1993, §§ 7 and 8.
[722] OAU/ICRC, First seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 7 April 1994, Conclusions and Recommendations, § 7.
[723] OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 1.
[724] OAU/ICRC, Fourth seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 29–30 April 1997, Recommendations, § 6.
[725] OIC, Contact Group on Bosnia and Herzegovina, Letter dated 5 October 1992 from Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992, p. 2.

responsible for the contingents [made available to the UN] agree to take all the necessary measures to prevent and suppress any breaches of the [1949 Geneva] Conventions".[726]

615. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the repression of violations of the Geneva Conventions in which it appealed "to Governments which have so far not done so to complete their legislation so as to ensure adequate penal sanctions for violations of these Conventions".[727]

616. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants urged all States to:

> 5. Adopt and implement, at the national level, all appropriate regulations, laws and measures to ensure respect for international humanitarian law applicable in the event of armed conflict and to punish violations thereof.
> 6. Contribute to an impartial clarification of alleged violations of international humanitarian law . . .
> 7. Ensure that war crimes are duly prosecuted and do not go unpunished, and accordingly implement the provisions on the punishment of grave breaches of international humanitarian law and encourage the timely establishment of appropriate international legal machinery, and in this connection acknowledge the substantial work accomplished by the International Law Commission on an international criminal court.[728]

617. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "all parties, directly involved in the conflict [between Israel and Palestinians] or not, to . . . take measures necessary for the prevention and suppression of breaches of the [1949 Geneva] Conventions".[729]

618. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants stated that:

> Wherever necessary, we commit ourselves to work towards the inclusion of these humanitarian norms in our national legislation with a view to guarantee their full implementation.
>
> . . . We commit ourselves to see that our States have the legislative means of repressing violations of International Humanitarian Law . . .
>
> We consider that a multidisciplinary committee bringing together all the State branches concerned and the various organisations, including the national Red Cross and Red Crescent Society, can be a useful and efficient mechanism to ensure the implementation of International Humanitarian Law. We therefore encourage our Parliaments to facilitate the setting up of such a structure if it is not yet in existence,

[726] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 3.
[727] 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVI.
[728] International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(5), (6) and (7).
[729] Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 4.

and take necessary measures to be represented on it and to be kept informed about its proceedings and recommendations.[730]

IV. Practice of International Judicial and Quasi-judicial Bodies

619. In 1993, in the *Application of Genocide Convention case* (Provisional Measures) brought by Bosnia and Herzegovina against the FRY (Serbia and Montenegro), the ICJ called upon the FRY (Serbia and Montenegro) to ensure that:

any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of direct and public incitement to commit genocide, or in complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.[731]

620. In 1997, in its concluding observations on the report of Myanmar, the CRC strongly recommended that:

All reported cases of abuse, rape and/or violence against children committed by members of the armed forces be rapidly, impartially, thoroughly and systematically investigated. Appropriate judicial sanctions should be applied to perpetrators and wide publicity should be given to such sanctions.[732]

621. In its admissibility decision in *X v. FRG* in 1976 regarding the right to be tried within a reasonable time for war crimes committed during the Second World War, the ECiHR noted that:

The international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute [war crimes committed during the Second World War] despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned.[733]

622. In 1993, in a report on the situation of human rights in Peru, the IACiHR recommended that the Peruvian government adopt "legislation to regulate offenses committed in connection with the performance of duties, in order to punish crimes committed by members of security forces in emergency areas".[734]

[730] African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble and §§ 7 and 11–12.
[731] ICJ, *Application of Genocide Convention case (Provisional Measures)*, Order, 8 April 1993, § 52.
[732] CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, § 41.
[733] ECiHR, *X v. FRG*, Admissibility Decision, 6 July 1976 , p. 116.
[734] IACiHR, Report on the Situation of Human Rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 61.

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

623. According to the ICRC Commentary on the First Geneva Convention, there is an inconsistency between the English and the French text in the third paragraph of Articles 49 GC I, 50 GC II, 129 GC III and 149 GC IV in that the English text uses the term "suppression", while the French text uses the wider expression "faire cesser":

> The expression "*faire cesser*", employed in the French text, is open to various interpretations. In our opinion it covers everything a State can do to prevent the commission, or the repetition, of acts contrary to the Convention ... The English word "suppression" corresponds more or less exactly to the French word "*répression*" (though not to the French word "*suppression*"). The French and English texts do not therefore correspond exactly. There can, however, be no doubt that the primary purpose of the paragraph is the *repression* of infractions other than "grave breaches", and that the administrative measures which may be taken to ensure respect for the provisions of the Convention on the part of the armed forces and the civilian population are only a secondary consideration ... It is thus clear that *all* breaches of the present Convention should be repressed by national legislation. At the very least, the Contracting Powers, having arranged for the repression of the various grave breaches and fixed an appropriate penalty for each, must include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention. Furthermore, under the present paragraph the authorities of the Contracting Parties should issue instructions in accordance with the Convention and arrange for judicial or disciplinary proceedings to be taken in all cases of failure to comply with such instructions.[735] [emphasis in original]

624. In 1993, in its report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that "under international law, States have a clear duty to bring to justice all persons suspected of having committed or ordered the commission of such acts ['certain breaches of international law, including those bearing on the environment in time of armed conflict']".[736]

625. In 1993, in a communication to the information services of National Red Cross and Red Crescent Societies, the ICRC stated that:

> The parties to a conflict and all the states party to the 1949 Geneva Conventions are under the obligation to repress grave breaches of international humanitarian law and to put an end to any violations thereof. The obligation to repress applies whatever the nationality of the offender and whenever the offence is committed.
> ...
> Nothing prevents states from collectively exercising powers that they possess on an individual basis ... The setting-up of [the ICTY] ... does not release states from

[735] Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, pp. 367–368.

[736] ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 49.

their obligation to take all other measures intended to ensure respect for international humanitarian law, to prevent and, where necessary, repress any violations thereof.[737]

626. In 1993, the ICRC informed the authorities of a State of an event involving the abuse of the remains of a dead person. The purpose of the notification was to enable the authorities "to conduct an inquiry into this violation of international humanitarian law and to avoid the repetition of such acts in the future". The ICRC expressed its hope that this might facilitate the work of the authorities, reminding them that they were "mandated to make prevail law and order".[738]

627. At its Seville Session in 1997, the Council of Delegates adopted a resolution in which it invited National Societies to promote the creation of an international criminal court, "while at the same time encouraging States to comply with their existing obligation under international humanitarian law to repress violations of this law and of the Convention relating to the crime of genocide".[739]

628. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on the international criminal court in which it invited National Societies:

to promote the ratification of the Rome Statute without making the declaration under Art. 124 of the Rome Statute, while at the same time encouraging States to comply with their existing obligation under international humanitarian law to suppress and repress violations of this law.[740]

VI. Other Practice

629. In 1988, in report on human rights in Nicaragua, Americas Watch stated that:

We learned of another rape, however, that did result in punishment. Four Sandinista soldiers were tried for the rape on January 27, 1988 in Yacapuca, Jinotega, of four women in their house. In addition, they were charged with theft. The soldiers, apparently conducting a recruitment sweep, accused the women of being *contra* collaborators.[741]

630. In 1993, the authorities of a separatist entity stated that it was impossible for the armed forces to prevent acts of pillage by civilians, since the troops were needed in another region. They added, however, that they had encouraged local television and radio stations to broadcast messages calling on the civilian population to stop the pillage of homes.[742]

631. In an appeal in 1996, Amnesty International stated that "IFOR should provide adequate security for grave sites to ensure that those responsible

[737] ICRC archive document [738] ICRC archive document.
[739] International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 5, § 1.
[740] International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 11, § 1.
[741] Americas Watch, *Human Rights in Nicaragua: 1987–1988*, New York, August 1998, p. 98.
[742] ICRC archive document.

for grave breaches of the [1949] Geneva Conventions can be brought to justice".[743]

632. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

> The competent authorities of a State on the territory of which is found a person against whom is alleged a serious violation of international humanitarian law committed in a non-international armed conflict are entitled to prosecute and try such a person before their courts; they are urged to do so.[744]

633. In 1995, the Groupe écoute et réconciliation dans l'Afrique des Grands Lacs – a group of private individuals from the Great Lakes region that met under the auspices of the Graduate Institute of Development Studies in Geneva – stated in a declaration on ending the reign of impunity in Rwanda and Burundi that the absence of an extradition treaty should not be used as an excuse to prevent the arrest and surrender of persons suspected of acts of genocide. In cases where States could not or would not extradite the suspects, they should be tried under the laws of the country where they resided.[745]

Granting of asylum to suspected war criminals

I. Treaties and Other Instruments

Treaties

634. Article 1(F)(a) of the 1951 Refugee Convention provides that:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

Other Instruments

635. No practice was found.

II. National Practice

Military Manuals

636. Australia's Defence Force Manual provides that:

> Where an individual seeking asylum in a neutral state is alleged to have committed grave breaches of LOAC, and a prima facie case can be established, the neutral state

[743] Amnesty International, Amnesty International renews calls for IFOR to comply with international law, April 1996.

[744] Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § VIII.

[745] Institut Universitaire d'études du développement, Groupe écoute et réconciliation dans l'Afrique des Grands Lacs, Pour en terminer avec la "culture de l'impunité" au Rwanda et Burundi, January 1995, p. 3.

is obligated either to place the individual on trial or hand them over to another party to the Geneva Conventions for trial.[746]

National Legislation

637. No practice was found.

National Case-law

638. In the *Ahmed case* in 1996, the Administrative Law Division of the Council of State of the Netherlands ruled that a Somali national could not be granted the protection of the 1951 Refugee Convention since he was suspected of having been involved in committing crimes against humanity and, being a high-ranking soldier and acting on behalf of the Somali government, was thus guilty of acts contrary to common Article 3 of the 1949 Geneva Conventions.[747] Similar judgements were pronounced by the same body in the *Hamoud case* and in the *Chantirakumar case* in 1997.[748]

639. In the *Demjanjuk case* in 1985, proceedings before the US Court of Appeals led to the revocation of the citizenship of the accused who was subsequently extradited to stand trial in Israel on accusations of having committed war crimes during the Second World War.[749]

Other National Practice

640. The Report on the Practice of the Netherlands, with respect to the 1984 Convention against Torture and its ratification procedure in the Netherlands, and referring to decisions of the Dutch Administrative Law Division of the Council of State to refuse protection under the 1951 Refugee Convention to persons suspected of having been involved in committing crimes against humanity and crimes in violation of common Article 3 of the 1949 Geneva Conventions, states that "the Dutch government completely complied with the treaty requirements".[750]

641. The Report on US Practice states that "over the last 20 years, the US Department of Justice has engaged in extensive investigations and litigation to denaturalise and expel war criminals from the Second World War era. It has also sought to exclude such persons from entry into the United States." The report concludes that "this reflects a broader *opinio juris* that no nation should provide sanctuary to persons guilty of war crimes".[751]

[746] Australia, *Defence Force Manual* (1994), § 1114.
[747] Netherlands, Council of State (Raad van State), Administrative Law Division, *Ahmed case*, Judgement, 20 December 1996.
[748] Netherlands, Council of State (Raad van State), Administrative Law Division, *Hamoud case*, Judgement, 11 September 1997; *Chantirakumar case*, Judgement, 2 September 1997.
[749] US, Court of Appeals, *Demjanjuk case*, Judgement, 31 October 1985.
[750] Report on the Practice of the Netherlands, 1997, Chapter 6.4.
[751] Report on US Practice, 1997, Chapter 6.12. (For a list of denaturalisation and deportation cases for which the US has sought judicial assistance from the Soviet Union, see Marian Nash

III. Practice of International Organisations and Conferences

United Nations

642. In 1994, in a statement by its President on Rwanda, the UN Security Council, after reaffirming its view that those responsible for serious breaches of IHL and acts of genocide must be brought to justice, stressed that "persons involved in such acts cannot achieve immunity from prosecution by fleeing the country" and noted that "the provisions of the Convention relating to the status of refugees do not apply to such persons".[752]

643. In a resolution adopting the Declaration on Territorial Asylum in 1967, the UN General Assembly stated that:

> The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.[753]

644. In a resolution adopted in 1973 on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly stated that "States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity".[754]

Other International Organisations

645. No practice was found.

International Conferences

646. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

647. No practice was found.

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

648. No practice was found.

(Leich), *Cumulative Digest of the United States Practice in International Law, 1981–1988*, US Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 1404–1405.)

752 UN Security Council, Statement by the President, UN Doc. S/PRST/1994/59, 14 October 1994, p. 2.

753 UN General Assembly, Res. 2312 (XXII), 14 December 1967, Article 1(2).

754 UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 7.

VI. Other Practice

649. In its summary findings of the project dealing with safeguarding the rights of refugees under the exclusion clauses provided in the 1951 Refugee Convention, the Lawyers Committee for Human Rights stated that:

Once an individual has been excluded, the Legal Advisory Group found that States are under a twofold duty. They must ensure that (a) those who have committed serious crimes are brought to justice and held responsible and (b) that the individual concerned continues to benefit from international human rights protection.

Some excludable crimes are crimes so serious under international law that any state may investigate, try and punish their perpetrators on the basis of the principle of universal jurisdiction. This is the case in particular for crimes within the purview of Article 1F(a) [of the 1951 Refugee Convention] including genocide, war crimes and crimes against humanity. Simply excluding the perpetrators of such crimes is not sufficient: States have a duty to prosecute such persons before a national or an international court.

There are three broad ways to ensure that those who have committed serious human rights violations are brought to justice:

- States may prosecute an excluded individual under the principle of universal jurisdiction
- States may extradite the excluded individual to face trial in the country in which the crimes were committed or a third State, if all requirements under binding international human rights law regarding the integrity of the person and fair trial guarantees can be assured
- States may extradite the excluded individual to face trial before an international tribunal. Where an International Tribunal, such as the International Criminal Tribunal for Rwanda (ICTR) or a future International Criminal Court (ICC), has sought the extradition of an excluded individual States have an obligation to comply with this request.[755]

650. In a report in 2002, the Lawyers Committee for Human Rights analysed the issue of preventing presumed criminals from acquiring the status of a refugee and stated that:

International refugee law contained a mechanism – exclusion – that, at least in theory, provided a foundation for effective action: individuals who have committed serious international crimes are not permitted to avail themselves of the protection of the refugee regime. In many ways exclusion can be viewed as a permanent valve which mediates between the obligation to protect those threatened with serious human rights violations (refugees) and the goal of combating the impunity of the authors of such violations. Serving as a reminder that criminals may not be unjustly sheltered, exclusion can play a role in triggering a State's obligation to search out those who have committed the most serious crimes and ensure that they are held accountable for their actions under international law.[756]

[755] Lawyers Committee for Human Rights, "Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective", *International Journal of Refugee Law*, Special Supplementary Issue, Winter 2000, Vol. 12, p. 322.

[756] Lawyers Committee for Human Rights, *Refugees, Rebels and the Quest for Justice*, New York, 2002, pp. viii–ix

D. Amnesty

Note: *For practice concerning fair trial guarantees, see Chapter 32, section M. For practice concerning release and return of persons deprived of their liberty, see Chapter 37, section K.*

I. Treaties and Other Instruments

Treaties

651. Article 6(5) AP II provides that:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Article 6 AP II was adopted by consensus.[757]

652. Section 1(b) of the 1987 Esquipulas II Accords provides that:

In each Central American country, except those where the International Verification and Follow-up Commission determines this to be unnecessary, amnesty decrees shall be issued which establish all necessary provisions guaranteeing the inviolability of life, freedom in all its forms, property and security of person of those to whom such decrees are applicable. Simultaneously with the issue of amnesty decrees, the irregular forces of the countries in question shall release anyone that they are holding prisoner.

653. In Article 3(c) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

Displaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings.

Such immunity shall not apply to persons where there are serious evidences that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict. Such immunity shall also not apply to persons who have previously taken part in the hostilities and are currently serving in armed formations, preparing to fight in Abkhazia.

Persons falling into these categories should be informed through appropriate channels of the possible consequences they may face upon return.

654. Article VI of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

Any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law as defined in the Statute of the International Tribunal for the Former Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict, shall upon return enjoy an amnesty. In no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of the amnesty.

[757] CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

655. Article 10 of the 2002 Statute of the Special Court for Sierra Leone provides that:

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of AP II, and other serious violations of IHL] shall not be a bar to prosecution.

Other Instruments

656. Article 3(1) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that:

All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Art. 50 of the First, Art. 51 of the Second, Art. 130 of the Third and Art. 147 of the Fourth Geneva Convention, as well as in Art. 85 of Additional Protocol I, will be unilaterally and unconditionally released.

657. Article 19 of the 1993 Cotonou Agreement on Liberia provides that:

The Parties . . . agree that . . . there shall be a general amnesty granted to all persons and parties involved in the Liberian civil conflict in the course of actual military engagements. Accordingly, acts committed by the Parties or by their forces while in actual combat or on the authority of any of the Parties in the course of actual combat are hereby granted amnesty.

658. The preamble to the General Amnesty Proclamation Order concerning Sudan, annexed to the 1997 Sudan Peace Agreement, provides that "the parties agree that the President of the Republic of the Sudan shall declare a general and unconditional amnesty for all offences committed . . . in accordance with the common will of the people of the Sudan".

659. Articles 1 and 2 of the General Amnesty Proclamation Order concerning Sudan, annexed to the 1997 Sudan Peace Agreement, provide that:

1. The general and unconditional amnesty shall cover the period from 16 May 1983 to . . . 1997 to all (SSDF) forces, to the effect that nobody shall be prosecuted or punished for acts or omissions committed during this period.
2. No action or other legal proceedings whatsoever, civil or criminal, shall be instituted against any persons in any court of law or any place for, or on account of, any act, omission or matter done inside or outside Sudan as from . . . if such act or omission or matter was committed by any member of (the SSDF).

660. Article 6 of the General Amnesty Proclamation Order concerning Sudan, annexed to the 1997 Sudan Peace Agreement, established a Joint Amnesty Commission in order to follow up on its implementation. Article 7 established a Joint Amnesty Tribunal in order to "receive, examine and determine cases which are covered by this Amnesty Proclamation".

661. The 1996 Moscow Agreement on Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in

Tajikistan, states that "there is a need to implement a universal amnesty and reciprocal pardoning of persons who took part in the military and political confrontation from 1992 up to the time of adoption of the Amnesty Act".

662. The 1996 Protocol on the Commission on National Reconciliation in Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that:

> During the transition period the President and the Commission on National Reconciliation will exercise the following functions and powers: . . . adoption of a Reciprocal Pardon Act and drafting of an Amnesty Act to be adopted by Parliament and the Commission on National Reconciliation.

663. Paragraph 2 of the 1997 Protocol on Tajik Refugees, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that:

> The Government of the Republic of Tajikistan assumes the obligation . . . not to institute criminal proceedings against returning refugees or displaced persons for their participation in the political confrontation and the civil war, in accordance with the legislative acts in force in the Republic.

664. Paragraph 7 of the 1997 Statute of the Tajik Commission on National Reconciliation, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that "the Commission shall have the following functions and powers: . . . Adoption of a Reciprocal Pardon Act and drafting of an Amnesty Act to be adopted by the Parliament and the Commission on National Reconciliation."

665. Paragraph 1 of the 1997 Protocol on Political Questions concerning Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that:

> The President and the Commission on National Reconciliation shall adopt the reciprocal-pardon act as the first political decision to be taken during the initial days of the Commission's work. No later than one month after the adoption of the reciprocal-pardon act, the amnesty act shall be adopted.

666. The 1997 Bishkek Memorandum, referring to the 1997 Protocol on Political Questions concerning Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, recalls that "a protocol on political questions was signed, which includes agreements on such basic issues as the adoption of the reciprocal-pardon act and the amnesty act".

667. Paragraph 1 of the 1997 Protocol on the Guarantees of Implementation of the General Agreement on the Establishment of Peace and National Accord in Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, recalls that the parties to the conflict agreed "to provide amnesty for persons who took part in the civil conflict and political confrontation".

668. Article IX of the 1999 Peace Agreement between the Government of Sierra Leone and the RUF, entitled "Pardon and Amnesty", provides that:

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

669. By Article 22(2)(c) of Protocol II to the 2000 Arusha Peace and Reconciliation Agreement for Burundi, which forms an integral part of the Agreement, the National Assembly of Burundi agreed "pending the installation of a transnational Government [to] adopt such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes prior to the signature of the Agreement".

II. National Practice

Military Manuals

670. Canada's LOAC Manual provides, with respect to non-international armed conflicts, that:

At the end of hostilities, and in order to facilitate a return to peaceful conditions, the authorities in power are to endeavour to grant the broadest possible amnesty to those who have participated in the conflict or been deprived of their liberty for reasons related thereto, whether they are interned or detained.[758]

671. New Zealand's Military Manual, with respect to non-international armed conflicts, provides that:

In order to facilitate a return to peaceful conditions, the authorities in power at the end of the hostilities are to endeavour to grant the broadest possible amnesty to those who have participated in the conflict or been deprived of their liberty for reasons related to it, whether they were interned or detained . . .

[758] Canada, *LOAC Manual* (1999), p. 17-4, § 31.

This terminology is used to apply to whichever Party is in power at the end of the conflict, whether it be the former government or its opponents . . .

This would seem to include persons tried for treason, but not those sentenced for common crimes, including assassination.[759]

672. The UK Military Manual states that:

Having regard to the duty of belligerents to try those who have committed grave breaches of the 1949 [Geneva] Conventions, it may now be open to doubt whether a treaty of peace would operate, as was often the case in the past, as an amnesty. It is, on the other hand, open to two or more belligerents to agree in a peace treaty, or even in a general armistice, that no further war crimes trials will be instituted by them after a certain agreed date or as from the date of the treaty of the armistice.[760]

National Legislation

673. Algeria's Law on National Reconciliation, proposed by the government for persons involved in terrorist activities who say they wish to stop, provides, *inter alia*, for immunity from prosecution for anyone:

who has not committed or participated in the commission of one of the offences set forth in Article 87 bis of the Penal Code [i.e. acts qualifying as "terrorist or subversive"], leading to death or permanent disability, rape, or who has not used explosives in public places or places frequented by the public and who, within six months of the date of promulgation of this law, has advised the competent authorities that he will stop any terrorist or subversive activity and has given himself up to the competent authorities.[761]

674. Argentina's Amnesty Law provides that amnesty shall be granted for acts committed before 25 May 1973 and relating to political, social, trade union or student activities, and for acts committed by civilians prosecuted by military courts or military commanders. Under this law, all sentences for such acts should be discontinued.[762]

675. Argentina's Self-Amnesty Law, in connection with the armed confrontations which occurred in the fight against subversive terrorism, discontinued the penal actions resulting from crimes committed for the purpose of terrorist or subversive activities between 25 May 1973 and 17 June 1982. It also applied to all unlawful acts undertaken on the occasion of, or for the purpose of developing, actions to prevent, thwart or put an end to terrorist or subversive activities.[763] However, this law was found to be unconstitutional and declared void by the Law Repealing the Self-Amnesty Law which declared it to be "without any juridical effect as regards the judgement of the penal, civil, administrative and military responsibilities for the acts it claims to cover. In particular, the

[759] New Zealand, *Military Manual* (1992), § 1816, including footnotes 55 and 56.
[760] UK, *Military Manual* (1958), § 641, footnote 1.
[761] Algeria, *Law on National Reconciliation* (1999), Article 3.
[762] Argentina, *Amnesty Law* (1973), Articles 1 and 5.
[763] Argentina, *Self-Amnesty Law* (1983), Articles 1, 2 and 6.

principle of least harsh punishment, stipulated in Article 2 of the Penal Code, is inapplicable."[764]

676. The Constitution of the City of Buenos Aires (Argentina) provides that the functions of the head of government of the autonomous City of Buenos Aires shall include the authority to "pardon or commute penalties individually and in exceptional cases following a plea by a competent court. However, at no time may he pardon or commute, *inter alia*, penalties for crimes against humanity, or crimes committed by public officials during the course of their duties."[765]

677. Argentina's Draft Code of Military Justice provides that "in no case shall amnesty or pardon be granted with respect to the offences contained in Chapter I (offences against protected persons and objects in the event of armed conflict)".[766]

678. The Amnesty Law as amended of the Federation of Bosnia and Herzegovina provides that:

> Amnesty is granted to all persons who committed, until 22 December 1995 [14 December 1995 in the original version before the amendment], criminal offences against the basic principles of the social system and security of Bosnia and Herzegovina . . . criminal offences against the armed forces . . . illegal possession of weapons and explosive material . . . as well as the criminal offence of failing to respond to a call and avoiding the military service by incapacitation or deceit and deliberate withdrawal or escape from the armed forces . . . if this Law or other related provisions applied in the territory of the Federation foresees penal sanctions against the persons who commit these criminal acts.[767]

679. The Law on Amnesty of the Federation of Bosnia and Herzegovina provides that:

> Exemption from criminal prosecution or full exemption from pronounced sentence or part of the sentence that has not been served (hereinafter: the amnesty) are granted to all persons who committed, in the period between 1 January 1991 and 22 December 1995, any criminal act stipulated in appropriate criminal laws that were applied in the territory of the Federation of Bosnia and Herzegovina (hereinafter: the Federation), except for criminal acts against humanity and international law as stipulated in Section XVI of the [Criminal Code] of the SFRY that has been taken over, and following criminal acts: murder . . . rape . . . criminal acts against a person's dignity and moral . . . as well as serious cases of robbery . . . if this Law or other related provisions applied in the territory of the Federation foresees penal sanctions against the persons who commit these criminal acts.[768]

680. The Law on Amnesty as amended of the Republika Srpska provides that:

> Exemption from criminal prosecution or partial or full exemption from pronounced sentence or a part of the sentence that has not been served (hereinafter: the amnesty)

[764] Argentina, *Law Repealing the Self-Amnesty Law* (1983), Articles 1 and 2.
[765] Argentina, *Constitution of the City of Buenos Aires* (1996), Article 104(18).
[766] Argentina, *Draft Code of Military Justice* (1998), Article 184, amending Article 478 of the *Code of Military Justice as amended* (1951).
[767] Bosnia and Herzegovina, Federation, *Amnesty Law as amended* (1996), Article 1.
[768] Bosnia and Herzegovina, Federation, *Law on Amnesty* (1999), Article 1.

are granted to all persons who committed, in the period between 1 January 1991 and 14 December 1995, any criminal act against basic principles of the social system of the Republika Srpska as stipulated in Section XV, and criminal acts against the armed forces of Republika Srpska as stipulated in the Criminal law of Republika Srpska, as well as the following acts: . . . illegal possession of weapons and explosive material.[769]

681. In line with the provisions of Protocol II to the 2000 Arusha Peace and Reconciliation Agreement for Burundi providing for the interim period and transitional institutions, a Draft Law on Provisional Immunity for Political Leaders (2001) is being discussed in Burundi, according to which members of political parties and movements signatory of the said agreement returning from exile shall be granted provisional immunity from penal prosecution for politically motivated offences committed during the period of 1 July 1962–28 August 2000. The Draft Law states that "this immunity does not concern crimes of genocide, crimes against humanity and war crimes".[770] However, in early 2002, the Draft Law failed to be adopted by the National Assembly (parliament) of Burundi.[771]

682. In Chile, during the military government, the Decree-Law on General Amnesty extended an amnesty to:

all persons who have been the authors, accomplices, or accessories of unlawful deeds during the period in which the state of siege was in force, between 11 September 1973 and 10 March 1978, unless they are currently being tried or have been sentenced and to those persons who as of the date that this decree-law took effect have been sentenced by military tribunals since 11 September 1973.[772]

683. Colombia's Amnesty Decree states that:

The National Government can grant, in every particular case, the benefits of a pardon or an amnesty [to Colombian nationals] for offences or acts which constitute crimes of rebellion, sedition, putsch, conspiracy and related acts, committed before the promulgation of the [Constitution], when, in its opinion, the guerrilla group of which the person asking for [the pardon or amnesty] is a member has demonstrated its intention to reintegrate into civil life.

. . .

The benefits provided for in this decree can neither be granted with respect to atrocities nor with respect to murder committed outside a situation of combat or in taking advantage of the defenselessness of the victim.[773]

684. Croatia's General Amnesty Law "grants general amnesty from criminal prosecution and proceedings for perpetrators of criminal offences committed during the aggression, armed rebellion or armed conflicts and in connection [therewith] in the Republic of Croatia". The Law provides, however, that "from

[769] Bosnia and Herzegovina, Republika Srpska, *Law on Amnesty* as amended (1996), Article 1.
[770] Burundi, *Draft Law on Provisional Immunity for Political Leaders (2001)*, Articles 1–2.
[771] International Crisis Group (ICG), Burundi after six months of transition: Continuing the war or winning peace?, ICG Africa Report No. 46, Nairobi/Brussels, 24 May 2002, p. 3.
[772] Chile, *Decree-Law on General Amnesty* (1978), Article 1.
[773] Colombia, *Amnesty Decree* (1991), Article 1.

the amnesty for criminal offences stated in . . . this law are exempted" perpetrators of crimes (under Articles 120–122 of the Criminal Code), genocide (under Article 119 of the Criminal Code) and any other act which under the Criminal Code constitutes a violation of the laws and customs of war.[774]

685. In 1987, El Salvador adopted the Law on Amnesty to Achieve National Reconciliation in conformity with the 1987 Esquipulas II Accords. The Law grants "absolute and exclusive legal amnesty" to all persons, national and foreign, who have acted as the immediate or proximate perpetrators or accomplices in the commission of political crimes or common crimes related to political or common crimes perpetrated prior to 22 October 1987 in which no fewer than 20 persons were involved. The Law also extends to those who have taken up arms if they come forward and state their wish to renounce violence and receive amnesty within 15 days of the date the law enters into effect. Those who took part in the assassinations of Mgr Romero and Herbert Anaya, committed kidnapping for personal gain or engaged in drug trafficking cannot benefit from the amnesty.[775]

686. Article 1 of El Salvador's General Amnesty Law for Consolidation of Peace gives full, absolute and unconditional amnesty to all persons who in any way have participated in the commission of political crimes, related common crimes and common crimes committed before 1 January 1992 by persons numbering no less than 20. In Article 2, the law extends the definition of a political crime to include "crimes against the public peace", "crimes against judicial activity" and crimes "committed because, or as a result of armed conflict, without taking into consideration political status, militancy, affiliation or ideology". Article 4 provides, *inter alia*, that "the amnesty granted by this law extinguishes all civil liability".[776]

687. Ethiopia's Constitution provides that:

> The legislature or any other organ of state shall have no power to pardon or give amnesty with regard to [acts qualified as "crimes against humanity" such as] inhuman punishment, forcible disappearances, summary executions, acts of genocide. Crimes against humanity shall not be subject to amnesty or pardon by any act of government.[777]

688. Guatemala's National Reconciliation Law foresees the "total release from penal responsibility for political crimes committed during the armed internal confrontation" and "the total release from penal responsibility for common crimes . . . connected to" such political crimes.[778] However, it states that:

> The release from penal responsibility . . . does neither apply to crimes of genocide, torture and forced disappearance nor to the crimes which are not subject

[774] Croatia, *General Amnesty Law* (1996), Articles 1 and 3.
[775] El Salvador, *Law on Amnesty to Achieve National Reconciliation* (1987).
[776] El Salvador, *General Amnesty Law for Consolidation of Peace* (1993), Articles 1, 2 and 4.
[777] Ethiopia, *Constitution* (1994), Article 28(1).
[778] Guatemala, *National Reconciliation Law* (1996), Articles 2 and 4.

to limitations or which, in conformity with internal law or international treaties ratified by Guatemala, do not allow the release from penal responsibility.[779]

689. Between 1987 and 1993, the Peruvian Congress adopted the Law on Terrorism (1987), the Law on the Mitigation, Exemption or Remission of Punishment of Terrorism (1989), the Decree on Terrorism (1991), the Decree-Law on the Conditions for Mitigation, Exemption, Remission or Reduction of Punishment for Terrorism (1992) and the Decree on Repentance for Terrorism (1993). In principle these laws excluded the commutation of sentences for offences related to acts of terrorism, foreseeing, however, sentence reductions or exemptions if there had been subsequent "repentance".[780]

690. In 1996, Peru adopted the Law on Amnesty for Retired Officers of the Armed Forces and the Law on Amnesty for Military and Civil Personnel by which it granted a general amnesty to military and civilian personnel investigated or tried for acts related to insults to the armed forces, disobedience, etc.[781]

691. In 1997, the Russian State Duma adopted the Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya. The Law aims at "re-enforcing the civil peace and understanding within the Russian Federation" and provides for the refraining from or ending of criminal procedures against persons who have committed "socially dangerous acts" in relation to the armed conflict in the Chechen Republic. It also provides for the exemption of such persons from the execution of punishment.[782] However, referring to a number of articles of Russia's Criminal Code, the law expressly excludes from the amnesty persons who committed specific acts such as spying, terrorism, banditry, intentional homicide, rape, kidnapping, robbery, etc., as well as foreigners.[783] According to the Law on the Execution of the Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya, the amnesty applies to persons who committed crimes within the territory of the Chechen Republic, Ingushetia, Daghestan, North Ossetia – Alanya and Stavropolsky Kraj – between 9 December 1994 and 31 December 1996, and to persons who committed one of the following acts, irrespective of the place of its committal: evasion of regular military duty; unwarranted absence and unwarranted abandonment of unit or duty station; desertion; and evasion of military service by maiming or by other

[779] Guatemala, *National Reconciliation Law* (1996), Article 8.

[780] Peru, *Law on Terrorism* (1987); *Law on the Mitigation, Exemption or Remission of Punishment of Terrorism* (1989); *Decree on Terrorism* (1991); *Decree-Law on the Conditions for Mitigation, Exemption, Remission or Reduction of Punishment for Terrorism* (1992); *Decree on Repentance for Terrorism* (1993).

[781] Peru, *Law on Amnesty for Retired Officers of the Armed Forces* (1996); *Law on Amnesty for Military and Civil Personnel* (1996).

[782] Russia, *Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), preamble and Articles 1–3.

[783] Russia, *Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), Article 4.

means. Nevertheless, the amnesty does not release persons from the duty to repair the damage caused by the illicit acts.[784]

692. Rwanda's Law on the Prosecution of the Crime of Genocide and Crimes against Humanity provides that "the court having jurisdiction over the civil action shall rule on damages even where the accused . . . has benefited from an amnesty".[785]

693. South Africa's Promotion of National Unity and Reconciliation Act provides that one of the functions of the Truth and Reconciliation Commission is to:

> facilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty, in the Gazette.[786]

694. Tajikistan's Constitution gives the Supreme Assembly (parliament) the power to declare a general amnesty.[787] The Draft Amnesty Act, signed by the Tajik President in July 1997, provides for the annulment of the convictions and the discontinuation of all criminal cases under investigation with regard to persons who took part in the political and military confrontation from 1992 to the time of adoption of the law.[788] Certain crimes are excluded.[789]

695. In 1998, the Tajik parliament, in honour of the 7th anniversary of Tajikistan's independence and the anniversary of the signing of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, adopted the General Amnesty Law which provides for the release from prison of convicted persons, such as, *inter alia*, "participants and veterans of the Great Patriotic War and persons equated with them, participants and veterans of armed conflicts on the territory of other States". The Law also provides for the stopping of criminal investigations against such persons. However, referring to a number of provisions of the Criminal Code of Tajikistan, it excludes from the granting of amnesty persons who have committed crimes such as pillage and violations against the civilian population in the area of armed clashes. Nor does it extend to acts such as murder, kidnapping, rape, terrorism, robbery and other similar crimes.[790]

696. In 1999, the Tajik parliament adopted a Resolution on Amnesty for Opposition Fighters, initiated by the President of Tajikistan, based on a resolution of

[784] Russia, *Law on the Execution of the Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), Articles 1 and 4.
[785] Rwanda, *Law on the Prosecution of the Crime of Genocide and Crimes against Humanity* (1996), Article 31.
[786] South Africa, *Promotion of National Unity and Reconciliation Act* (1995), Article 4(c).
[787] Tajikistan, *Constitution* (1994), Article 49(24).
[788] Tajikistan, *Draft Amnesty Act* (1997), Articles 1–2.
[789] Tajikistan, *Draft Amnesty Act* (1997), Article 4.
[790] Tajikistan, *General Amnesty Law* (1998), Articles 1, 6 and 8(b) and (c).

the Commission on National Reconciliation, and on the request of the UTO. This resolution expressly aims at "facilitating the process of peace building and national reconciliation in Tajikistan" and is "guided by the principle of humanity". It provides for the release of members of the armed forces of the UTO in accordance with a list approved by the Commission on National Reconciliation, as well as for the stopping of criminal investigations against such persons, and applies to acts committed before adoption of the resolution.[791]

697. Under its Amnesty Law of 1985, Uruguay granted amnesty with respect to all political offences and criminal and military offences related thereto committed after 1 January 1962. "Political offences" are defined as those committed directly or indirectly for political motives. The amnesty extends to all persons accused of committing these offences as authors, co-authors or accomplices and accessories, whether or not they have been convicted or tried. Offences committed by police or military personnel, *equiparados*, and others who have subjected individuals to inhuman, cruel or degrading treatment or detained individuals who subsequently disappeared are excluded, as are offences committed by persons of these categories who acted as accomplices for or covered up those offences. Penalties and sanctions imposed for the amnestied offences were also declared null and void *ab initio*.[792]

698. In 1986, Uruguay adopted an Amnesty Law for offences committed between 1984 and 1985 by military and police personnel for political motives or in the course of discharging their functions, and for offences committed on orders received during the "*de facto* period" when a situation of internal violence prevailed.[793]

699. Zimbabwe's Amnesty Act provides that "no legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court of law in respect of any act to which this section applies, done within Southern Rhodesia or elsewhere before the 21st December, 1979".[794] The Amnesty (General Pardon) Act provides that "a free pardon is hereby granted to every person in respect of any act committed by him, being an act which constitutes a criminal offence, to which this Act applies".[795]

National Case-law

700. In the *Cavallo case* in 2001, Argentina's Federal Judge nullified two 1987 laws that had amnestied hundreds of military officers for human rights violations during the country's 1976–1983 dictatorship. The judge stated that these laws did not respect States' obligations under international law to investigate and punish human rights violations and crimes against humanity.[796]

[791] Tajikistan, *Resolution on Amnesty of Opposition Fighters* (1999), preamble and Articles 1–3.
[792] Uruguay, *Amnesty Law* (1985), Articles 1–7.
[793] Uruguay, *Amnesty Law* (1986), Article 1.
[794] Zimbabwe, *Amnesty Act* (1979), Article 2.
[795] Zimbabwe, *Amnesty (General Pardon) Act* (1980), Article 2.
[796] Argentina, Federal Judge, *Cavallo case*, Decision, 6 March 2001.

701. In the *Saavedra case* in 1993 concerning the application of Chile's 1978 Decree-Law on Amnesty to serious violations of the 1949 Geneva Conventions, the Supreme Court of Chile ruled that:

The appellant claims in the writ of appeal that the ruling appealed from is contrary to the Conventions of Geneva of 1949, because the decree-law of amnesty by definition does not apply to persons accused of serious infractions of the aforementioned Conventions. In this connection, it should be stated that Articles 2 and 3 common to the four Conventions establish the scope of their application to international conflicts and armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties. Concerning armed conflicts not of an international character, it is the opinion of this Court that disturbances or other situations of internal order, usually accompanied by terrorist or unlawful actions such as the one in question, do not constitute conflicts governed by what is known as the Law of Geneva, and the appellant's argument in this case is invalid. The facts of this case are not congruent with the characteristics of the situations of internal war referred to by Article 3 common to the said Conventions.[797]

702. In the *Videla case* in 1994 concerning the abduction, torture and murder of a Chilean woman in 1974, Chile's Appeal Court of Santiago held that the acts charged constituted grave breaches under Article 147 GC IV, which it found applicable, and that:

Such offences as constitute grave breaches of the Convention are . . . unamenable to amnesty; . . . [it is not] appropriate to apply amnesty as a way of extinguishing criminal liability. Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law.[798]

703. In 1995, Colombia's Constitutional Court examined the constitutionality of AP II. As part of its consideration of Article 6(5) AP II, the Court stated that:

In internal armed conflicts . . . those who have taken up arms do not in principle enjoy prisoner-of-war status and are consequently subject to penal sanctions imposed by the State, since they are not legally entitled to fight or to take up arms. In so doing they are guilty of an offence, such as rebellion or sedition, which is punishable under domestic legislation . . . It is easy to understand the purpose of a provision designed to ensure that the authorities in power will grant the broadest

[797] Chile, Supreme Court, *Saavedra case*, Judgement, 19 November 1993; see also Supreme Court, *Bascuñán case*, Judgement, 24 August 1990, where it is stated that "it can be concluded that the Geneva Conventions are not applicable to the unlawful acts investigated in the case giving rise to the appeal; and so although these acts did take place during the state of siege covered by the amnesty, they have not been shown to be the consequence or result of a state of internal conflict of the nature described [in the Geneva Conventions]. Consequently, the provisions of the aforementioned Conventions are unaffected by the legal precept that granted the amnesty of 1978."

[798] Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.

possible amnesty for reasons related to the conflict, once hostilities are over, as this can pave the way towards national reconciliation.[799]

704. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Colonel Mengistu Haile Mariam and former members of the Derg for allegedly committing genocide, crimes against humanity and war crimes during the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply submitted in response to the objection filed by counsels for defendants, stated that "it is . . . a well established custom and belief that war crimes and crimes against humanity are not subject to amnesty".[800] Referring to a statement made in 1991 by a high-ranking US peace negotiator at the London Conference as well as to a decision of the Transitional Government of Ethiopia, the Special Prosecutor further quoted the following: "The Transitional Government should consider an appropriate amnesty or indemnity for past acts not constituting violations of the laws of war or international human rights."[801]

705. In the *Azapo case* in 1996 in which the appellants challenged the constitutionality of the Promotion of National Unity and Reconciliation Act of 1995, which granted amnesties from personal criminal and civil liability for the covered unlawful activities, a South African Court stated that:

> It is however, unnecessary, in our judgment, to consider further the applicability of the *jus cogens* to the interpretation of the Constitution. That is because there is an exception to the peremptory rule prohibiting an amnesty in relation to crimes against humanity contained in Additional Protocol II.
> . . .
> In our judgment this subarticle [Article 6(5) AP II] indicates that there is no peremptory rule of international law which prohibits the granting of the broadest possible amnesty in the case of conflicts of the kind which existed in South Africa prior to the firm "cut-off date" referred to in the post-amble to the Constitution.[802]

In the same case in 1996, South Africa's Constitutional Court was asked to decide upon the constitutionality of a provision of the Promotion of National Unity and Reconciliation Act of 1995 according to which amnesty can be granted to persons prepared to make "full disclosure of all the relevant facts relating to acts associated with a political objective". The Azanian People's Organisation argued that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the relevant provision authorising amnesty for such offenders constituted a breach of international law including Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV. In considering this argument, the Court stated that it was "doubtful whether the

[799] Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.
[800] Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, Conclusion.
[801] Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, Conclusion.
[802] South Africa, Cape Provincial Division, *Azapo case*, Judgement, 6 May 1996.

Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict". The Court referred to Article 6(5) AP II and stated that in situations of internal armed conflict, "there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights". In conclusion, the Court held that the wording of the provision in question did not violate the South African Constitution.[803]

706. In the *Pinochet case* in 1998, Spain's Sala de lo Penal de la Audiencia Nacional, sitting in full bench, held that Chile's Decree-Law on General Amnesty of 1978 did not preclude the exercise of universal jurisdiction by Spanish courts. It stated that:

> Regardless of the fact that Decree-Law 2.191 of 1978 can be considered contrary to international *ius cogens*, said Decree-Law is not tantamount to a true pardon in accordance with the Spanish rules applicable in this case and can be considered a rule that waives punishment for reasons of political expediency; it therefore does not apply in the case of someone who has been acquitted or pardoned abroad . . . but rather in the case of conduct . . . that is not punishable in the country in which the offence was committed . . . which has no effect on Spain's extraterritorial jurisdiction in application of the principles of protection and universal persecution.[804]

Other National Practice

707. In 1993, in the context of peace talks between the three parties to the conflict in Bosnia and Herzegovina, the ICRC reported that "the Bosnian Government says it stands ready to release all prisoners, except war criminals, after an amnesty has been proclaimed".[805]

708. A decision taken in 1956 by the Chinese National People's Congress adopted as policy for the prosecution of Japanese war criminals that those Japanese whose criminal acts were of secondary importance or who showed good signs of repentance would be dealt with leniently and spared prosecution. Those Japanese war criminals who had committed serious crimes would be sentenced on an individual basis according to the crimes they had committed and their behaviour during detention.[806]

709. In October 2001, the government of the FYROM confirmed its intention "to grant amnesty to the members of the so-called NLA (UCK) who

[803] South Africa, Constitutional Court, *Azapo case*, Judgement, 25 July 1996.
[804] Spain, Sala de lo Penal de la Audiencia Nacional, *Pinochet case*, Judgement, 5 November 1998.
[805] ICRC, Paper on unconditional and unilateral release of all prisoners presented during talks among the three sides to the conflict in Bosnia and Herzegovina, Geneva, 2–4 January 1993, annexed to Report of the UN Secretary-General on the activities of the International Conference on the Former Yugoslavia, UN Doc. S/25050, 6 January 1993, Annex IV, § 2(a).
[806] China, Decision on the handling of Japanese war criminals under detention who committed crimes during the Japanese Invasion War by the Standing Committee of the National People's Congress, 25 April 1956, *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 4, pp. 58–59.

voluntarily surrendered their weapons during the NATO operation 'Essential Harvest'". The President of FYROM stated that this would initiate a process of reintegration of those who did not commit crimes and that the amnesty would allow the process of return of the security forces of FYROM in the regions that were temporarily out of their control. However, he stressed that "the amnesty does not refer to those who committed war crimes and crimes against humanity, torture and murder of civilians, ethnic cleansing, demolition of religious buildings and other acts for which the International Tribunal for former Yugoslavia is responsible".[807] Members of the NLA welcomed the amnesty but added that it should be given force of law, and demanded the release of rebel prisoners.[808]

710. According to the Report on the Practice of Malaysia, communist insurgents have been encouraged to surrender, and declarations of amnesty have been issued regularly. One of these was issued in September 1955.[809]

711. In 1991, the President of Rwanda offered a general amnesty to FPR combatants accepting to lay down their weapons between 14 and 29 March 1991, provided they fulfilled certain conditions such as entering the country at a certain checkpoint and depositing their weapons at a specific place.[810]

712. According to a report by a Rwandan human rights organisation, the application of two amnesty laws in Rwanda in 1992 led to the release from prison of approximately 60 persons accused or detained for acts committed during the war or other politically motivated acts.[811]

713. In 1992, the President of the Philippines issued a proclamation amending a previous proclamation by which the National Unification Commission was established and which states that:

> [The previous Proclamation] is hereby amended to read as follows: . . . Amnesty is hereby granted in favor of those who have applied for amnesty under Executive Order No. 350, and whose applications had already been processed and are ready for final action as of date hereof, and whosoever may want to apply for amnesty under Executive Order No. 350 from the date of this Proclamation up to December 31, 1992, who have committed any act covered under Section 2 of Executive Order No. 350, series of 1989.[812]

714. In 1994, the President of the Philippines issued a proclamation granting amnesty to rebels, insurgents and other persons according to which:

[807] FYROM, Statement by the President, 8 October 2001.
[808] BBC News, 12 October 2001.
[809] Report on the Practice of Malaysia, 1997, Chapter 6.10.
[810] Rwanda, Amnesty Offer by the President, Ruhengeri, 14 March 1991, reprinted in Agence Rwandaise de Presse, Daily Bulletin No. 003931, 16th Year, 15 March 1991, pp. 1–2.
[811] Association Rwandaise pour la défense des droits de l'homme et des libertés publiques, Report on Human Rights in Rwanda, October 1992–October 1993, p. 45.
[812] Philippines, President, Proclamation No. 10-A Amending Proclamation No. 10 Granting Amnesty in favor of Persons Who Have Filed Applications for Amnesty under Executive Order No. 350, Series of 1989 and Creating the National Unification Commission, Manila, 28 July 1992, Section 4 amending Section 1 of the original version of the Proclamation, and Section 5 introducing a new Section 2 in the original version of the Proclamation.

Amnesty is hereby granted to all personnel of the APF and the PNP who shall apply therefor and who have or may have committed crimes, on or before thirty (30) days following the publication of this Proclamation in two (2) newspapers of general circulation, in pursuit of political beliefs, whether punishable under the Revised Penal Code or special laws, including but not limited to the following: rebellion or insurrection; coup d'etat; conspiracy and proposal to commit rebellion, insurrection or coup d'etat; disloyalty of public officers or employees; inciting to rebellion or insurrection; sedition; conspiracy to commit sedition; inciting to sedition; illegal assembly; illegal association; direct assault; indirect assault; resistance and disobedience to a person in authority or the agents of such person; tumults and other disturbances of public order; unlawful means of publication and unlawful utterances; alarms and scandals; illegal possession of firearms, ammunition or explosives, committed in furtherance of, incident to, or in connection with the crimes of rebellion or insurrection; and violations of Articles 59 (desertion), 62 (absence without leave), 67 (mutiny or sedition), 68 (failure to suppress mutiny or sedition), 94 (various crimes), 96 (conduct unbecoming an officer and a gentlemen), and 97 (general article) of the Articles of War; *Provided*, that the amnesty shall not cover crimes against chastity and other crimes committed for personal ends.[813] [emphasis in original]

By the same proclamation, the President also established the National Amnesty Commission in charge with receiving and processing applications for amnesty and determining whether the applicants were entitled to amnesty under the proclamation.[814]

715. In 1994, the President of the Philippines issued a proclamation granting amnesty to certain members of the AFP and PNP which stated that:

Amnesty is hereby granted to all personnel of the APF and the PNP who shall apply therefor and who have or may have committed, as of the date of this Proclamation, acts or omissions punishable under the Revised Penal Code, the Articles of War or other special laws, in furtherance of, incident to, or in connection with counter-insurgency operations; *Provided*, that such acts or omissions do not constitute acts of torture, arson, massacre, rape, other crimes against chastity, or robbery of any form; and *Provided*, that the acts were not committed for personal ends.[815] [emphasis in original]

716. At the CDDH, the USSR, in its explanation of vote on Article 10 of Draft AP II (which later became Article 6 AP II), stated that it "was convinced that

[813] Philippines, President, Proclamation No. 347 Granting Amnesty to Rebels, Insurgents, and All Other Persons Who Have or May Have Committed Crimes against Public Order, Other Crimes Committed in furtherance of Political Ends, and Violations of the Articles of War, and Creating a National Amnesty Commission, Manila, 25 March 1994, Section 1.

[814] Philippines, President, Proclamation No. 347 Granting Amnesty to Rebels, Insurgents, and All Other Persons Who Have or May Have Committed Crimes against Public Order, Other Crimes Committed in furtherance of Political Ends, and Violations of the Articles of War, and Creating a National Amnesty Commission, Manila, 25 March 1994, Section 4.

[815] Philippines, President, Proclamation No. 348 Granting Amnesty to Certain Personnel of the AFP and PNP Who Have or May Have Committed Certain Acts or Omissions Punishable under the Revised Penal Code, the Articles of War, or Other Special Laws, Committed in furtherance of, incident to or in connection with Counter-Insurgency Operations, Manila, 25 March 1994, Section 1.

the text elaborated by Committee I could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever".[816]

717. In 1981, a high-ranking government official informed the ICRC that his government had given a complete amnesty to all prisoners captured during the war that year and that no prosecution for war crimes or other crimes had been undertaken.[817]

718. In 1988, in a meeting with the ICRC, the official of a State party to an armed conflict stated that all death penalties imposed on prisoners had been commuted to 20-year sentences under an amnesty law adopted in 1987.[818]

III. Practice of International Organisations and Conferences

United Nations

719. In a resolution adopted in 1964 on the policies of apartheid of the government of South Africa, the UN Security Council urged the South African government "to grant an amnesty to all persons already imprisoned, interned of subjected to other restrictions for having opposed the policy of *apartheid*".[819] In another resolution adopted the same year, the Security Council urged the South African government "to grant immediate amnesty to all persons detained or on trial, as well as clemency to all persons sentenced for their opposition to the Government's racial policies".[820]

720. In a resolution adopted in 1980, the UN Security Council called upon the South African regime to take measures immediately to eliminate the policy of apartheid, including "granting of an unconditional amnesty to all persons imprisoned, restricted or exiled for their opposition to apartheid".[821]

721. In a resolution adopted in 1986, the UN Security Council demanded that South Africa "unconditionally release all persons imprisoned, detained or restricted for their opposition to *apartheid*".[822]

722. In a resolution adopted in 1996, the UN Security Council welcomed "the proclamation by the National Assembly of Angola of amnesty arrangements, as agreed in Libreville, for offences resulting from the Angolan conflict, in order to facilitate the formation of a joint military command".[823]

723. In a resolution adopted in 1996, the UN Security Council commended the government of Angola for the promulgation of an amnesty law.[824]

816 USSR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.64, 7 June 1976, p. 319, § 85.
817 ICRC archive document.
818 ICRC archive document.
819 UN Security Council, Res. 190, 9 June 1964, § 1(c).
820 UN Security Council, Res. 191, 18 June 1964, § 4(b).
821 UN Security Council, Res. 473, 13 June 1980, § 7.
822 UN Security Council, Res. 581, 13 February 1986, § 8.
823 UN Security Council, Res. 1055, 8 May 1996, § 9.
824 UN Security Council, Res. 1064, 11 July 1996, § 9.

724. In a resolution adopted in 1997, the UN Security Council urged Croatia:

> to eliminate ambiguities in implementation of the Amnesty Law, and to implement it fairly and objectively in accordance with international standards, in particular by concluding all investigations of crimes covered by the amnesty and undertaking an immediate and comprehensive review with United Nations and local Serb participation of all charges outstanding against individuals for serious violations of international humanitarian law which are not covered by the amnesty in order to end proceedings against all individuals against whom there is insufficient evidence.[825]

725. In a resolution adopted in 2000 on the establishment of a Special Court for Sierra Leone, the UN Security Council recalled that:

> The Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.[826]

726. In 1997, in a statement by its President, the UN Security Council encouraged the government of Croatia "to take such steps as are needed to promote goodwill, build confidence, and provide assurances of a safe, secure and stable environment to all people in the region. These steps should include full implementation of its Law on Amnesty."[827]

727. In 1997, in a statement by its President, the UN Security Council called upon the government of Croatia "to remove uncertainty about the implementation of its amnesty law, in particular by finalizing without delay the list of war crime suspects on the basis of existing evidence and in strict accordance with international law".[828]

728. In a resolution adopted in 1991, the UN General Assembly called upon the Afghan authorities "to apply amnesty decrees equally to foreign detainees".[829]

729. In a resolution on Afghanistan adopted in 1992, the UN General Assembly welcomed "the [1992] declaration of general amnesty issued by the Islamic State of Afghanistan, which should be applied in a strictly non-discriminatory manner" and called upon the Afghan authorities "to apply amnesty decrees equally to all detainees".[830]

730. In a resolution on Kosovo adopted in 1998, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro) "to mitigate

[825] UN Security Council, Res. 1120, 14 July 1997, § 7.
[826] UN, Security Council, Res. 1315, 14 August 2000, preamble.
[827] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/4*, 6 March 1997, p. 2.
[828] UN Security Council, Statement by the President, UN Doc. S/PRST/1997/15, 19 March 1997, p. 2.
[829] UN General Assembly, Res. 46/136, 17 December 1991, § 9.
[830] UN General Assembly, Res. 47/141, 18 December 1992, preamble and § 8; see also Res. 48/152, 20 December 1993, preamble and § 12; Res. 49/207, 23 December 1994, preamble and § 14.

the punishments of and where appropriate to amnesty the ethnic Albanians in Kosovo sentenced for criminal offences motivated by political aims".[831]

731. In a resolution adopted in 1987, the UN Commission on Human Rights emphasised the need for the government of Chile "to investigate and clarify without further delay the fate of persons arrested for political reasons who have subsequently disappeared, without the granting of amnesty which creates an obstacle for the identification of those responsible and the administration of justice".[832]

732. In a resolution adopted in 1996, the UN Commission on Human Rights called upon the Republika Srpska and the Federation of Bosnia and Herzegovina "to adopt amnesty laws" and deplored "reported arrests inconsistent with the amnesty law adopted by the State of Bosnia and Herzegovina".[833]

733. In a resolution adopted in 1996, the UN Commission on Human Rights welcomed the announcement by the government of Sudan of a national amnesty in 1995.[834]

734. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights recognised that "amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes".[835]

735. In a resolution in 1995 on the situation in the territory of the former Yugoslavia, the UN Sub-Commission on Human Rights emphasised that no provision for impunity for any act of genocide, "ethnic cleansing" or other serious war crimes, including rape, must be made in the peace plan.[836]

736. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights noted that "the rights and obligations of States and individuals with respect to the violations referred to in the present resolution cannot, as a matter of international law, be extinguished by peace treaty, peace agreement, amnesty or by any other means".[837]

737. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General stated that:

> One potential obstacle to the return of young adult males is the requirement that they first undergo interrogations by Croatian authorities concerning their activities on behalf of the so-called "Republic of Serb Krajina". In the absence of broad amnesty legislation, these interrogations have caused widespread apprehension among potential returnees, as well as delays in the processing of applications.[838]

[831] UN General Assembly, Res. 53/164, 9 December 1998, § 14(d).
[832] UN, Commission on Human Rights, Res. 1987/60, 12 March 1987, § 10(e).
[833] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 24.
[834] UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.
[835] UN Commission on Human Rights, Res. 2002/79, 25 April 2002, § 2.
[836] UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 7; see also Res. 1993/17, 20 August 1993, § 3.
[837] UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 13.
[838] UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council resolution 1019 (1995), UN Doc. S/1996/691, 23 August 1996, § 22.

738. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General noted that:

> While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.
>
> At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law . . .
>
> In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows: "an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."[839]

739. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General pointed out that "the granting of amnesties to those who committed serious violations of international humanitarian and criminal law is not acceptable. The experience of Sierra Leone has confirmed that such amnesties do not bring about lasting peace and reconciliation."[840]

740. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that:

> 54. The new Law on Amnesty, passed by the Parliament on 25 September 1996, has been hailed by most observers as a significant step towards both the return of Croatian Serb refugees and the peaceful reintegration of the region of Eastern Slavonia into the rest of the country. However, the Special Rapporteur's attention has been drawn to the need to scrutinize the Law's application in practice.
> 55. The Law, which became effective on 3 October 1996, applies to criminal acts referred to in Croatian legislation as "participation in armed rebellion", and specifically excludes war crimes. The Law stipulates that all current investigations and trials shall be stopped, all completed trials annulled and all prisoners sentenced for "armed rebellion" released.
> 56. Some 100 prisoners reportedly were released between 5 and 7 October 1996 from various detention centres in Croatia. The Special Rapporteur has received reliable information, however, that at least seven of these persons were rearrested only a few days after their release in connection with an

[839] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 22–24.

[840] UN Secretary-General, Report of the on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 10.

investigation of alleged involvement in war crimes by the Karlovac Public Prosecutor's Office, although they had not previously been charged with war crimes. The remainder of those released reportedly were to be transported at their request to the FRY for resettlement.

57. The rearrest of several Croatian Serbs is of great concern to the Special Rapporteur, and she will seek to monitor this situation closely. The potential benefit of the new amnesty legislation in raising the confidence of Croatia's Serb population and encouraging returns will be substantially damaged if persons still find themselves the subject of criminal proceedings.[841]

741. In 1997, in a report on assistance to Guatemala in the field of human rights, the Independent Expert of the UN Commission on Human Rights stated that:

The National Reconciliation Act [of Guatemala], which came into force on 29 December 1996 with the signing of the Agreement on a Firm and Lasting Peace, leaves it to the courts to determine which acts committed by members of the army and the URNG in the course of the armed conflict will be pardoned. Crimes against humanity are excluded from this. The burden of proof is being turned upside down, since it will be for the victim to demonstrate that the injury suffered was not a reasonable consequence of the conflict.[842]

742. In 1998, in the conclusions and recommendations of his fifth report question of the human rights of all persons subjected to any form of detention or imprisonment, in particular, torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the UN Commission on Human Rights stated with respect to the Draft Statute for an International Criminal Court that:

In this connection, the Special Rapporteur is aware of suggestions according to which nationally granted amnesties could be introduced as a bar to the proposed court's jurisdiction. He considers any such move subversive not just of the project at hand, but of international legality in general. It would gravely undermine the purpose of the proposed court, by permitting States to legislate their nationals out of the jurisdiction of the court. It would undermine international legality, because it is axiomatic that States may not invoke their own law to avoid their obligations under international law. Since international law requires States to penalize the types of crime contemplated in the draft statute of the court in general, and torture in particular, and to bring perpetrators to justice, the amnesties in question are, ipso facto, violations of the concerned States' obligations to bring violators to justice.[843]

743. In 1996, in a statement before the UN Commission on Human Rights, the UN High Commissioner for Refugees stated with respect to the situation

[841] UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, §§ 54–57.

[842] UN Commission on Human Rights, Independent Expert on the Situation of Human Rights in Guatemala, UN Doc. E/CN.4/1997/90, 22 January 1997, § 100.

[843] UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, § 228.

in Bosnia and Herzegovina that "personal security was evidently of critical importance in the context of peaceful and dignified return. The amnesty adopted by the Bosnian Parliament, covering inter alia, draft evaders and deserters, was thus a very welcome step."[844]

Other International Organisations

744. In a resolution adopted in 1984 on enforced disappearances, the Parliamentary Assembly of the Council of Europe called upon the governments of member States "to support the preparation and adoption by the United Nations of a declaration setting forth the following principles: . . . enforced disappearance is a crime against humanity which . . . may not be covered by amnesty laws".[845]

745. In a recommendation on Kosovo adopted in 1998, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers urge the government of the FRY "to take practical steps to facilitate the voluntary return of refugees and displaced persons to their homes before the winter . . . ceasing the practice of interrogating male returnees; [and] providing and respecting an amnesty for those wishing to return".[846]

746. In a resolution adopted in 1993, the European Parliament stated that it believed that "the problem of impunity . . . can take the form of amnesty, immunity, extraordinary jurisdiction and constrains democracy by effectively condoning human rights infringements and distressing victims". It stressed that "there should be no question of impunity for those responsible for war crimes in the former Yugoslavia".[847]

747. In 2002, the EU Secretary General/High Representative CFSP stated that:

> I warmly welcome the adoption yesterday of a Law on Amnesty by the Assembly of the former Yugoslav Republic of Macedonia (FYROM).
>
> With its adoption, the elected representatives of the citizens have taken a courageous step forward, towards peace, stability and reconciliation.[848]

748. In 2001, NATO welcomed the acceptance by members of the NLA of an amnesty issued by the government of the FYROM, adding, however, that the challenge was to show that the amnesty worked in practice.[849]

749. In 2001, the OSCE welcomed the decision of the President and parliament of Tajikistan to grant a general amnesty to more than 19,000 detainees. It also

[844] UN High Commissioner on Refugees, Statement before the UN Commission on Human Rights, 20 March 1996, UN Doc. E/CN.4/1996/SR.4, 25 March 1996, § 54.
[845] Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 13(a)(i)(3).
[846] Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(i)(b).
[847] European Parliament, Resolution on human rights in the world and Community human rights policy for the years 1991/1992, 12 March 1993, §§ 7 and 8.
[848] EU, Secretary General/High Representative CFSP, Communiqué No. 0039/02, Dr. Javier Solana, EU High Representative for the Common Foreign and Security Policy (CFSP), welcomes the adoption of the Law on Amnesty in the Former Yugoslav Republic of Macedonia (FYROM), 8 March 2002.
[849] BBC News, 12 October 2001.

"noted with appreciation the humanitarian character of the General Amnesty Law".[850]

International Conferences

750. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon African States "to respect fully the provisions of international human rights and humanitarian law, in particular in the case of captured child soldiers, especially by . . . considering the broadest possible amnesty".[851]

IV. Practice of International Judicial and Quasi-judicial Bodies

751. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber stated that:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".[852]

752. In 1992, in its General Comment on the prohibition of torture and cruel treatment or punishment, the HRC noted that:

[850] OSCE, Press Release, OSCE welcomes granting of amnesty to detainees in Tajikistan, 3 September 2001.
[851] African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 5.
[852] ICTY, *Furundžija case*, Judgement, 10 December 1998, § 155.

Some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[853]

753. In its admissibility decision in *Dujardin and Others v. France* in 1991 concerning the killing of four disarmed gendarmes by about 50 assailants in New Caledonia, in the aftermath of which an amnesty law had been adopted preventing the public authorities from prosecuting the assailants, the ECiHR held that:

The Commission considers . . . that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands.

It is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law.[854]

754. In 1983, in a report on the situation of a segment of the Nicaraguan population of Miskito origin, the IACiHR recommended that the government of Nicaragua "declare a pardon or amnesty to cover all Indian Nicaraguans who have been accused of committing crimes against public order and security or any other connected crime and who are currently in prison . . . or who are at liberty, within or outside of Nicaragua".[855]

755. In 1992, in a report on a case with respect to the Las Hojas massacres in El Salvador in 1983, during which about 74 persons were allegedly killed by members of the Salvadoran armed forces with the participation of members of the Civil Defence and which had led to a petition before the IACiHR, the IACiHR held that the application of El Salvador's 1987 Law on Amnesty to Achieve National Reconciliation

constitutes a clear violation of the obligation of the Salvadoran Government to investigate and punish the violations of the rights of the Las Hojas victims, and to provide compensation for damages resulting from the violations . . . The present amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial guarantees, denies the fundamental nature of the most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders.[856]

[853] HRC, General Comment No. 20 (Article 7 ICCPR), 10 March 1992, § 15.
[854] ECiHR, *Dujardin and Others v. France*, Admissibility Decision, 2 September 1991.
[855] IACiHR, Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, Doc. OEA/Ser.L/V/II.62 Doc. 10 rev. 3, 29 November 1983, Part Three, B(1).
[856] IACiHR, *Case 10.287 (El Salvador)*, Report, 24 September 1992.

756. In 1994, in a report on the situation of human rights in El Salvador, the IACiHR stated with respect to El Salvador's General Amnesty Law for Consolidation of Peace that:

Regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law [for Consolidation of Peace] passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a "reciprocal amnesty" without first acknowledging responsibility . . . because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims.[857]

757. In 1999, in a report of a case concerning El Salvador's 1993 General Amnesty Law for Consolidation of Peace, the IACiHR stated that:

The Commission should emphasize that [this law] was applied to serious human rights violations in El Salvador between January 1, 1980, and January 1, 1992, including those examined and established by the Truth Commission. In particular, its effect was extended, among other things, to crimes such as summary executions, torture, and the forced disappearance of persons. Some of these crimes are considered of such gravity as to have justified the adoption of special conventions on the subject and the inclusion of specific measures for preventing impunity in their regard, including universal jurisdiction and inapplicability of the statute of limitations . . . The Commission also notes that Article 2 of [this law] was apparently applied to all violations of common Article 3 [of the 1949 Geneva Conventions] and of [AP II], committed by agents of the State during the armed conflict which took place in El Salvador.[858]

The Commission concluded that:

In approving and enforcing the General Amnesty Law, the Salvadoran State violated the right to judicial guarantees enshrined in Article 8(1) of the [1969 ACHR], to the detriment of the surviving victims of torture and of the relatives of . . . who were prevented from obtaining redress in the civil courts; all of this in relation to Article 1(1) of the Convention . . . In promulgating and enforcing the Amnesty Law, El Salvador has violated the right to judicial protection enshrined in Article 25 of the [the 1969 ACHR], to the detriment of the surviving victims and those with legal claims on behalf of . . .[859]

In its conclusions, the IACiHR stated that El Salvador "has also violated, with respect to the same persons, common Article 3 of the Four Geneva Conventions of 1949 and Article 4 of [AP II]".[860] Moreover, in order to safeguard the rights of the victims, it recommended that El Salvador should, "if need be, . . . annul that law *ex-tunc*".[861]

[857] IACiHR, Report on the Situation of Human Rights in El Salvador, Doc. OEA/Ser/L/V/II.86 Doc.5 rev. 1, June 1994.
[858] IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, §§ 112 and 115.
[859] IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, §§ 123 and 129.
[860] IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, Chapter XI, § 2.
[861] IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, Chapter XII, § 1.

758. In its judgement in the *Barrios Altos case* in 2001 involving the question of the legality of Peruvian amnesty laws, the IACtHR stated that:

> 41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.
> 42. The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge . . . they violated the right to judicial protection . . . they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the [1969 ACHR], and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the [1969 ACHR] meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the [1969 ACHR].
> 43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the [1969 ACHR], the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the [1969 ACHR]. Consequently, States Parties to the [1969 ACHR] which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the [1969 ACHR]. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.
> 44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the [1969 ACHR] have been violated.[862]

In his concurring opinion, one of the judges added that:

> The international responsibility of the State for violations of internationally recognized human rights, – including violations which have taken place by means of the adoption and application of laws of self-amnesty, – and the individual penal

[862] IACtHR, *Barrios Altos case*, Judgment, 14 March 2001, §§ 41–44.

responsibility of agents perpetrators of grave violations of human rights and of International Humanitarian Law, are two faces of the same coin, in the fight against atrocities, impunity, and injustice. It was necessary to wait many years to come to this conclusion, which, if it is possible today, is also due, – may I insist on a point which is very dear to me, – to the *awakening of the universal juridical conscience*, as the *material source par excellence* of International Law itself.[863] [emphasis in original]

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

759. In 1995, in a meeting of the Humanitarian Liaison Working Group on the role of mechanisms for accountability in resolving humanitarian emergencies, the issue of amnesty at the end of a conflict was discussed, in particular Article 6 AP II. The ICRC noted that, given "the preparatory works and the context", this provision could not be invoked in favour of impunity of war criminals, since it only applied to prosecution for the sole participation in hostilities.[864]

760. In a letter from the Head of the ICRC Legal Division to the Department of Law at the University of California in 1997, the ICRC stated that:

> The "*travaux préparatoires*" of Article 6(5) [AP II] indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law . . . Anyway States did not accept any rule in Protocol II obliging them to criminalize its violations . . . Conversely, one cannot either affirm that international humanitarian law absolutely excludes any amnesty including persons having committed violations of international humanitarian law, as long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance.[865]

VI. Other Practice

761. According to Amnesty International, Article 19 of the 1993 Cotonou Agreement on Liberia providing for a general amnesty would appear to violate the obligation of States to take the necessary measures to suppress violations of IHL under the 1949 Geneva Conventions, in particular, in respect of violations of common Article 3.[866]

762. With respect to Russia's Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya and the Law on the Execution of the Law on

[863] IACtHR, *Barrios Altos case*, Concurring Opinion of Judge Cançado Trindade, 14 March 2001, § 13.
[864] ICRC, Statement at the Humanitarian Liaison Working Group (HLWG), Geneva, 19 June 1995.
[865] ICRC, Letter from the Head of the ICRC Legal Division to the Department of Law at the University of California and the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, 15 April 1997.
[866] Amnesty International, Letter from to the ICRC, 28 September 1993.

Amnesty for Acts Committed in the Context of the Conflict in Chechnya, both of 1997, the Russian human rights group Memorial, together with the Soldiers' Mothers Committee and families of Russian soldiers detained in Chechnya, called for the revision of the amnesty law as it would jeopardise the life and security of the detainees and halt the exchange process of POWs.[867]

E. Statutes of Limitation

I. Treaties and Other Instruments

Treaties

763. The preamble to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity recognises that "it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application".

764. Article 1 of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

(a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

765. Article 1 of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes provides that:

Each Contracting State undertakes to adopt any necessary measures to secure that statutory limitation shall not apply to the prosecution of the following offences, or to the enforcement of the sentences imposed for such offences, in so far as they are punishable under its domestic law:

[867] "Exchange or deception? The Amnesty is unlikely to help the Chechens who are in the hands of the Russian military", *Izvestiya*, Moscow, 28 March 1997.

1. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;
2. (a) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, (b) any comparable violations of the laws of war having effect at the time when this Convention enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions, when the specific violation under consideration is of a particularly grave character by reason either of its factual and intentional elements or of the extent of its foreseeable consequences;
3. any other violation of a rule or custom of international law which may hereafter be established and which the Contracting State concerned considers according to a declaration under Article 6 as being of a comparable nature to those referred to in paragraph 1 or 2 of this article.

As of 1 February 2004, four States (Belgium, France, Netherlands and Romania) had signed the Convention, and three (Belgium, Netherlands and Romania) had ratified it. Article 3(2) states that "the Convention shall enter into force three months after the date of deposit of the third instrument of ratification or acceptance".

766. Article 2 of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes provides that:

1. The present Convention applies to offences committed after its entry into force in respect of the Contracting State concerned.
2. It applies also to offences committed before such entry into force in those cases where the statutory limitation period had not expired at that time.

767. Article 29 of the 1998 ICC Statute provides that "the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".

768. Upon signature of the 1998 ICC Statute, Egypt declared that:

The Arab Republic of Egypt declares that the principle of the non-retroactivity of the jurisdiction of the Court, pursuant to articles 11 and 24 of the Statute, shall not invalidate the well established principle that no war crime shall be barred from prosecution due to the statute of limitations.[868]

Other Instruments

769. Article 7 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Non-applicability of statutory limitations", provides

[868] Egypt, Declarations made upon signature of the ICC Statute, 26 December 2000, § 5.

that "no statutory limitation shall apply to crimes against the peace and security of mankind".

770. Article 6 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that "statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law".

771. Article 7 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

> Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.

772. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including genocide, war crimes, crimes against humanity and torture. Section 17(1) provides that these offences "shall not be subject to any statute of limitations".

II. National Practice

Military Manuals

773. Australia's Commanders' Guide states that:

> Any nation may prosecute any person who is suspected of committing a major war crime and no statute of limitation applies for such prosecutions. Trial of a suspected war criminal may take place any time that the individual is located or evidence of a war crimes commission is unearthed.[869]

774. France's LOAC Manual states that "Article 29 of the [1998 ICC Statute] provides that crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".[870]

775. Italy's IHL Manual provides that "war crimes are not subject to statutes of limitation".[871]

776. The UK Military Manual states that it is "open to two or more belligerents to agree in a peace treaty, or even in a general armistice, that no further war crimes trials will be instituted by them after a certain agreed date or as from the date of the treaty of the armistice".[872]

777. The US Instructor's Guide provides that "there is no statute of limitations on the prosecution of a war crime".[873]

[869] Australia, *Commanders' Guide* (1994), § 1307.
[870] France, *LOAC Manual* (2001), p. 45.
[871] Italy, *IHL Manual* (1991), Vol. I, § 86.
[872] UK, *Military Manual* (1958), § 641, footnote 1.
[873] US, *Instructor's Guide* (1985), p. 13.

778. The US Naval Handbook provides that "there is no statute of limitations on the prosecution of a war crime".[874]

National Legislation

779. Albania's Military Penal Code provides that statutory limitations will not apply to war crimes and crimes against humanity.[875]

780. Argentina's Law concerning the Imprescriptibility of War Crimes and Crimes against Humanity approved the 1968 UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity.[876]

781. Argentina's Draft Code of Military Justice provides for the introduction of a new provision in the Code of Military Justice as amended according to which "the penal action with respect to [offences against protected persons and objects in the event of an armed conflict] are not subject to statutory limitations".[877]

782. Armenia's Penal Code provides that crimes such as "Application of prohibited methods of warfare", "Serious breaches of international humanitarian law during armed conflict" or genocide are not subject to statutes of limitation.[878]

783. Austria's Penal Code, which provides for possible life imprisonment for, *inter alia*, acts such as murder (Article 75), specific cases of rape (Article 201(3)) and genocide (Article 321), states that "acts which are punishable with life imprisonment, or which are punishable with imprisonment for a period between ten and twenty years or life imprisonment, are not subject to statutory limitations".[879]

784. Azerbaijan's Criminal Code excludes statutory limitations with regard to war crimes.[880]

785. The Criminal Code of Belarus provides that "the exoneration from criminal responsibility or punishment . . . in relation with the expiration of statutory limitation is inapplicable to crimes against peace, [crimes against] the security of mankind and war crimes".[881]

786. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "Article 21 of the Introductory Part of the Code of Penal Procedure and Article 91 of the Penal Code, relative to the statutory limitation of public prosecutions and penalties, shall not be applicable to the breaches listed in

[874] US, *Naval Handbook* (1995), § 6.2.5.3.
[875] Albania, *Military Penal Code* (1995), Article 67.
[876] Argentina, *Law concerning the Imprescriptibility of War Crimes and Crimes against Humanity* (1995).
[877] Argentina, *Draft Code of Military Justice* (1998), Article 236, introducing a new Article 601 *bis* in the *Code of Military Justice as amended* (1951).
[878] Armenia, *Penal Code* (2003), Article 75(6).
[879] Austria, *Penal Code* (1974), Article 57(1).
[880] Azerbaijan, *Criminal Code* (1999), Article 75.
[881] Belarus, *Criminal Code* (1999), Article 85.

Article 1 of the present Act".[882] Article 1 provides for the punishment of the crime of genocide (paragraph 1), crimes against humanity (paragraph 2) and "grave breaches . . . which cause injury, by act or omission, to persons or objects protected by the [1949 Geneva Conventions] and by Protocols I and II additional to those Conventions" (paragraph 3).[883]

787. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes states that "the prosecution and punishment of infringements constituent of genocide, crimes against humanity or war crimes are not subject to statutes of limitation".[884]

788. Under Colombia's Penal Code, the period of limitation for penal action with regard to genocide, forced disappearance, torture and forced displacement is 30 years.[885]

789. Congo's Genocide, War Crimes and Crimes against Humanity Act states that statutes of limitation do not apply with regard to the prosecution and repression of war crimes or with regard to the pronounced penalty.[886]

790. Croatia's Criminal Code provides that:

> The non-applicability of the criminal legislation of the Republic of Croatia [because of the statute of limitations] does not apply to the criminal offences of genocide, as referred to in Article 156, a war of aggression, as referred to in Article 157, war crimes, as referred to in Articles 158, 159 and 160 of this Code, or other criminal offences which, pursuant to international law, are not subject to the statute of limitations.[887]

The Code further provides that:

> No statutory limitation shall apply to the execution of punishment pronounced on a perpetrator of the criminal offence of genocide as specified in Article 156, of a war of aggression as specified in Article 157, of war crimes as specified in Articles 158, 159 and 160 of this Code, or of other criminal offences which, pursuant to international law, are not subject to the statute of limitations.[888]

791. Cuba's Penal Code states that its provisions regarding statutes of limitation for penal action "do not apply to cases for which the law foresees the death penalty and to crimes against humanity".[889] It adds that its provisions regarding statutes of limitation for punishment "do not apply with respect to crimes against humanity".[890]

[882] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 8.
[883] Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(1), (2) and (3).
[884] Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 28.
[885] Colombia, *Penal Code* (2000), Article 83.
[886] Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 14.
[887] Croatia, *Criminal Code* (1997), Article 18(2).
[888] Croatia, *Criminal Code* (1997), Article 24.
[889] Cuba, *Penal Code* (1987), Article 64(5).
[890] Cuba, *Penal Code* (1987), Article 65(5).

792. Estonia's Criminal Code as amended provides that there is no statutory limitation for war crimes.[891]

793. In 1992, the transitional government of Ethiopia adopted the Special Public Prosecutor's Office Establishment Proclamation which has "the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Derg-WPE regime".[892] The Proclamation states, *inter alia*, that "the provisions concerning limitation of criminal action and the time limit concerning the submission of charges, evidence and pleading to charges shall not be applicable to proceedings instituted by the Office".[893]

794. Ethiopia's Constitution provides that "there shall be no period of limitation on persons charged with crimes against humanity [i.e. "inhuman punishment, forcible disappearances, summary executions, acts of genocide"] as provided by international conventions ratified by Ethiopia and other laws of Ethiopia".[894]

795. Under France's Penal Code, "the public action with regard to [genocide and "other crimes against humanity"], as well as the sentences imposed [on genocide and "other crimes against humanity"], are not subject to statutory limitations".[895]

796. Under Germany's Penal Code, genocide and murder are explicitly excluded from the general provisions relative to statutory limitation.[896]

797. Germany's Law Introducing the International Crimes Code provides that "the prosecution of serious criminal offences pursuant to this Act [*inter alia*, genocide, crimes against humanity and war crimes] and the execution of sentences imposed on their account shall not be subject to any statute of limitations".[897]

798. Hungary's Criminal Code as amended provides that statutory limitations will not apply to war crimes and crimes against humanity.[898]

799. Under Israel's Criminal Procedure Law, the period of limitation for the most serious crimes is 20 years and for other crimes 10 years.[899]

800. Israel's Nazis and Nazi Collaborators (Punishment) Law provides that there shall be no period of limitation for the crimes dealt with therein (crimes against the Jewish people, crimes against humanity and war crimes).[900]

[891] Estonia, *Criminal Code as amended* (1992), Section 53.
[892] Ethiopia, *Special Public Prosecutor's Office Establishment Proclamation* (1992), Articles 2(1) and 6.
[893] Ethiopia, *Special Public Prosecutor's Office Establishment Proclamation* (1992), Article 7(2).
[894] Ethiopia, *Constitution* (1994), Article 28(1).
[895] France, *Penal Code* (1994), Article 213(5).
[896] Germany, *Penal Code* (1998), Section 78(2).
[897] Germany, *Law Introducing the International Crimes Code* (2002), Article 1(5).
[898] Hungary, *Criminal Code as amended* (1978), Article 33(2).
[899] Israel, *Criminal Procedure Law* (1982), Article 9.
[900] Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 12.

801. Israel's Crime of Genocide (Prevention and Punishment) Law excludes the applicability of the provision of the Penal Code dealing with limitations.[901]
802. Jordan's Draft Military Criminal Code, in a part entitled "war crimes", states that "the provisions with regard to statutes of limitation of the common law do not apply to war crimes nor to the sanctions incurred".[902]
803. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment of war criminals, provide that "the crimes provided for in this law are not subject to statutes of limitation".[903]
804. Lithuania's Criminal Code as amended provides that "there is no prescription for genocide and war crimes".[904]
805. Luxembourg's Law on the Non-Applicability of Statutory Limitations to War Crimes provides that "war crimes . . . are, by their nature, not subject to statutes of limitation".[905]
806. Malaysia's Armed Forces Act provides for a general three-year limitation period for offences under service law, except for offences relative to mutiny and desertion.[906]
807. Mali's Penal Code provides that "any of the crimes provided for under the present title [i.e. crimes against humanity, genocide and war crimes] . . . just as any punishment pronounced in repression of such crimes are not subject to statutes of limitation".[907]
808. Moldova's Draft Penal Code, under a provision dealing with statutes of limitation for crimes, provides that "the statutes of limitation do not apply with regard to persons having committed crimes against the peace and security of mankind or war crimes". It also states that "the statutes of limitation do not apply to the principal penalties which are applied with regard to crimes against the security of mankind or to war crimes provided for in this Code".[908]
809. According to the International Crimes Act of the Netherlands, the expiration of the right to institute criminal proceedings or to impose a sentence, as defined in Articles 70 and 76 of the Penal Code as amended, "shall not apply to the crimes defined in this Act [genocide, crimes against humanity, war crimes and torture]".[909]
810. Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes" in which it provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes in the

[901] Israel, *Crime of Genocide (Prevention and Punishment) Law* (1950), Section 6.
[902] Jordan, *Draft Military Criminal Code* (2000), Article 43.
[903] Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 149.
[904] Lithuania, *Criminal Code as amended* (1961), Article 49.
[905] Luxembourg, *Law on the Non-Applicability of Statutory Limitations to War Crimes* (1974).
[906] Malaysia, *Armed Forces Act* (1972), Section 144.
[907] Mali, *Penal Code* (2001), Article 32.
[908] Moldova, *Draft Penal Code* (1999), Articles 61(8) and 95(4).
[909] Netherlands, *International Crimes Act* (2003), Article 13.

meaning of the 1949 Geneva Conventions and both AP I and AP II, states that "the prosecution with regard to the crimes set out under this chapter, as well as the penalties pronounced, are not subject to statutes of limitation".[910]

811. Poland's Penal Code provides for the non-application of statutory limitations to war offences and crimes against peace and humanity.[911]

812. Russia's Decree on the Punishment of War Criminals states that "Nazi criminals, guilty of most serious crimes against peace and humanity and war crimes, are subject to prosecution and punishment, irrespective of the time elapsed after the crimes committed".[912]

813. Russia's Criminal Code, with respect to possible release from criminal responsibility owing to the expiry of statutes of limitation, provides that:

> The periods of limitation shall not be applied to persons who have committed crimes against peace and the security of mankind, provided for by Articles 353 [planning, preparing, unleashing or waging an aggressive war], 356 [use of banned means and methods of warfare], 357 [genocide] and 358 [ecocide] of this Code.[913]

With respect to possible release from punishment owing to the expiry of the limitation period of the Court's sentence, the Code provides that:

> Limitation periods shall not be applicable to persons convicted for the commission of crimes against peace and the security of mankind, provided for by Articles 353 [planning, preparing, unleashing or waging an aggressive war], 356 [use of banned means and methods of warfare], 357 [genocide] and 358 [ecocide] of this Code.[914]

814. Rwanda's Law on the Prosecution of the Crime of Genocide and Crimes against Humanity provides that "prosecutions and penalties for offences constituting the crime of genocide or crimes against humanity are not subject to a limitation period".[915]

815. Rwanda's Law Setting up Gacaca Jurisdictions provides that "the public action and penalties related to offences of the crime of genocide or crimes against humanity are imprescriptible".[916]

816. Slovenia's Penal Code provides that:

> Criminal prosecution and the implementation of a sentence shall not be prevented for criminal offences from Articles 373–378 of the Present Code [i.e. genocide; war crimes against the civilian population; war crimes against the wounded and sick; war crimes against prisoners of war; war crimes of use of unlawful weapons; association with and incitement to genocide and war crimes] as well as for criminal

[910] Niger, *Penal Code as amended* (1961), Article 208.8.
[911] Poland, *Penal Code* (1997), Article 109.
[912] Russia, *Decree on the Punishment of War Criminals* (1965).
[913] Russia, *Criminal Code* (1996), Article 78(5).
[914] Russia, *Criminal Code* (1996), Article 83(4).
[915] Rwanda, *Law on the Prosecution of the Crime of Genocide and Crimes against Humanity* (1996), Article 37.
[916] Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 92.

offences the prosecution of which may not be prevented under international agreements.[917]

817. Spain's Military Criminal Code provides for periods of limitation for military offences punishable thereunder, including offences against the laws and customs of war, and for the penalties imposed for such offences.[918]

818. Spain's Penal Code provides that "in no case shall the crime of genocide be subject to statutory limitations" and that the same is valid for the punishment imposed therefore.[919] Periods of limitation are provided for other offences punishable under the Code.[920]

819. Switzerland's Military Criminal Code as amended provides that:

[The following acts] are not subject to statutes of limitation:

1. Crimes aiming at the extermination or oppression of a group of the population because of its nationality, race, religion or because of its ethnic, social or political affiliation;
2. Serious crimes under the Geneva Conventions of 12 August 1949 and other international agreements relating to the protection of victims of war to which Switzerland is a party, if the offence under examination is particularly serious because of the conditions under which it was committed;
3. Crimes committed with the aim of exercising duress or extortion and which put in danger or threaten to put in danger the life and physical integrity of persons, in particular by the use of means of massive destruction, the triggering of a catastrophe or the taking of hostages.[921]

Switzerland's Penal Code as amended contains an identical provision.[922]

820. Tajikistan's Criminal Code provides that "crimes against the peace and security of mankind are not subject to statutes of limitation".[923]

821. Uzbekistan's Criminal Code provides that statutory limitations are not applicable to crimes against the peace and security of mankind, including genocide and violations of the laws and customs of war.[924]

822. Yemen's Military Criminal Code states that "with regard to the crimes set out under this chapter [i.e. war crimes], the right to prosecution is not subject to statutes of limitation".[925]

823. Zimbabwe's Criminal Procedure and Evidence Act as amended provides that:

[917] Slovenia, *Penal Code* (1994), Article 116.
[918] Spain, *Military Criminal Code* (1985), Articles 45 and 46.
[919] Spain, *Penal Code* (1995), Articles 131(4) and 133(2).
[920] Spain, *Penal Code* (1995), Article 133.
[921] Switzerland, *Military Criminal Code as amended* (1927), Article 56 *bis*.
[922] Switzerland, *Penal Code as amended* (1937), Article 75 *bis*.
[923] Tajikistan, *Criminal Code* (1998), Articles 75 and 81.
[924] Uzbekistan, *Criminal Code* (1994), Articles 64 and 69.
[925] Yemen, *Military Criminal Code* (1998), Article 22.

(1) The right of prosecution for murder shall not be barred by any lapse of time.
(2) The right of prosecution for any offence other than murder . . . shall, unless some other period is expressly provided by law, be barred by the lapse of twenty years from the time when the offence was committed.[926]

National Case-law

824. In the *Bohne case* in 1966, Argentina's Supreme Court of Justice found that in fact there had been no verification that prescription applied to penal action under the laws of the requesting State (FRG), and that the decision in question remained unchanged even in the light of the argument put forward by the defence to the effect that prescription of penal action for the crimes attributed to the accused applied after 15 years because the case was one of participation in simple homicide. The accused had been requisitioned for widespread and systematic execution of mentally ill persons in 1939 and 1940.[927]

825. In the *Priebke case* in 1995 dealing with the question of the possible extradition of the accused to Italy for acts committed during the Second World War (Ardeatine caves massacre), Argentina's Court of Appeal found that, under the terms of Argentine legislation, the charge of homicide was prescribed and therefore the extradition request should be rejected.[928] The Supreme Court revoked the decision of the Court of Appeal and allowed the extradition, stating that the fact that Priebke was required for trial in Italy established *prima facie* the crime of genocide "for killing 75 Jews out of 335 dead". It added that "the classification of offences as crimes against humanity does not depend on whether the requesting or requested States agree with the extradition process, but instead on the principles of *jus cogens* of international law" and that "there is no prescription for crimes under this law".[929] One of the Court magistrates referred to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and concluded that the Argentine Republic's practice undeniably contributed to the development of an international custom that favoured the non-applicability of statutory limitations, and that express acceptance of such non-applicability through adherence to or ratification of the Convention was not the only means of determining the existence of *jus cogens*. In his opinion, Argentina's Executive and Legislative Branches had already expressed their agreement with the contents of the text, which had already been approved by both the Argentine Senate and House of Deputies.[930] Other magistrates also found that Priebke's conduct had all the characteristics of crimes against humanity committed against civilians and prisoners of war

926 Zimbabwe, *Criminal Procedure and Evidence Act as amended* (1927), Section 23.
927 Argentina, Supreme Court of Justice, *Bohne case*, 24 August 1966.
928 Argentina, Court of Appeal of General Roca, *Priebke case* (Appeal), 23 August 1995.
929 Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995.
930 Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995, Opinion by Dr Bossert.

in wartime, and that this classification was in line with the principles of *jus cogens*, and that such crimes were not subject to limitations.[931] However, other judges casting dissenting votes found that, since the crimes were homicides in terms of Article 62 of the Argentine Penal Code, the time limit after which prescription would apply had already elapsed. They found that even if the acts were to be considered crimes against humanity, they would be subject to a period of limitation since the UN Convention had yet to enter into force in Argentina.[932]

826. In the *Schwammberger case* in 1989, a magistrate of Argentina's Cámara Federal de La Plata found the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity to be an indisputable factor in the non-applicability of statutory limitations to war crimes as a principle of international law, and despite the absence of ratification by Argentina, held that Argentina was bound by the principle according to Article 102 of its Constitution.[933] Similarly, another magistrate rejected the position that prescription was covered by Article 18 of the National Constitution.[934] The Attorney-General argued that in the case in question it must be verified whether penal action was not prescribed under the laws of the requesting State (FRG) rather than the laws of Argentina.[935] Similarly, in 1990, the Supreme Court found that under German law there was no prescription.[936]

827. In its judgement in the *Videla case* in 1994 concerning the abduction, torture and murder of a Chilean woman in 1974, Chile's Appeal Court of Santiago held that the acts charged constituted grave breaches under Article 147 GC IV, which it found applicable, and that:

> Such offences as constitute grave breaches of the Convention are imprescriptible . . . the ten-year prescription of legal action in respect of the crimes provided for in Article 94 of the Penal Code cannot apply . . . Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law.[937]

828. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Colonel Mengistu Haile Mariam and former members of the Derg for allegedly committing genocide, crimes against humanity and war crimes during

[931] Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995, Opinion by Drs Nazareno and Moliné O'Connor.
[932] Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995, Dissenting vote by Drs Belluscio and Levene.
[933] Argentina, Cámara Federal de La Plata, *Schwammberger case* (First Instance), 30 August 1989, Opinion by Dr Schiffrin.
[934] Argentina, Cámara Federal de La Plata, *Schwammberger case* (First Instance), 30 August 1989, Opinion by Dr Garro.
[935] Argentina, Legal opinion of the Procurator-general of the Nation, *Schwammberger case* (Legal Opinion), 21 January 1989.
[936] Argentina, Supreme Court of Justice, *Schwammberger case* (Supreme Court), 20 March 1990.
[937] Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.

the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply submitted in response to the objection filed by counsels for defendants, stated that "the UN General Assembly, in article 1 of its Resolution on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity, has clearly stated that these offences are imprescriptible".[938] In his conclusions, the Special Prosecutor noted that "it is . . . a well established custom and belief that war crimes and crimes against humanity are not . . . barred by limitation".[939]

829. In the *Barbie case* in 1984, France's Court of Cassation held that:

The judgement under appeal conforms with the official interpretation of the London Agreement given on 15 June 1979 by the Minister of Foreign Affairs, who was consulted on the occasion of other proceedings but whose opinion on questions relating to international public policy (*ordre public international*) is of general scope and binding on the judiciary. The Court held that "the only principle with regard to the statutory limitation of prosecution of crimes against humanity which is to be considered as deducible from the Charter of the International Military Tribunal is that prosecution of such crimes is not subject to statutory limitation". The Court of Appeal stated correctly that, within the meaning of Article 60 of the European Convention on Human Rights, "the right to benefit of statutory limitation of prosecution" cannot constitute a human right or fundamental freedom. The Court of Appeal then referred to Article 7(2) of the Convention, as well as to Article 15(2) of the [1966 ICCPR]. In fact, neither of these provisions give rise to any derogation or restriction on the rule that prosecution is not subject to statutory limitation. This rule is applicable to crimes against humanity by virtue of the principles of law recognized by the community of nations.[940]

In a later judgement in the same case, the Court of Cassation held that war crimes, in contrast to crimes against humanity, were subject "to the time-limits imposed by statute" and stated that:

Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which might have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity. There is no principle of law with an authority superior to that of French law which would allow war crimes, either within the meaning of the London Agreement of 8 August 1945 or as defined in the Ordinance of 28 August 1944 which preceded it, to be declared not subject to statutory limitation.[941]

830. In 1996, the Constitutional Court of Hungary held that the provision of Hungary's Penal Code on the imprescriptibility of war crimes and crimes

[938] Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 6.1.1.
[939] Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, Conclusion.
[940] France, Court of Cassation, *Barbie case*, Judgement, 26 January 1984.
[941] France, Cour de Cassation, *Barbie case*, 20 December 1985.

against humanity could only be applied to grave breaches in international conflicts and prohibited acts under common Article 3 of the 1949 Geneva Conventions.[942]

831. At the Trial of First Instance in the *Priebke case* in 1996, Italy's Military Tribunal of Rome held that the criminal prosecution prescribed period of 20 years had elapsed. The charge laid against the accused was "violence and murder of Italian citizens" under Italy's Military Criminal Code, a war crime but not a crime against humanity according to the Tribunal. Since the sentence would not be life imprisonment – the only crimes (with crimes against humanity and genocide) not subject to limitation under Italian law – the Tribunal held that the prosecution was prescribed. However, this verdict was annulled by the Supreme Court of Cassation, which ordered a new trial.[943]

832. At the Trial of First Instance in the *Hass and Priebke case* in 1997, Italy's Military Tribunal of Rome held that the charge was both a war crime and a crime against humanity and that, under Italian law and under customary international law (which prevailed over national law), they were not subject to limitations.[944] The Military Court of Appeals, as well as the Supreme Court of Cassation, confirmed this judgement in the relevant parts.[945]

833. In the *Spring case* in 2001 dealing with the claim of an Auschwitz survivor against the Swiss Confederation for compensation for having been handed over, in November 1943, to German troops by Swiss border guards, Switzerland's Federal Court, in the part of the judgement concerning the question whether the right to compensation was barred by statutes of limitation, referred to Article 75(1) *bis* of the Swiss Penal Code and Article 56 *bis* of the Swiss Military Criminal Code as amended and stated that these provisions excluded the applicability of statutes of limitation to, *inter alia*, genocide and grave breaches of the Geneva Conventions or other international agreements on the protection of victims of war if the offence was particularly serious given the circumstances. However, the Federal Court pointed out that Article 75 *bis* of the Swiss Penal Code had been adopted under the premise that the provision be applicable "only if the prosecution of the crime or the punishment was not yet barred by statutes of limitation under the then applicable law at the time of the coming into force of this change" and that this would not be valid only for the cases of extradition and other forms of international cooperation in criminal matters. As to the alleged punishable act – the claimant referring, *inter alia*,

[942] Hungary, Constitutional Court of Hungary, *Judgement No. 36/1996*, 4 September 1996.

[943] Italy, Military Tribunal of Rome, *Priebke case*, Judgement (Trial of First Instance), 1 August 1996; Supreme Court of Cassation, *Priebke case*, Judgement (Cancelling Verdict of First Instance), 15 October 1997.

[944] Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement (Trial of First Instance), 22 July 1997.

[945] Italy, Military Appeals Court, *Hass and Priebke case*, Judgement (Trial of Second Instance), 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement (Trial of Third Instance), 16 November 1998.

to complicity in genocide – the Court stated that, if the handing over of the claimant to the German authorities should in fact be relevant under penal law, the relevant acts would, at the time of the coming into force of Article 75 *bis* of the Swiss Penal Code in 1983, have been barred by absolute statutes of limitation, which would be the reason why the applicant could not deduce a right in his favour from the principle that statutes of limitation under penal law can also be applicable to the right under civil law.[946]

Other National Practice

834. On the occasion of a possible request for the extradition of a Belgian national from Spain for acts committed during the Second World War, it was noted in the Commission of Justice of the Belgian parliament that Belgium did not want to ratify the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity because it could be applied to acts committed before its entry into force, in contradiction with general principles of Belgian penal law. Belgium would, however, be willing to ratify the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes since it only applied to acts for which the limitation period had not elapsed.[947]

835. In an explanatory memorandum submitted to the Belgian Senate in 1991 in the context of the adoption procedure of the Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (as amended), the Belgian government noted that the principle of the non-application of statutory limitations to war crimes was now generally accepted and that several States had modified their legislation in accordance with the principle. It referred to the UN and European Conventions on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, although Belgium had ratified neither of them at the time.[948]

836. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who had committed crimes against humanity, the representative of Brazil stated that "the principle of non-applicability of statutory limitation to war crimes and crimes against humanity was a new principle for many countries, including his own, where the law recognized statutory limitations in criminal matters".[949]

946 Switzerland, Federal Court, *Spring case*, Judgement, 21 January 2001.

947 Belgium, House of Representatives, Commission of Justice, Debates on a proposal for a resolution on the request for extradition of the war criminal Léon Degrelle and on the ratification of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, 1982–1983 Session, *Débats parlementaires*, Chambre, Vol. 540, No. 2, pp. 6–9, reprinted in part in *RBDI*, Vol. 19, 1986, pp. 463–464.

948 Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 16.

949 Brazil, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 28.

837. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who had committed crimes against humanity, the representative of Bulgaria stated that:

He was convinced of the need to adopt a convention on the non-applicability of statutory limitation to war crimes in order to prevent new crimes . . . In resolution 1158 (XLI) the Economic and Social Council had urged all States to take "any measures necessary to prevent the application of statutory limitation to war crimes and crimes against humanity". The Committee's task was therefore very simple and essentially a technical one: it had to adopt a convention which was of the nature of a declaration and brought together principles that already existed in international law. Statutory limitation with respect to war crimes did not exist in Bulgaria, nor in the legislation of many countries . . . Although statutory limitation was known in the domestic law of many countries, it had always been very controversial, and in some countries applied to some crimes but not to others. All international documents dealing with international criminal law, moreover, pass over the question of the non-applicability of statutory limitation in silence . . . No moral considerations could justify the application of statutory limitation to such crimes . . . What should be done . . . was to take all necessary measures to confirm a principle which already existed in international law.[950]

838. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Chile stated that:

His country had voted in favour of the draft convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity] because it considered it essential to adopt an instrument establishing the non-applicability of statutory limitation to war crimes and crimes against humanity.[951]

839. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Congo stated that "there could be no statutory limitation in the case of war crimes and crimes against humanity".[952]

840. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Côte d'Ivoire stated that:

It was particularly important, by adopting a convention, to embody in international law the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity at a time when the policy of aggression, intervention and

[950] Bulgaria, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 5.
[951] Chile, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 29.
[952] Congo, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 21.

hegemony pursued by certain countries was giving rise to new crimes of that kind in various parts of the world. He would therefore support any steps aimed at ensuring that such crimes were punished.[953]

841. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Cyprus stated that:

The last paragraph of the preamble and article I of the [preliminary draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity], as well as Economic and Social Council resolution 1158 (XLI), took it for granted that the non-applicability of statutory limitation to war crimes and crimes against humanity was a principle. If, however, the new notion of the non-applicability of statutory limitation to war crimes was, as a necessary evil, made applicable to the past, it would not be possible to speak of a principle; whereas it was elevated to the status of a principle by a process of creating international law, it would be difficult to understand why certain offences against property, included in the available definition of war crimes, should be considered of such gravity as to be exempt from statutory limitation, while more serious crimes at the national level were subject to limitation. Statements that the non-applicability of statutory limitation to war crimes became a principle because there was no statutory limitation in international law were inadmissible; for the absence of any provision on that point did not mean that the principle was accepted or recognized.[954]

In a later meeting on the same issue in 1967, the representative of Cyprus stated that:

> 23. . . . There had indeed been no precise definition of [the crimes such as those committed during the Second World War] in international law at the time when they were committed, nor had there been any provision relating to the applicability or non-applicability of the rules of statutory limitation. The absence of any reference to that in international law was regarded by some as proof of the existence of the principle of the non-applicability in international law. In his opinion, that was not the case, for international law was not yet as developed as domestic law, and it was to the characteristics and weaknesses of international law that its silence on that point was due . . .
> . . .
> 25. While the principle of statutory limitation was well established in domestic criminal law, the non-applicability of statutory limitation to war crimes and crimes against humanity, on the other hand, did not constitute an established principle of international law.[955]

842. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons

[953] Côte d'Ivoire, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 6.
[954] Cyprus, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, § 15.
[955] Cyprus, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, §§ 23 and 25.

who have committed crimes against humanity, the representative of Czechoslovakia stated that:

> 35. ... Her government fully supported the drafting of a binding legal instrument which would incorporate the principle of non-applicability of statutory limitation to war crimes and crimes against humanity.
> ...
> 37. ... To apply statutory limitation to [war crimes and crimes against humanity] would be contrary to the provisions of the international instruments which she had mentioned [i.e. the 1945 London Agreement, the 1945 IMT Charter (Nuremberg) and UN General Assembly resolutions 3 (I), 95 (I) and 170 (II)] and to the spirit of the [1943 Moscow Declaration] ... A number of countries, including the Czechoslovak Socialist Republic, had enacted legislation under which, in accordance with the rules of international law, statutory limitation did not apply to persons who had committed war crimes or crimes against humanity. Czechoslovakia's Act No. 184, adopted in 1964, was based on the principles of international law and was aimed at assuring the Czechoslovak people ... that no war criminal would escape punishment. It embodied the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, a principle which had more recently been confirmed by resolution 3 (XXI) of the [UN] Commission on Human Rights and resolution 1158 (XLI) of the Economic and Social Council and by the study submitted by the Secretary-General ...
> 38. ... The principle of non-applicability of statutory limitation was universally recognized as constituting one of the fundamental principles of international law ...
> 39. ... The non-applicability of statutory limitation to war crimes and crimes against humanity followed directly from international law ... [C]onsequently, the application to such crimes of the rules of domestic law concerning statutory limitation would constitute a flagrant violation of the principles of international law.[956]

In a later meeting of the Third Committee on the same issue in 1968, Czechoslovakia stated that "the non-applicability of statutory limitation to war crimes and crimes against humanity constituted a valid and acknowledged principle of international law".[957]

843. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, France stated that:

> While the statutory limitation of crimes was a principle of domestic law, the very nature of war crimes, as defined in the [1945 IMT Charter (Nuremberg)], made it inapplicable to them; that had been recognized by France by the Act of 26 December 1964, and was a tenet which should be recognized at the international level,

[956] Czechoslovakia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1514, 14 November 1967, §§ 35–39.
[957] Czechoslovakia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1567, 10 October 1968, § 22.

with retroactivity as an essential corollary, for without it the non-applicability of statutory limitation would be meaningless.[958]

844. In 1981, during a debate in the Sixth Committee of the UN General Assembly in relation to the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the GDR stated that "the draft code should include a clear provision on the non-applicability of the statute of limitations to such offences".[959]

845. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Greece stated that:

> 12. . . . The non-applicability of statutory limitation to [war crimes and crimes against humanity] was said to be a principle of international law which the [preliminary draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity] only affirmed. Hence the subtitle of article I of the draft convention: "Affirmation of the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity". What was actually involved, in her delegation's opinion, was a new legal concept . . .
> . . .
> 15. . . . The convention before the Committee did not meet current needs: society no longer felt the same resentment towards crimes committed twenty or thirty years ago, and the criminals who had committed those crimes were no longer the same men. They should therefore have the benefit of statutory limitation, particularly since limitation statutes applying to crimes committed in time of peace extended to even the most hideous crimes . . .
> . . .
> 19. It was thus inadvisable to exclude war crimes from statutory limitation.[960]

In a later meeting on the same issue in 1967, Greece stated that "the draft convention before the Committee [on the non-applicability of statutory limitations to war crimes and crimes against humanity] was intended to establish a new principle, the non-applicability of statutory limitation to war crimes and crimes against humanity".[961]

846. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Honduras stated that:

[958] France, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1515, 15 November 1967, § 19.
[959] GDR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.60, 26 November 1981, § 26.
[960] Greece, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1515, 15 November 1967, §§ 12–19.
[961] Greece, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 5.

War criminals should have the benefit of statutory limitation for humanitarian reasons. Many countries' constitutions established that principle and made it part of their law . . . It was . . . reasonable that when the period of statutory limitation expired [a war criminal] should gain a certain degree of relief.[962]

847. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Hungary stated that:

21. . . . The recent adoption . . . in the Federal Republic of Germany of an Act under which statutory limitation would be applied to war crimes was a setback to the development of international law . . .
22. It was impossible to accept the arguments of those who favoured the application of statutory limitation to war crimes on the grounds that that principle was recognized in domestic legislation, for it was not ordinary crimes that were in question . . . Legal technicalities could not . . . be allowed to prevent the punishment of those who were responsible for war crimes and still not been brought to justice . . . The Hungarian Government had therefore established the non-applicability of statutory limitation to war crimes by legislation decree, in 1964.[963]

848. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, India stated that its legislation did not provide for statutory limitation in the case of grave breaches of the 1949 Geneva Conventions and that:

It was in the light of that legislation that her delegation had voted in the [UN] Commission on Human Rights and the Economic and Social Council in favour of the resolution requesting the principle that there would be no period of limitation for war crimes and crimes against humanity . . . She would like to reiterate her delegation's view that since that principle was not yet universally recognized the elaboration of an international convention on the matter would help to promote uniformity in national legislations.[964]

849. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Israel stated that:

The Government of Israel had no difficulty in accepting the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, which was consistent with its legislation on the matter . . . As his delegation had stated at the 874th meeting of the [UN] Commission on Human Rights, on

[962] Honduras, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 7.
[963] Hungary, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, §§ 21–22.
[964] India, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, §§ 1–2.

24 March 1966, the principle was an established principle of international law and corresponded to a need of the international community. Since the draft convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity] restated that principle in more formal terms, it could be accepted.[965]

850. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Italy stated that it "favoured the adoption of a convention on the non-applicability of statutory limitation to war crimes".[966]

851. In 1971, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Norway stated that "it could not accept the principle of non-applicability of statutory limitations".[967]

852. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Peru stated that:

It would . . . be advisable to find a legal formula which combined respect for the principles of statutory limitation and non-retroactivity with the non-applicability of statutory limitation to war crimes and crimes against humanity. His delegation thought that a happy balance would be struck if the [draft] Convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity] were made applicable only to future cases.[968]

853. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Poland stated that:

17. The preliminary draft convention on the non-applicability of statutory limitation to war crimes and crimes against humanity . . . which the Committee had before it deserved its support . . .
18. The principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, which was one of the basic principles of international law, was properly formulated, confirmed and sanctioned in the preamble to the preliminary draft convention. The responsibility of war criminals and of persons guilty of crimes against humanity was defined by instruments of international law where application of statutory limits was not provided for. The judgement of the International Military Tribunal of Nürnberg had not been an arbitrary decision by the victorious Powers: it had been an application of international law already in force on 8 August 1945, when the

[965] Israel, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 1.
[966] Italy, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 34.
[967] Norway, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1902, 9 December 1971, § 80.
[968] Peru, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1517, 16 November 1967, § 3.

charter of the Tribunal had been adopted. The responsibility of war criminals and of persons guilty of crimes against humanity was based on instruments and principles of international law which took precedence over any country's domestic laws. National legislation therefore could not apply statutory limitation to crimes which international law specifically excluded from such limitation. Many States whose internal legislation provided for such limitation in respect of offences under the ordinary law had borne that out by reaffirming the non-applicability of statutory limitation to war crimes.

...

25. No one seemed to question the basic principle of the non-applicability of statutory limitation to war crimes. The crimes committed during the Second World War had been particularly barbarous and cruel, and the memory of the millions of victims of the Nazi terror made it imperative to adopt all necessary measures so that those who had perpetrated the crimes would not go unpunished.[969]

854. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Romania stated that "war crimes and crimes against humanity, because of their exceptional gravity, must be given special treatment. Her delegation therefore supported the principle of the non-applicability of statutory limitation to such crimes."[970]

855. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Sweden stated that:

18. ... Statutory limitation applied in Sweden to all kinds of crimes, from the most petty to the gravest ... The statutory limitation on [the most serious crimes punished by life imprisonment] was fixed at twenty-five years from the date on which the crime was committed. The principle of statutory limitation had been recognized in his country for more than 150 years and was an integral part of the Swedish Penal Code. His government therefore had no intention of renouncing that principle with regard to a certain category of crimes, even if they were war crimes or crimes against humanity ...
19. Since that was the case, his Government had no intention of acceding to the convention adopted by the Committee. He felt that, except as regarded those States which became parties to the [draft] convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity], there was no principle of international law which sanctioned the non-applicability of statutory limitation to war crimes and crimes against humanity.[971]

[969] Poland, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1514, 14 November 1967, §§ 17–25.

[970] Romania, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 4.

[971] Sweden, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1549, 13 December 1967, §§ 18–19.

856. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the Ukraine stated that:

The Committee's task was not to establish a new system of judicial procedure, but to confirm in a multilateral international treaty a generally recognized principle of international law, namely, the non-applicability of statutory limitation to war crimes and crimes against humanity . . . Statutory limitation . . . was of an exceptional nature and could only apply when the law so indicated. War crimes and crimes against humanity did not come in the category of ordinary crimes and because of the social dangers involved the principle of statutory limitation was not equally applicable to them.[972]

857. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the USSR stated that:

6. In the whole history of criminal law there had never been a code or law envisaging the monstrous crimes committed by the Nazis. There could accordingly be no question of fixing a period of limitation for such crimes. It should also be noted that modern international law did not recognize the institution of statutory limitation. On the contrary, international law affirmed the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, and honest people the world over hoped that the United Nations would enshrine that principle in an international instrument, a convention. It was therefore the duty of the United Nations to draw up such a convention without delay
7. . . . The [UN] Secretary-General's earlier study "Question of the non-applicability of statutory limitation to war crimes and crimes against humanity" . . . based on the relevant international instruments, national legislation, the doctrines of international law and international practice, clearly demonstrated the existence of the legal principle of the non-applicability of statutory limitation to war crimes and crimes against humanity . . . That the principle in question was not unknown in international law was demonstrated by various important documents, such as the London Declaration of 13 January 1942, the [1943 Moscow Declaration], the Potsdam Agreements of 1945, the [1945 London Agreement], the [1945 IMT Charter (Nuremberg)] and the [1946 IMT Charter (Tokyo)] . . . The same principle was embodied in various United Nations documents, including General Assembly resolutions 3 (I), 95 (I) and 170 (II), and it was not merely a fortuitous circumstance that none of them mentioned the possibility of statutory limitation in respect of such crimes.
8. The same principle of international law found expression in the domestic legislation of many countries – Bulgaria, the German Democratic Republic, Poland, France, Hungary, Austria, and Czechoslovakia, among others. It was also embodied in the domestic legislation of the Soviet Union; a decree by the

[972] Ukraine, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1517, 16 November 1967, § 5.

Presidium of the Supreme Soviet of the Union dated 4 March 1965 stipulated that war crimes and crimes against humanity were not subject to statutory limitation.

9. Her delegation considered that such precedents indicated quite clearly that the principle of the non-applicability of statutory limitation to war crimes had long been established and recognized in international law.[973]

858. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of the UK stated that:

As her Government had explained in its reply to the [UN] Secretary-General's questionnaire, there was no prescription or statute of limitation under the criminal law of the United Kingdom which would preclude persons from being tried for war crimes or crimes against humanity because of the date on which the crime was committed.[974]

In a later meeting on the same issue, the UK representative stated that:

30. . . . Her Government was in favour of a convention to the effect that no statutory limitation should apply to war crimes and crimes against humanity irrespective of the date of their commission . . .

. . .

34. Her delegation was . . . in favour of a general definition [of war crimes and crimes against humanity] and suggested that article I [of the draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity] should be replaced by the following text:

"No statutory limitation shall apply to war crimes of a grave nature and to crimes against humanity as defined in international law, irrespective of the date of their commission".[975]

859. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of the US stated that:

Her delegation supported the basic human rights objectives sought through the adoption of a convention on the non-applicability of statutory limitation to the kinds of crimes of which Nazi criminals were prosecuted and convicted at Nürnberg, namely war crimes and crimes against humanity and would co-operate with other delegations which wished to approach the question in a constructive manner.[976]

[973] USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, §§ 6–9.

[974] UK, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 14.

[975] UK, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, §§ 30 and 34.

[976] US, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1517, 16 November 1967, § 9.

860. In 1977, in reply to a question from the Embassy of France, the US Department of State stated that:

It is the view of the United States Government that neither the [1945 London Agreement], with the [1945 IMT Charter (Nuremberg)] annexed, nor [the 1945 Allied Control Council Law No. 10] . . . contain any provisions setting a time limit for prosecution or punishment. The United States further regards [the 1945 Allied Control Council Law No. 10] as revoking the benefits of any statute of limitation in respect of the period specified; and in light of the absence of any provision to the contrary, the offenses covered in these instruments are considered not to be subject to limitation concerning their prosecution and punishment.

United States Federal law contains no statute of limitations on war crimes and crimes against humanity.[977]

861. In 1991, in a diplomatic note to Iraq, the US stated that:

The Government of the United States reminds the Government of Iraq that under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.[978]

In another such diplomatic note, the US reiterated that "Iraqi individuals who are guilty of . . . war crimes . . . are personally liable and subject to prosecution at any time".[979]

862. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Uruguay stated that:

Under Uruguayan legislation, statutory limitation would be applied to all crimes, the period of limitation depending on the severity of the punishment. He recognized, however, that in the present instance, since international law prevailed over domestic law, war crimes and crimes against humanity could be excluded from the range of applicability of the rules regarding statutory limitation, or at least that the periods of limitation could be prolonged in the case of such crimes.[980]

[977] US, Department of State, Note addressed to the Embassy of France, 19 May 1977, Department of State File No. P77 0090-522, reprinted in John A. Boyd, *Digest of United States Practice in International Law, 1977*, US Department of State Publication 8960, Washington, D.C., 1979, p. 927.

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

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

[980] Uruguay, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 12.

863. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Venezuela stated that it "had no difficulty in recognizing the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity".[981]

864. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of the SFRY stated that:

> 27. ... Yugoslavia, like many other countries, was most anxious to see all those responsible for war crimes and crimes against humanity punished, without exception, and to see the adoption of an international convention which would reaffirm once again, the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, ensuring that all States would acknowledge and respect that principle ...
> 28. Although the principle of the non-applicability of statutory limitation to prosecution and punishment for war crimes [and crimes] against humanity had been universally accepted since the end of the Second World War, some countries had not yet adapted their legislation to that principle ... His delegation ... considered that the adoption of a convention on the non-applicability of statutory limitation to the prosecution and punishment of those guilty of war crimes and crimes against humanity was an urgent necessity and a duty.
> ...
> 34. In his delegation's view, there should be no particular difficulty in adopting the convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity], for it would merely be a solemn reaffirmation of principles which, since the Second World War, had already become positive norms of international law and should therefore prompt all States to adapt their national legislation to positive international law.[982]

865. In 1993, in a letter to the UN Secretary-General concerning the establishment of the ICTY, the FRY stated that "war crimes ... are not subject to the statute of limitations".[983]

866. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Zaire stated that it "welcomed with enthusiasm the principle of non-applicability of statutory limitation to war crimes and crimes against humanity".[984]

[981] Venezuela, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 4.
[982] SFRY, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1514, 14 November 1967, §§ 27–34.
[983] FRY, Deputy Prime Minister and Minister of Foreign Affairs, Letter dated 17 May 1993 to the UN Secretary-General, UN Doc. A/48/170*–S/25801*, 21 May 1993, p. 2.
[984] Zaire, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 1.

III. Practice of International Organisations and Conferences

United Nations

867. In a resolution adopted in 1967, the UN General Assembly, noting "that none of the solemn declarations, instruments or conventions relating to prosecution and punishment for war crimes and crimes against humanity makes provision for a period of limitation", stated that:

> The application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes.[985]

The General Assembly recognised that "it is necessary and timely to affirm in international law, through a convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application" and recommended that "no legislative or other action be taken which may be prejudicial to the aims and purposes of a convention on the non-applicability of statutory limitation to war crimes and crimes against humanity".[986]

868. In a resolution adopted in 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly invited States concerned "which had not yet signed or ratified the [1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] to do so as soon as possible".[987]

869. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly welcomed "with satisfaction the fact that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity entered into force on 11 November 1970" and requested States which had not yet become parties to this Convention "to do so as soon as possible".[988]

870. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon all States which had not yet done so "to become as soon as possible parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity".[989]

871. In 1973, the UN General Assembly adopted a resolution on principles of international cooperation in the detection, arrest, extradition and punishment

[985] UN General Assembly, Res. 2338 (XXII), 18 December 1967, preamble.
[986] UN General Assembly, Res. 2338 (XXII), 18 December 1967, preamble and § 5.
[987] UN General Assembly, Res. 2583 (XXIV), 15 December 1969, § 2.
[988] UN General Assembly, Res. 2712 (XXV), 15 December 1970, preamble and § 6.
[989] UN General Assembly, Res. 2840 (XXVI), 18 December 1971, § 3.

of persons guilty of war crimes and crimes against humanity in which it recalled its resolution 2583 (XXIV) of 1969 and in which it stated that:

> States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.[990]

872. In a resolution adopted in 1966 on the question of punishment of war criminals and of persons who have committed crimes against humanity, the UN Economic and Social Council urged all States "to prevent the application of statutory limitation to war crimes and crimes against humanity".[991]

873. In a resolution adopted in 1965 on the question of punishment of war criminals and of persons who have committed crimes against humanity, the UN Commission on Human Rights considered that:

> The United Nations must contribute to the solution of the problems raised by war crimes and crimes against humanity, which are serious violations of the law of nations, and that it must, in particular, study possible ways and means of establishing the principle that there is no period of limitation for such crimes in international law.[992]

The Commission requested the UN Secretary-General "to undertake a study of the problems raised in international law by war crimes and crimes against humanity, and by priority a study of legal procedures to ensure that no period of limitation shall apply to such crimes".[993]

874. In a resolution adopted in 2001 on the Convention on the Prevention and Punishment of the Crime of Genocide, the UN Commission on Human Rights noted "the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity of 26 November 1968".[994]

Other International Organisations

875. In a recommendation adopted in 1979, the Parliamentary Assembly of the Council of Europe expressed "its keen disappointment at the fact that none of Council of Europe member states has ratified the [1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes], and that it has been signed only by France" and recommended that the Committee of Ministers:

[990] UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, preamble and § 8.
[991] ECOSOC, Res. 1158 (XLI), 5 August 1966, § 1.
[992] UN Commission on Human Rights, Res. 3 (XXI), 9 April 1965, preamble.
[993] UN Commission on Human Rights, Res. 3 (XXI), 9 April 1965, § 2.
[994] UN Commission on Human Rights, Res. 2001/66, 25 April 2001, preamble.

i. invite member governments to sign and ratify the European Convention on the non-applicability of statutory limitation to crimes against humanity and war crimes of 1974;
ii. invite member governments to take whatever steps may be necessary to ensure that neither the application of statutory limitation nor the implementation of any other legal measures should enable crimes against humanity and other very serious crimes to escape punishment.[995]

876. In a resolution adopted in 1984 on enforced disappearances, the Parliamentary Assembly of the Council of Europe called upon the governments of the member States "to support the preparation and adoption by the United Nations of a declaration setting forth the following principles: . . . enforced disappearance is a crime against humanity which . . . is not subject to limitation".[996]

877. In a recommendation adopted in 1993 on establishing an international court to try serious violations of international humanitarian law, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers "invite member states which have not yet done so to sign and ratify the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes".[997]

878. In 1979, in his presentation of a report on the statutory limitations of war crimes and crimes against humanity prepared by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe's, the Rapporteur stated that:

We studied the legislation in the member states [with regard to statutory limitation applying to war crimes and crimes against humanity] and have come to certain conclusions. There is no statutory limitation of war crimes, including World War II crimes, and crimes against humanity, in Austria, Denmark, France, Ireland, Italy, Liechtenstein, the Netherlands and the United Kingdom. In the Federal Republic of Germany the statutory limitation period for Second World War crimes will expire on 31 December 1979, but there will be no statutory limitation for future crimes.

In Luxembourg, the situation is reverse. There is statutory limitation in Belgium, Greece, Malta, Norway, Portugal, Spain, Sweden, Switzerland and Turkey. But in Switzerland there is a proposal for the abolition of this limitation.[998]

The Rapporteur further stated that:

We ask that the statutory limitation be stopped. Sign and ratify the [1974 European Convention on the Non-applicability of Statutory Limitations to Crimes

[995] Council of Europe, Parliamentary Assembly, Rec. 855 on statutory limitation of war crimes and crimes against humanity, 2 February 1979, §§ 4 and 10(i) and (ii).
[996] Council of Europe, Parliamentary Assembly, Res. 828 on enforced disappearances, 26 September 1984, § 13(a)(i)(2).
[997] Council of Europe, Parliamentary Assembly, Rec. 1218 (1993) on establishing an international court to try serious violations of international humanitarian law, 27 September 1993, § 6(iii).
[998] Council of Europe, Parliamentary Assembly, Legal Affairs Committee, Rapporteur, Report on the statutory limitation of war crimes and crimes against humanity, 30th Ordinary Session, Twenty-fifth Sitting, 2 February 1979, Official Report of Debates, p. 959.

against Humanity and War Crimes], take whatever steps may be necessary to ensure that neither the application of statutory limitation nor the implementation of any other legal measures should enable crimes against humanity and other very serious crimes to escape punishment.[999]

879. In 1993, a motion for a recommendation on the systematic gang rape of women and children on the territory of the former Yugoslavia presented by 37 members of the Parliamentary Assembly of the Council of Europe contained the following part:

The [Parliamentary] Assembly . . . recommends that the Committee of Ministers of the Council of Europe and the governments of the member states: . . . re-affirm without delay that these violations of the integrity and dignity of women and children are unquestionably war crimes and even crimes against humanity and are not, therefore, subject to limitation.[1000]

International Conferences

880. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

881. In its judgement in the *Tadić case* in 1997, the ICTY referred to the judgements of the French courts in the *Barbie case* and stated that:

641. In this case the *Chambre d'accusation* of the Court of Appeal of Lyons ordered that an indictment for crimes against humanity be issued against Klaus Barbie, head of the Gestapo of Lyons during the Second World War, but only for "persecutions against innocent Jews", and held that prosecution was barred by the statute of limitations for crimes committed by Barbie against combatants who were members of the Resistance or whom Barbie thought were members of the Resistance, even if they were Jewish, because these acts could only constitute war crimes and not crimes against humanity . . .
642. While instructive, it should be noted that the court [of Cassation] in the *Barbie* case was applying national legislation that declared crimes against humanity not subject to statutory limitation, although the national legislation defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter (law of 26 December 1964); and the fact that a crime against humanity is an international crime was relied upon to deny the accused's appeal on the bases of disguised extradition and an elapsed statute of limitations.[1001]

[999] Council of Europe, Parliamentary Assembly, Legal Affairs Committee, Rapporteur, Report on the statutory limitation of war crimes and crimes against humanity, 30th Ordinary Session, Twenty-fifth Sitting, 2 February 1979, Official Report of Debates, p. 960.
[1000] Council of Europe, Parliamentary Assembly, Motion for a Recommendation on the systematic gang rape of women and children on the territory of the former Yugoslavia, Doc. 6770, Forty-fourth Ordinary Session, Fifth Part, Documents, Vol. VIII, 5 February 1993, § 3(i). (The motion was referred to the Committee on Legal Affairs and Human Rights.)
[1001] ICTY, *Tadić case*, Judgement, 7 May 1997, §§ 641–642.

882. In its admissibility decision in *X v. FRG* in 1976 concerning an application relative to the right to be tried for crimes committed during the Second World War within a reasonable time in criminal matters, the ECiHR stated that:

> The Commission had regard to the fact that the rules of prescription do not apply to war crimes and that the international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute these crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned.
>
> In this situation the Commission considers that the criteria determining reasonableness of the length of ordinary criminal proceedings are not applicable to proceedings concerning war crimes.[1002]

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

883. No practice was found.

VI. Other Practice

884. No practice was found.

F. International Cooperation in Criminal Proceedings

Cooperation between States

I. Treaties and Other Instruments

Treaties

885. Under Article 1(1) of the 1959 European Convention on Mutual Assistance in Criminal Matters, the parties undertake:

> to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

According to Article 1(2), the Convention does not apply, however, to "arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law".

886. Article 88(1) AP I provides that "the High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol". Article 88 AP I was adopted by consensus.[1003]

[1002] ECiHR, *X v. FRG*, Decision, 6 July 1976, § 1.
[1003] CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 309.

887. Article 10 of the 1977 OAU Convention against Mercenarism provides that "the contracting States shall afford one another the greatest measure of assistance in connection with the investigation and criminal proceedings brought in respect of the offence and other acts connected with the activities of the offender".

888. Article 13 of the 1989 UN Mercenary Convention provides that:

> States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in the present Convention, including the supply of all evidence at their disposal necessary for the proceedings. The law of the State whose assistance is requested shall apply in all cases.
>
> The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

889. Article 1 of the 1989 US-Soviet Memorandum of Understanding on the Pursuit of Nazi War Criminals provides that the Office of the Procurator General of the USSR and the US Department of Justice "agree to provide legal assistance on a reciprocal basis in the investigation of individuals who are suspected of having committed Nazi war crimes or of having assisted in the commission of such crimes".

890. Article 19 of the 1999 Second Protocol to the 1954 Hague Convention concerning "Mutual legal assistance", which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

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

Other Instruments

891. In paragraphs 11 and 12 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, the parties agreed to institute, with the cooperation of the ICRC, a confidential enquiry system regarding allegations of violations of IHL.

892. Article 4 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law states that "violations of international ... humanitarian law norms that constitute crimes under international law carry the duty to ... cooperate with and assist States ... in the investigation and prosecution of these violations".

II. National Practice

Military Manuals

893. Argentina's Law of War Manual, referring to Article 88 AP I, states that "the contracting parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the [Geneva] Conventions and of [AP I]".[1004]

894. Belgium's Law of War Manual states that:

> The States Signatory to the [1949 Geneva] Conventions have engaged to take a series of measures in order to promote their respect. These measures can be summarized as follows:
>
> ...
>
> 3) search for, identification and prosecution before the own courts of the authors of grave breaches, whatever their nationality may be, or extradition of these authors to the State which requests for it, within the limits of the legislation in force.[1005]

895. Hungary's Military Manual states that "the judicial procedure [in case of breaches or violations of IHL] also comprises: assistance between belligerent parties".[1006]

896. Italy's IHL Manual notes that "international cooperation for the search, arrest, extradition and punishment of persons who have committed [war crimes] is established".[1007]

897. South Korea's Operational Law Manual provides that each party to the Geneva Conventions shall cooperate to extradite persons who have committed grave breaches of IHL.[1008]

898. The Military Manual of the Netherlands states that "in general, States are obliged to provide judicial assistance to each other to the maximum extent possible with respect to penal procedures concerning grave breaches".[1009]

899. New Zealand's Military Manual provides that "AP I Art. 88 requires the parties to assist one another in connection with grave breaches, including cooperation in matters of extradition".[1010]

900. Spain's LOAC Manual provides that "States shall provide each other with the greatest possible mutual assistance for the penal repression of violations, at national and international level".[1011]

901. Sweden's IHL Manual notes that AP I "states that the contracting parties shall to the greatest extent possible assist each other in connection with

[1004] Argentina, *Law of War Manual* (1989), § 8.08.
[1005] Belgium, *Law of War Manual* (1983), p. 55, § 3(3).
[1006] Hungary, *Military Manual* (1992), p. 91
[1007] Italy, *IHL Manual* (1991), Vol. I, § 86.
[1008] South Korea, *Operational Law Manual* (1996), p. 193, § 4.
[1009] Netherlands, *Military Manual* (1993), p. IX-8.
[1010] New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.
[1011] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(4).

penal procedures instituted as a consequence of grave breaches of the Geneva Conventions or [AP I]".[1012]

National Legislation

902. Argentina's Law on International Cooperation on Criminal Matters stipulates that "Argentina shall do its utmost to assist in the investigation, conviction and punishment" of crimes corresponding to the jurisdiction of any State requesting such assistance, and shall act "most diligently" in such procedures. As regards the investigation and conviction of such crimes, the law provides that "assistance shall be provided even if the act in question is not a crime in Argentina", although under such circumstances there would be some exceptions to the types of assistance provided.[1013]

903. According to Germany's Law on International Legal Assistance in Criminal Matters as amended, "the legal assistance in criminal matters with foreign countries is based on this law". However, the Law also states that "provisions of international agreements have priority insofar as they have become directly applicable domestic law".[1014]

904. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended applies to the following forms of international cooperation in criminal matters: extradition; transfer of proceedings in criminal matters; enforcement of criminal judgements; transfer of persons sentenced to any punishment, or measure, involving deprivation of liberty; supervision of conditionally sentenced or conditionally released persons; and mutual legal assistance in criminal matters.[1015] These "shall apply, as appropriate, to the cooperation between Portugal and any international judicial entities established within the framework of treaties or conventions that bind the Portuguese State".[1016]

National Case-law

905. No practice was found.

Other National Practice

906. In 1971, the French delegation explained its abstention in the vote on UN General Assembly Resolution 2840 (XXVI) stating that it:

abstained in the vote on the draft resolution because we consider that all the work of the United Nations in connexion with this matter is vitiated by the faulty definition of a number of crimes contained in the Convention on the Non-Applicability

[1012] Sweden, *IHL Manual* (1991), Section 4.2, p. 97.
[1013] Argentina, *Law on International Cooperation on Criminal Matters* (1997), Articles 1 and 67.
[1014] Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 1.
[1015] Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 1(1).
[1016] Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 1(2).

of Statutory Limitations to War Crimes and Crimes against Humanity, to which France is not a party. Indeed this definition is based on theoretical and practical considerations which are too imprecise for a convention of a penal nature and which are at any rate contrary to the principles of the French Penal Code.[1017]

907. In 1981, during a debate in the Sixth Committee of the UN General Assembly in relation to the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the GDR stated that "it was necessary to establish a universal duty to prosecute offences, which included the obligation of States to co-operate in combating international offences".[1018]

908. In 1979, in a diplomatic note addressed to the USSR embassy, the US Department of State stated that:

> The Department of State requests the cooperation of the Embassy of the USSR in bringing to the attention of the appropriate officials and organs the essential need for . . . witnesses to testify in the prosecution of war crimes cases in the United States. Without firm assurances on the availability of witnesses the United States Government will be unable to continue these prosecutions. In many cases, therefore, individuals accused of committing serious crimes during 1941–1945 will be allowed to remain free without a proper trial.
>
> We believe that it is in the mutual best interest of the United States and the Union of Soviet Socialist Republics to cooperate to ensure that this result is avoided and that justice is done in these cases.[1019]

909. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 85–89 AP I, affirmed that "we support the principle that the appropriate authorities . . . make good faith efforts to cooperate with one another".[1020]

910. In 1989, a study prepared by the Deputy Director of the US Office of Special Investigations summarized the Office's assistance in investigations involving three Second World War Nazi war criminals outside the US. The study reported that:

> At the time of [Klaus Barbie's] extradition [from Bolivia to France], OSI [Office of Special Investigations] was asked by Attorney General William French Smith to investigate and report on allegations concerning Barbie's post-war relationship

[1017] France, Statement before the UN General Assembly, UN Doc. A/PV.2025, 18 December 1971, § 102.

[1018] GDR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.60, 26 November 1981, § 26.

[1019] US, Department of State, Note addressed to the USSR Embassy, 21 March 1979, Department of State File No. P79 0046–0132, reprinted in Marian Lloyd Nash, *Digest of United States Practice in International Law, 1979*, US Department of State Publication 9374, Washington, D.C., 1983, pp. 883–884.

[1020] US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

with American military intelligence and the latter's efforts to prevent his arrest by French authorities . . .

In 1985, OSI strongly supported an effort with West German and Israeli authorities to locate [Josef] Mengele's whereabouts . . .

Prompted by a request from the Anti-Defamation League of B'nai B'rith, OSI undertook a formal inquiry into the relationship between the United States government and convicted criminal Robert Jan Verbelen.[1021]

911. In 1992, a report on Iraqi war crimes (Desert Shield/Desert Storm) prepared under the auspices of the US Secretary of the Army noted that "the obligation to investigate violations of the law of war committed against allied personnel is subject to the consent of the ally in question, particularly if the alleged violations occurred within the territory of the ally".[1022] As regards alleged Iraqi war crimes, the report noted that to carry out US directives dealing with the investigation and prosecution of war crimes:

An interagency meeting was held on 30 August 1990 . . . [The participants] understood that any formal war crimes investigation would depend upon authorization by appropriate authority and, depending on the scope of the investigation, might also require the consent of the host nation . . .

Detachments selected for mobilization were the 199th Judge Advocate Detachment . . . and the 208th Judge Advocate Detachment . . . Elements of the 199th arrived in Kuwait City on 1 March 1991, and upon arrival, reestablished contact with the Kuwaiti Ministry of Justice. Then, with the consent of the Ministry, they contacted members of Kuwaiti resistance groups . . . The Ministry of Justice was also investigating Iraqi actions during the occupation, To avoid duplicate effort, and in the spirit of cooperation, the mission of the 199th evolved into establishing the nature and extent of Iraqi offences rather than building cases for prosecution. One of the goals was to accumulate and organize the evidence in a fashion that would facilitate preparation of criminal cases should prosecution of war criminals at a later date become an option.[1023]

912. According to the Report on US Practice, it is the *opinio juris* of the US that "there is a general obligation to try [persons suspected of war crimes other than members of its own armed forces] or to cooperate with another state willing to try them in accordance with international fair trial standards".[1024] It also states that "the United States appears to recognize a general obligation on all states to assist each other in the investigation and prosecution of war crimes".[1025]

[1021] US, Office of Special Investigations, Deputy Director, Study on "The Purpose and History of the Office of Special Investigations", 1989, Department of State File Nos. P90 0015–0882, 0932/0935, reprinted in Marian Nash (Leich), *Cumulative Digest of the United States Practice in International Law, 1981–1988*, US Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 1408–1409.

[1022] US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, p. 4.

[1023] US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, pp. 4–8.

[1024] Report on US Practice, 1997, Chapter 6.4.

[1025] Report on US Practice, 1997, Chapter 6.10.

III. Practice of International Organisations and Conferences

United Nations

913. In a resolution adopted in 1989 on hostage-taking and abduction, the UN Security Council, considering that "the taking of hostages and abduction are offences of grave concern to all States and serious violations of international humanitarian law", urged:

> the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of terrorism.[1026]

914. In 1998, in a statement by its President concerning the conflict in the DRC, the UN Security Council urged member States "to cooperate with the Governments of the Democratic Republic of the Congo and Rwanda in the investigation and prosecution of [any persons found to have been involved in . . . massacres, atrocities and violations of international humanitarian law]".[1027]

915. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon all the States concerned "to intensify their co-operation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity".[1028]

916. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly stated that it was "firmly convinced of the need for international co-operation in the thorough investigation of war crimes and crimes against humanity . . . and in bringing about the detection, arrest, extradition and punishment of all war criminals and persons guilty of crimes against humanity who have not yet been brought to trial or punished".[1029] The General Assembly went on to state that it:

> 2. *Further urges* all States to co-operate in particular in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity.
> . . .
> 4. *Affirms* that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.[1030] [emphasis in original]

[1026] UN Security Council, Res. 683, 31 July 1989, preamble and § 6.
[1027] UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, p. 2.
[1028] UN General Assembly, Res. 2712 (XXV), 15 December 1970, § 4.
[1029] UN General Assembly, Res. 2840 (XXVI), 18 December 1971, preamble.
[1030] UN General Assembly, Res. 2840 (XXVI), 18 December 1971, §§ 2 and 4.

917. In a resolution adopted in 1971 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly requested the UN Commission on Human Rights "to submit to the General Assembly . . . draft principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity".[1031]

918. In a resolution adopted in 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly declared that:

> The United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:
>
> . . .
>
> 3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.
> 4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
>
> . . .
>
> 6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial [persons against whom there is evidence that they have committed war crimes and crimes against humanity] and shall exchange such information.[1032]

919. In a resolution adopted in 1965 on the question of punishment of war criminals and of persons who have committed crimes against humanity, the UN Commission on Human Rights requested ECOSOC:

> to urge all States to continue their efforts to ensure that, in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity are traced, apprehended and equitably punished by the competent courts. For this purpose they should co-operate, in particular, by making available any documents in their possession, relating to such crimes.[1033]

920. In a resolution adopted in 1988 on prosecution and punishment of all war criminals and persons who have committed crimes against humanity, the UN Commission on Human Rights urged:

[1031] UN General Assembly, Res. 3020 (XXVII), 18 December 1972, § 3.
[1032] UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, preamble and §§ 3–6.
[1033] UN Commission on Human Rights, Res. 3 (XXI), 9 April 1965, § 1(a).

all States to take the necessary measures, in accordance with their national constitutional systems, to ensure full international co-operation for the purpose of securing, preferably in the place where they committed their deeds, the prosecution and just punishment of all those who have committed war crimes and crimes against humanity.[1034]

921. In a resolution adopted in 2001 on international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN Sub-Commission on Human Rights stated that:

The Sub-Commission on the Promotion and Protection of Human Rights . . .

Convinced that maximum international cooperation among States is needed in order to ensure a thorough investigation of war crimes and crimes against humanity, as well as to bring to trial their perpetrators . . .

1. Affirms that within the framework of international cooperation in the search for, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the highest priority should be given, independently of the circumstances in which these violations are committed, to legal proceedings against all individuals responsible for such crimes, including former heads of State or Government whose exile serves as a pretext for their impunity;
2. Urges all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity;
3. Reaffirms the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity recorded in General Assembly resolution 3074 (XXVIII) of 3 December 1973 . . .
4. Affirms that States have an obligation to cooperate in the arrest, extradition, trial and punishment of persons found guilty of war crimes and crimes against humanity, including former heads of State or Government, keeping in mind the purposes and principles of the Charter of the United Nations and generally recognized norms of international law.[1035]

922. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General pointed out that "consistent enforcement depends primarily on the commitment and cooperation of national jurisdictions. The prosecution of individuals is, first and foremost, a responsibility of the State concerned."[1036]

Other International Organisations

923. In a recommendation adopted in 1979 on statutory limitation of war crimes and crimes against humanity, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers:

[1034] UN, Commission on Human Rights, Res. 1988/47, 8 March 1988.
[1035] UN Sub-Commission on Human Rights, Res. 2001/22, 16 August 2001, preamble and §§ 1–4
[1036] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 12.

iii. invite member governments to improve their co-operation, co-ordination and exchange of information for the purpose of prosecuting the perpetrators of [crimes against humanity and war crimes] by:

a. providing rapidly all relevant information on these crimes to the competent authorities of the member states concerned;
b. providing facilities for rapid direct contacts between the authorities responsible for the search for and prosecution of the perpetrators of these crimes in member states;
c. studying further possibilities for co-operation and co-ordination in respect of these crimes;
d. preparing a special wanted persons' list in respect of these crimes;
e. considering the possibility of appointing a special public prosecutor in charge of the prosecution of these crimes.[1037]

924. In 1979, during his presentation of a report by the Legal Affairs Committee on the statutory limitation of war crimes and crimes against humanity, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that "we beg member governments to improve their co-operation, their co-ordination and exchange of information for the purpose of prosecuting the perpetrators of [crimes against humanity and other very serious crimes]".[1038]

International Conferences

925. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

926. No practice was found.

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

927. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The [High Contracting] Parties shall afford one another the greatest measure of assistance with penal proceedings relative to grave breaches of the law of war.

The [High Contracting] Parties shall benefit by the same assistance from neutral States.[1039]

VI. Other Practice

928. No practice was found.

[1037] Council of Europe, Parliamentary Assembly, Rec. 855, 2 February 1979, § 10(iii).
[1038] Council of Europe, Parliamentary Assembly, Legal Affairs Committee, Rapporteur, Report on the statutory limitation of war crimes and crimes against humanity, 30th Ordinary Session, Twenty-fifth Sitting, 2 February 1979, *Official Report of Debates*, p. 960.
[1039] Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 783–784.

Extradition

I. Treaties and Other Instruments

Treaties

929. Article 49, second paragraph, GC I, Article 50, second paragraph, GC II, Article 129, second paragraph, GC III and Article 146, second paragraph, GC IV provide that:

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

930. Under Article 1 of the 1957 European Convention on Extradition, the parties undertake:

> to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

931. Article 2(1) of the 1957 European Convention on Extradition provides that "extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty".

932. According to Article 4 of the 1957 European Convention on Extradition, "extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention".

933. Article 11 of the 1957 European Convention on Extradition provides for the possibility to refuse extradition if the offence for which it is requested is punishable by death under the law of the requesting party.

934. Article 3 of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that:

> The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition in accordance with international law, of the persons referred to in Article 2 of this Convention [i.e. representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of war crimes or crimes against humanity, or who conspire to commit them, irrespective of the degree of completion, and representatives of the State authority who tolerate their commission].

935. Article 78 of draft AP I, entitled "Extradition", submitted by the ICRC to the CDDH provided that:

Grave breaches of the Conventions or of the present Protocol, whatever the motives for which they were committed, shall be deemed to be included as extraditable offences in any extradition treaty existing between the High Contracting Parties. The High Contracting Parties undertake to include the said grave breaches as extraditable offences in every extradition treaty to be concluded between them.

If a High Contracting Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another High Contracting Party with which it has no extradition treaty, the Conventions and the present Protocol shall be considered as the legal basis for extradition in respect of the said grave breaches. Extradition shall be subject to the other conditions provided by the law of the requested High Contracting Party.

High Contracting Parties which do not make extradition conditional on the existence of a treaty shall recognize the said grave breaches as extraditable offences between themselves subject to the conditions provided by the law of the requested High Contracting Party.[1040]

After several proposals of amendment, paragraph 1 of Article 78 was rejected in Committee I of the CDDH by 27 votes in favour, 7 against and 39 abstentions; paragraph 2 was rejected by 41 votes in favour, one against and 29 abstentions; Article 78 was consequently rejected as a whole.[1041]

936. Article 88(2) AP I provides that:

Subject to the rights and obligations established in the [1949 Geneva] Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

937. Upon accession to AP I, China stated that "at present [i.e. in 1983], Chinese legislation has no provisions concerning extradition, and deals with this matter on a case-by-case basis. For this reason China does not accept the stipulations of Article 88, paragraph 2, of Protocol I".[1042]

938. Article 7 of the 1977 OAU Convention against Mercenarism states that:

1. A request for extradition cannot be rejected, unless the State from which it is sought undertakes to prosecute the offender in accordance with the provisions of Article Five of the present Convention.
2. When a national is the subject of the request for extradition, the State from which it is sought must, if it refuses, undertake prosecution of the offence committed.
3. If, in accordance with sections 1 and 2 of this Article, prosecution is undertaken, the State from which extradition is sought will notify the outcome of such prosecution to the state seeking extradition and to any other interested Member State of the Organization of African Unity.

[1040] CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.
[1041] CDDH, *Official Records*, Vol. IX, CDDH/I/SR.70, 28 April 1977, pp. 396–397, § 54.
[1042] China, Reservation made upon accession to AP I, 14 September 1983.

4. A state will be regarded as an interested party for the outcome of a prosecution as defined in section 3 of this Article if the offence has some connection with its territory or militates against its interests.

939. Article 3 of the 1978 Second Additional Protocol to the European Convention on Extradition provides that extradition may be refused, under certain conditions, in case it is requested for the purpose of carrying out a sentence or detention order imposed by a decision rendered against a person *in absentia*.
940. Article 4 of the 1978 Second Additional Protocol to the European Convention on Extradition provides that "extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State and which that State had competence to prosecute under its own criminal law".
941. Article 3(1) of the 1984 Convention against Torture states that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".
942. Article 7(1) of the 1984 Convention against Torture provides that:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

943. Article 15 of the 1989 UN Mercenary Convention provides that:

1. The offences set forth in articles 2, 3 and 4 of the present Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.
4. The offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the State required to establish their jurisdiction in accordance with article 9 of the present Convention.

944. Article 1 of the 1997 Extradition Treaty between Argentina and the US provides that "the Parties agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State have charged with or found guilty of an extraditable offense".

945. Article 2 of the 1997 Extradition Treaty between Argentina and the US provides that:

1. An offense shall be an extraditable offense if it is punishable under the laws in both Parties by deprivation of liberty for a maximum period of more than one year or by a more severe penalty . . .
. . .
4. In accordance with the provisions of this Treaty, extradition shall be granted for offenses committed in whole or in part within the Requesting State's territory, which, for the purposes of this Article, includes all places subject to that State's criminal jurisdiction. Extradition shall also be granted for offenses committed outside the territory of the Requesting State if:
   (a) the act or acts that constitute the offense have effects in the territory of the Requesting State; or
   (b) the laws in the Requested State provide for punishment of an offense committed outside its territory in similar circumstances.

946. Article 7 of the 1997 Extradition Treaty between Argentina and the US provides that "extradition shall not be denied on the ground that the prosecution or the penalty would be barred under the statute of limitations in the Requested State".

947. Article 18 of the 1999 Second Protocol to the 1954 Hague Convention, which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.
2. When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).
3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.
4. If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

Other Instruments

948. Paragraph 18 of the 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that:

Governments shall either bring . . . persons [identified by the investigation as having participated in extra-legal, arbitrary or summary executions] to justice or cooperate

to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespectively of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

949. Article 6 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, dealing with the "Obligation to try or extradite", provides that:

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.
2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.
3. The provisions of paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court.

950. Article 9 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Obligation to extradite or prosecute", provides that:

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] is found shall extradite or prosecute that individual.

951. Article 10 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Extradition of alleged offenders", provides that:

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.
3. State Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.
4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

952. Article 5 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that "States shall incorporate within their domestic law . . . appropriate legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies".

II. National Practice

Military Manuals

953. Belgium's Law of War Manual states that:

> The States Signatory to the [1949 Geneva] Conventions have engaged to take a series of measures in order to promote their respect. These measures can be summarized as follows:
>
> . . .
>
> 3) search for, identification and prosecution before the own courts of the authors of grave breaches, whatever their nationality may be, or extradition of these authors to the State which requests for it, within the limits of the legislation in force.[1043]

954. Italy's IHL Manual notes that "international cooperation for the search, arrest, extradition and punishment of persons who have committed [war crimes] is established".[1044]

955. South Korea's Operational Law Manual provides that each party to the Geneva Conventions shall cooperate to extradite persons who have committed grave breaches of IHL.[1045]

956. The Military Manual of the Netherlands states that "in general, States . . . must cooperate as much as possible with respect to the extradition of war criminals".[1046]

957. New Zealand's Military Manual states that "AP I Art. 88 requires the parties to assist one another in connection with grave breaches, including cooperation in matters of extradition".[1047]

958. Spain's LOAC Manual provides that:

> The States have the obligation to search for persons accused of having committed, or having ordered to be committed, grave breaches, being obliged to make them appear before their own tribunals, regardless of their nationality. They can also agree to the extradition of those persons in order for them to be judged by other States, in accordance with the legal obligations which regulate the said extradition.[1048]

The manual adds that "States shall provide each other with the greatest possible mutual assistance for the penal repression of violations, at national and international level. Such cooperation shall also be accorded in extradition matters."[1049]

959. Sweden's IHL Manual notes that:

[1043] Belgium, *Law of War Manual* (1983), p. 55, § 3(3).
[1044] Italy, *IHL Manual* (1991), Vol. I, § 86.
[1045] South Korea, *Operational Law Manual* (1996), p. 193, § 4.
[1046] Netherlands, *Military Manual* (1993), p. IX-8.
[1047] New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.
[1048] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).
[1049] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(4).

Additional Protocol I . . . states that the contracting parties shall to the greatest extent possible assist each other in connection with penal procedures instituted as a consequence of grave breaches of the Geneva Conventions or the Protocol. The States shall also cooperate in extradition cases . . .

In the extradition request the government can refer to the article in Additional Protocol I concerning mutual assistance in criminal proceedings (AP I, Art. 88:2), according to which due consideration shall be given to a request for extradition from the state in whose territory the alleged offence has occurred.[1050]

National Legislation

960. Armenia's Penal Code provides that:

In accordance with an international treaty of the Republic of Armenia, the foreign citizens and stateless persons who committed a crime outside the territory of the Republic of Armenia and who find themselves in the Republic of Armenia can be extradited to a foreign State, for criminal liability or to serve a sentence.[1051]

961. Germany's Law on International Legal Assistance in Criminal Matters as amended provides that "a foreign person who is searched for or convicted by a foreign State for an offence which is punishable in that State, can, on the request of a competent authority of that State, . . . be extradited to that State".[1052]

962. Ireland's Geneva Conventions Act as amended provides that:

The restriction on granting extradition contained in section 12 of the Extradition Act, 1965 [which states that "extradition shall not be granted for offences under military law which are not offences under ordinary criminal law"], does not apply in the case of an offence involving a grave or minor breach of any of the [Geneva] Conventions or Protocol I or a minor breach of Protocol II.[1053]

963. Lithuania's Criminal Code as amended provides that:

Foreigners who have committed a crime shall be extradited for committing offences in accordance with corresponding international and interstate agreements, or, if there are no such agreements, in accordance with the laws of the Republic of Lithuania.

. . .

Foreign nationals shall not be extradited if the acts committed by them are not considered criminal under the criminal laws of the Republic of Lithuania.

Persons shall not be . . . extradited to foreign countries for committing acts which have been ground for granting asylum in the Republic of Lithuania.[1054]

964. Luxembourg's Law on the Punishment of Grave Breaches states that, under certain conditions,

[1050] Sweden, *IHL Manual* (1991), Section 4.2, p. 97.
[1051] Armenia, *Penal Code* (2003), Article 16(2).
[1052] Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 2(1).
[1053] Ireland, *Geneva Conventions Act as amended* (1962), Section 11.
[1054] Lithuania, *Criminal Code as amended* (1961), Article 7.

Luxembourg can hand over to governments of States parties to the [1949 Geneva Conventions] every foreign person being prosecuted or convicted in these States for an offence provided for in the Geneva Conventions and in Article 1 of this law, provided that sufficient charges are held against [him or her] and that the statutes of limitation for the public prosecution or for the sentencing have not yet been reached under Luxembourg's law.[1055]

965. Under the Act on the Surrender of Persons Suspected of War Crimes as amended of the Netherlands, individuals can be surrendered to another power for trial if they are suspected of having committed one of the crimes defined in Articles 3 (genocide), 5 to 8 (war crimes committed in an international or a non-international armed conflict, and torture) and, in so far as it is connected with the offences referred to in those articles, Article 9 of the International Crimes Act.[1056]

966. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended provides that:

1. Extradition may be granted only for the purpose either of instituting criminal proceedings or of executing a sanction or measure involving deprivation of liberty, for an offence that the courts of the requesting State have jurisdiction to try.
2. For any such purpose, surrender of a person shall be possible only in respect of offences, including attempted offences, that are punishable under both the Portuguese law and the law of the requesting State by a sanction or measure involving deprivation of liberty for a maximum period of at least one year . . .[1057]

967. The US Military Extraterritorial Jurisdiction Act, under a provision entitled "Delivery to authorities of foreign countries", provides that:

(a) Any person designated and authorized . . . may deliver a person described in section 3261(a) ["whoever engages in conduct outside the United States that would constitute an offence punishable by imprisonment for more that 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States – (1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces"] to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if

(1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offence under the laws of that country; and
(2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.[1058]

[1055] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 11.
[1056] Netherlands, *Act on the Surrender of Persons Suspected of War Crimes as amended* (1954), Article 1.
[1057] Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 31.
[1058] US, *Military Extraterritorial Jurisdiction Act* (2000), § 3263.

968. Zimbabwe's Extradition Act provides that:

> (1) Subject to this Act, a person may be arrested, detained and extradited from Zimbabwe to a designated country . . . for an offence in respect of which in the designated country he is accused or has been convicted and is required to be sentenced or to undergo punishment, whether the offence was committed before or after the declaration of the country concerned as a designated country.
> (2) This part shall apply to any offence which –
> (a) is punishable in the law of the designated country concerned by imprisonment for a period of twelve months or by any more severe punishment; and
> (b) would constitute an offence punishable in Zimbabwe if the act or omission constituting the offence took place in Zimbabwe or, in the case of an extraterritorial offence, in corresponding circumstances outside Zimbabwe.[1059]

National Case-law

969. In the *Bohne case* in 1966, in which extradition was requested for crimes related to the execution of mentally ill patients during Germany's Nazi regime, Argentina's Supreme Court of Justice emphasised that it was "a duty under international law to provide mutual support in the pursuit of criminals that represent a danger to all". It added that the extradition process was founded on the common interest of all States for offenders to be tried, and possibly punished, "by the country whose jurisdiction had cognisance of the criminal acts concerned".[1060]

970. In the *Schwammberger case* in 1989 concerning a request for extradition by the FRG, Argentina's Cámara Federal de La Plata referred to the prosecution and punishment of the major war criminals. The public prosecutor referred to the lawfulness of an extradition for an act committed outside the territory of the requesting State. The Court, invoking the various commitments made at the international level regarding the handing over of individuals accused of war crimes, rejected the request of the defendant to be tried by Argentine courts, an option provided by Argentine law, and affirmed the lower court's decision granting the request for extradition.[1061] In the same case before the Supreme Court of Justice in 1990, both the Attorney-General and the Court considered that:

> The prosecution and punishment of crimes committed prior to changes in sovereignty constitutes a discretionary decision for the new power rather than an obligation, but as the new power has expressed an interest in exercising penal authority against such crimes, the international community has no legitimate reason to oppose such measures.[1062]

[1059] Zimbabwe, *Extradition Act* (1982), Section 14.
[1060] Argentina, Supreme Court of Justice, *Bohne case*, 24 August 1966.
[1061] Argentina, Cámara Federal de La Plata, *Schwammberger case* (First Instance), 30 August 1989.
[1062] Argentina, Supreme Court of Justice, *Schwammberger case* (Supreme Court), 20 March 1990.

971. At the hearing of the Public Prosecutor of the First Instance n the *Priebke case* in Argentina in 1995, the public prosecutor qualified the alleged acts of the requested person as war crimes and stated that the refusal to extradite him to Italy would trigger the international responsibility of Argentina, even if such refusal would be based on a rule of internal law.[1063] The extradition request was granted by the Court of first instance which stated that there could be no statutory limitation with regard to the alleged acts and therefore rejected the argument raised by the defence that extradition could not be granted because the acts were prescribed under Argentine law.[1064] However, the Court of Appeal found that under the terms of Argentine legislation, penal action was extinguished and that, therefore, extradition had to be refused.[1065] The Supreme Court of Justice found in favour of the requested person's extradition and considered that the acts for which extradition was sought were *prima facie* genocide. It added that "the classification of offences as crimes against humanity does not depend on whether the requesting or requested State agrees with the extradition process, but instead of the principles of *jus cogens* of international law".[1066]

972. In the *Barbie extradition case* in 1974, Bolivia's Supreme Court turned down France's request for the extradition of Klaus Barbie, the head of the Gestapo in Lyon during the Second World War, who had been found guilty of war crimes *in absentia*. The rejection was based on the absence of an extradition treaty between the two States.[1067]

973. In the *Barbie case* in 1983, France's Court of Cassation quoted the Court of Appeal which had stated that it was competent to examine the submissions made in the application by Barbie, according to which his detention was a nullity since there did not exist any extradition treaty between France and Bolivia and it was the result of a '"disguised extradition":

> In the absence of any extradition request, the execution of an arrest warrant on national territory, against a person who has previously taken refuge abroad, is not subject to his voluntary return to France or to the institution of extradition proceedings. Furthermore, by reason of their nature, the crimes against humanity do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.[1068]

The Court of Cassation stated that "in giving this ruling . . . the Court of Appeal gave a proper legal basis to its decision, without inadequacy or contradiction". Referring to the 1945 London Agreement and UN General Assembly Resolution

[1063] Argentina, Court of Bariloche, *Priebke case*, Hearing of the Public Prosecutor of the First Instance, 1995.
[1064] Argentina, Court of Bariloche, *Priebke case* (First Instance), Judgement, 31 May 1995.
[1065] Argentina, Court of Appeal of General Roca, *Priebke case*, Judgement, 23 August 1995.
[1066] Argentina, Supreme Court of Justice, *Priebke case*, Judgement, 2 November 1995.
[1067] Bolivia, Supreme Court, *Barbie extradition case*, 11 December 1974.
[1068] France, Court of Cassation, *Barbie case*, Judgement, 6 October 1983.

3(I) of 1946 on extradition and punishment of war criminals, the Court ruled that:

It results from these provisions that "all necessary measures" are to be taken by the Member States of the United Nations to ensure that war crimes, crimes against peace and crimes against humanity are punished and that those persons suspected of being responsible for such crimes are sent back "to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those countries". By reasons of the nature of those crimes, these provisions are in accordance with the general principles of law recognized by the community of nations.[1069]

974. In the decision in the trial of first instance in the *Cavallo case* in 2001, a Mexican court allowed the extradition, on the request of a Spanish judge, of Ricardo Miguel Cavallo, a former military officer of Argentine citizenship charged with committing acts of genocide, torture and terrorism during the 1976–1983 "dirty war" in Argentina. The Court's decision was based, *inter alia*, on the principle of universal jurisdiction.[1070]

Other National Practice

975. According to the Report on the Practice of Croatia, Croatia has concluded treaties on extradition with a number of States. The report also notes that:

According to Article 134 of the Croatian Constitution [which provides that "international agreements concluded and ratified in accordance with the Constitution and made public are part of the Republic's internal legal order and are in terms of legal effect above law"], Croatian courts should directly apply the European Convention on Extradition with its two additional protocols and also existing bilateral agreements on extradition.[1071]

976. According to the Report on the Practice of Israel, Israel has signed extradition agreements with numerous countries. It has also cooperated with other countries for the extradition, mainly for trial in Israel, of suspected Nazi war criminals.[1072]

977. At the International Conference for the Protection of War Victims in 1993, Kuwait expressed the view that States should cooperate for the extradition of war criminals.[1073]

978. According to the Report on the Practice of Malaysia, the extradition of persons having committed grave breaches of the 1949 Geneva Conventions is governed by Malaysia's Extradition Act. Under this act, if there is no extradition

[1069] France, Court of Cassation, *Barbie case*, Judgement, 6 October 1983.
[1070] Mexico, Federal Court of the First Circuit, *Cavallo case*, Decision, 11 January 2001.
[1071] Report on the Practice of Croatia, 1997, Chapter 6.3.
[1072] Report on the Practice of Israel, 1997, Chapter 6.11.
[1073] Kuwait, Remarks and Proposals of the Ministry of Justice concerning the draft Declaration of the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, § 4.

treaty with the requesting State, the Minister of Home Affairs may permit the extradition if he/she deems fit.[1074]

979. In 2001, with regard to the *Cavallo case*, the Mexican Foreign Relations Secretariat issued a directive on this matter, stating that:

> Based on Article 28, part XI, of the Federal Public Administration Law and in conformity with articles 30 of the International Law of Extradition, and articles 1, 9, 14 and 25 of the Treaty of Extradition and Mutual Assistance on Criminal Matters between the United Mexican States and the Kingdom of Spain, it is resolved: . . . to grant the extradition of the individual in question, Ricardo Miguel Cavallo, known as Miguel Angel Cavallo, requested by the government of Spain through its embassy in Mexico, to face charges of genocide, torture and terrorism.[1075]

III. Practice of International Organisations and Conferences

United Nations

980. In a resolution adopted in 1946 on extradition and punishment of war criminals, the UN General Assembly stated that it:

> *Recommends* that Members of the United Nations forthwith take all the necessary measures . . . to cause [war criminals who have been responsible for or have taken a consenting part in war crimes, crimes against peace and against humanity] to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries;
>
> *and calls upon* the governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed.[1076]

981. In a resolution adopted in 1947 on surrender of war criminals and traitors, the UN General Assembly

> *Recommends* Members of the United Nations, which desire the surrender of alleged war criminals or traitors (that is to say nationals of any State accused of having violated their national law by treason or active collaboration with the enemy during the war) by other Members in whose jurisdiction they are believed to be, to request surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable prima facie case exists as to identity and guilt.[1077]

982. In a resolution adopted in 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly stated that it was convinced:

[1074] Report on the Practice of Malaysia, 1997, Chapter 6.4, referring to the *Extradition Act* (1992), Sections 1 to 6.

[1075] Mexico, Ministry of Foreign Affairs, Communication No. 021/01, The Ministry of Foreign Affairs grants Spain's Request to extradite Ricardo Miguel Cavallo, Directive of 2 February 2001, § 2.

[1076] UN General Assembly, Res. 3 (I), 13 February 1946.

[1077] UN General Assembly, Res. 170 (II), 31 October 1947.

that the . . . extradition and punishment of persons responsible for war crimes and crimes against humanity . . . constitute an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples, and the promotion of international peace and security.[1078]

983. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly stated that it was convinced:

that . . . the . . . extradition and punishment or persons guilty of [war crimes and crimes against humanity] – wherever they may have been committed – . . . are important elements in the prevention of similar crimes now and in the future, and also in the protection of human rights and fundamental freedoms, the strengthening of confidence and the development of co-operation between peoples, and the safeguarding of international peace and security.[1079]

The General Assembly called upon all States:

to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trail and punished in accordance with the laws of those countries.[1080]

984. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly urged all States:

to implement the relevant resolutions of the General Assembly and to take measures in accordance with international law . . . to ensure the punishment of all persons guilty of [war crimes and crimes against humanity], including their extradition to those countries where they have committed such crimes.[1081]

985. In a resolution adopted in 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly declared that:

The United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:

. . .

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to

[1078] UN General Assembly, Res. 2583 (XXIV), 15 December 1969, preamble.
[1079] UN General Assembly, Res. 2712 (XXV), 15 December 1970, preamble.
[1080] UN General Assembly, Res. 2712 (XXV), 15 December 1970, § 2.
[1081] UN General Assembly, Res. 2840 (XXVI), 18 December 1971, § 1.

> punishment, as a general rules in the country in which they have committed those crimes. In that connexion, States shall co-operate on questions of extraditing such persons.[1082]

986. In a resolution adopted in 1988 on prosecution and punishment of all war criminals and persons who have committed crimes against humanity, the UN Commission on Human Rights noted "with satisfaction the spirit of co-operation shown by several Member States in facilitating the extradition of war criminals who, in the aftermath of the Second World War, attempted to elude responsibility for their deeds by taking refuge in other countries". It welcomed "the interest shown in this problem by numerous Member States regarding alleged war criminals residing in their territories and the assistance given by other Member States in providing evidence making possible the extradition and prosecution of such individuals".[1083]

987. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights recognised that "crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and that perpetrators of such crimes should be prosecuted or extradited by States".[1084]

988. In a resolution adopted in 2001 on international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN Sub-Commission on Human Rights urged all governments:

> to implement the relevant resolutions of the General Assembly and other United Nations bodies and to take measures in accordance with international law to . . . ensure the punishment of all persons found guilty of [war crimes and crimes against humanity], or their extradition to those countries where they have committed such crimes, even when there is no treaty to facilitate that task.[1085]

Other International Organisations

989. No practice was found.

International Conferences

990. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

991. No practice was found.

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

992. No practice was found.

[1082] UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, preamble and § 5.
[1083] UN, Commission on Human Rights, Res. 1988/47, 8 March 1988.
[1084] UN Commission on Human Rights, Res. 2002/79, 25 April 2002, § 11.
[1085] UN Sub-Commission on Human Rights, Res. 2001/22, 16 August 2001, § 5

VI. Other Practice

993. In 1994, in a report on Ethiopia, Human Rights Watch noted that:

The SPO [Special Prosecutor's Office] believes that some 300 government and military officials fled Ethiopia when the Mengistu regime collapsed. Other Dergue officials guilty of human rights violations may have left the country earlier, having fallen out of favor with the regime. The SPO has investigated the whereabouts of at least sixty fugitive officials. The largest number of fugitives are believed to be in the United States and Kenya, with others in Europe and Djibouti . . . Ethiopia does not have extradition treaties in force with the countries where the fugitives are believed to be.[1086]

Extradition of own nationals

I. Treaties and Other Instruments

Treaties

994. The following bilateral treaties provide, for example, that in a case where extradition is requested for one of its own nationals, the State has a choice to extradite or try the person itself: the 1874 Extradition Treaty between Peru and France (Article 1); the 1881 Extradition Treaty between Argentina and Spain; the 1886 Extradition Treaty between Argentina and Belgium; the 1886 Extradition Treaty between Argentina and Italy; the 1889 Extradition Treaty between Argentina and the UK; the 1893 Extradition Treaty between Argentina and the Netherlands; the 1904 Extradition Treaty between Peru and the UK (Article 3); the 1932 Extradition Treaty between Peru and Chile (Articles 1 and 4); the 1972 Extradition Treaty between Argentina and the US; the 1987 Extradition Treaty between Argentina and Italy; the 1988 Extradition Treaty between Argentina and Australia; and the 1994 Extradition Treaty between Peru and Italy (Articles 2, 5 and 7).

995. Under Article 20 of the 1889 Montevideo Treaty on International Criminal Law concluded between Argentina, Bolivia, Paraguay and Uruguay, extradition is granted regardless of the nationality of the person for whom it is requested.

996. Article 1 of the 1919 Extradition Treaty between Brazil and Peru provides that "the High Contracting Parties are obliged to reciprocally hand over criminals of whatever nationality, including their own nationals".

997. Article 228 of the 1919 Treaty of Versailles provides that:

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

[1086] Human Rights Watch, *Reckoning under the Law*, Series Human Rights Watch/Africa, Vol. 6, No. 11, New York, December 1994, p. 16.

In the end, however, the German government refused to extradite its nationals. Instead, prosecutions were instituted before the court of Leipzig.[1087]

998. Article 345 of the 1928 Bustamante Code – a convention on private international law concluded between 21 States of South, Central and North America – provides that "the States parties are not obliged to extradite their own nationals". However, the same provision states that a State which refuses to extradite is obliged to try the individual.

999. Article 7(1) of the 1933 Inter-American Convention on Extradition provides that "the nationality of the person sought may not be invoked as a ground for denying extradition, except when the law of the requested State otherwise provides".

1000. Article 6(1)(a) of the 1957 European Convention on Extradition provides that "a Contracting Party shall have the right to refuse extradition of its nationals". However, according to Article 6(2), "if the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate".

1001. Article 4 of the 1973 Extradition Treaty between Uruguay and the US provides that "the Requested Party will not refuse the request for extradition on the ground that the person is a national of the Requested Party".

1002. Article 7 of the 1977 OAU Convention against Mercenarism provides that:

> 2. When a national is the subject of the request for extradition, the State from which it is sought must, if it refuses, undertake prosecution of the offence committed.
> 3. If, in accordance with sections 1 and 2 of this Article, prosecution is undertaken, the State from which extradition is sought will notify the outcome of such prosecution to the state seeking extradition and to any other interested Member State of the Organization of African Unity.

1003. Upon ratification of AP I, Mongolia declared that:

> In regard of Article 88, paragraph 2 of the Additional Protocol to the Protection of Victims in the International Armed Conflicts ("Protocol I") which states [that] "The High Contracting Parties shall co-operate in the matter of extradition", the Mongolian law which prohibits deprivation and extradition of its citizens from Mongolia shall be respected.[1088]

1004. Article 3 of the 1997 Extradition Treaty between Argentina and the US provides that "the extradition and surrender of the person sought shall not be refused on the ground that such person is a national of the Requested Party".

Other Instruments

1005. No practice was found.

[1087] M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Kluwer, Dordrecht, 1992, pp. 200 and 201.

[1088] Mongolia, Reservation made upon ratification of AP I, 6 December 1995.

II. National Practice

Military Manuals

1006. The YPA Military Manual states that nationals would be tried in the SFRY at the request of a foreign country if reliable evidence of serious violations of IHL were provided.[1089]

National Legislation

1007. Argentina's Law on International Cooperation in Criminal Matters provides that if the person for whom extradition is sought has been an Argentine national since the time the crime was committed (and is still an Argentine national at the time of the option), such person may opt to be tried by Argentine courts, unless a treaty obliging the extradition of its nationals applies. If the Argentine national chooses to exercise this right, extradition is denied and the case is tried in Argentina under Argentine penal law, so long as the requesting State gives its consent and renounces its jurisdiction, and hands over the relevant records and evidence.[1090]

1008. Armenia's Penal Code provides that "the citizens of the Republic of Armenia who have committed a crime in another State are not extradited to that State".[1091]

1009. According to the Report on the Practice of Chile, Chilean law does not, in general, prohibit the extradition of Chilean nationals.[1092]

1010. Croatia's Constitution and Code of Criminal Procedure prohibit the extradition of a Croatian national.[1093]

1011. Georgia's Constitution provides that "the extradition of a citizen of Georgia to another State is prohibited, except in cases provided for by international agreements. A decision on extradition may be appealed in court."[1094]

1012. Germany's Law on International Legal Assistance in Criminal Matters as amended, which provides for the possibility of the extradition of "a foreign person who is searched for or convicted by a foreign State for an offence which is punishable in that State", provides that "a foreign person in the terms of this law is a person who is not a German national in the meaning of . . . the Basic Law [of the Federal Republic of Germany]".[1095]

1013. Ireland's Extradition Act as amended provides that "extradition shall not be granted where a person claimed is a citizen of Ireland, unless the relevant extradition provisions otherwise provide".[1096]

[1089] SFRY (FRY), *YPA Military Manual* (1988), Point 35.
[1090] Argentina, *Law on International Cooperation in Criminal Matters* (1997), Article 12.
[1091] Armenia, *Penal Code* (2003), Article 16(1).
[1092] Report on the Practice of Chile, 1997, Chapter 6.3.
[1093] Croatia, *Constitution* (1990), Article 9(2); *Code of Criminal Procedure* (1993), Article 13.
[1094] Georgia, *Constitution* (1995), Article 13(4).
[1095] Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 2(1) and (3).
[1096] Ireland, *Extradition Act as amended* (1965), Section 14.

1014. Italy's Constitution as amended provides that:

> (1) The extradition of a citizen may be permitted only in such cases as are expressly provided for in international conventions.
> (2) In no instance shall it be permitted for political offences.[1097]

1015. Lithuania's Criminal Code as amended provides that "citizens of the Republic of Lithuania shall not be extradited to foreign states for committing offences".[1098]

1016. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended provides that:

> 1. Extradition shall be excluded . . . in the following cases:
> a) where the offence was committed on Portuguese territory;
> b) where the person claimed is a Portuguese national, without prejudice to the provisions of the following paragraph.
> 2. The extradition of Portuguese nationals shall however not be excluded where:
> extradition of nationals is provided for in a treaty, convention or agreement to which Portugal is a Party, and
> extradition is sought for offences of terrorism or international organised crime, and the legal system of the requesting State embodies guarantees of a fair trial.[1099]

1017. Under Russia's Constitution, the extradition of Russian citizens is prohibited.[1100] Russia's Criminal Code also provides that Russian citizens who have committed crimes in the territory of a foreign State shall not be extradited to that State.[1101]

1018. Under Rwanda's Penal Code, Rwandan nationals cannot be extradited.[1102]

1019. Spain's Law on Passive Extradition provides that "extradition of Spanish nationals will not be granted".[1103]

1020. Under Yemen's Constitution as amended, the extradition of nationals is prohibited.[1104]

1021. The Constitution as amended of the SFRY (FRY) provides that a Yugoslav citizen "may not be . . . deported from the country, or extradited to another state".[1105]

National Case-law

1022. No practice was found.

[1097] Italy, *Constitution as amended* (1947), Article 26.
[1098] Lithuania, *Criminal Code as amended* (1961), Article 7.
[1099] Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 32.
[1100] Russia, *Constitution* (1993), Article 61.
[1101] Russia, *Criminal Code* (1996), Article 13.
[1102] Rwanda, *Penal Code* (1977), Article 16.
[1103] Spain, *Law on Passive Extradition* (1985), Article 3(1).
[1104] Yemen, *Constitution as amended* (1994), Article 44.
[1105] SFRY, *Constitution as amended* (1992), Article 17(3).

Other National Practice

1023. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Austria stated that "it was a principle recognized in international law that States were not bound to consent to the extradition of their own nationals".[1106]

1024. In 1973, during a debate in the Third Committee of the UN General Assembly, Belgium noted that Belgian law prohibited the extradition of Belgian nationals.[1107]

1025. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Chile stated that "the principle whereby the requested State was not bound to accede to the extradition of its own nationals was recognized by only a minority of States in international law".[1108]

III. Practice of International Organisations and Conferences

1026. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1027. No practice was found.

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

1028. No practice was found.

VI. Other Practice

1029. No practice was found.

Political offence exception to extradition

I. Treaties and Other Instruments

Treaties

1030. Article IV of the 1919 Extradition Treaty between Brazil and Peru provides that "extradition for political offences" shall not take place. Under the

[1106] Austria, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1570, 14 October 1968, § 22.

[1107] Belgium, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2022, 9 November 1973, § 40.

[1108] Chile, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1570, 14 October 1968, § 27.

same provision, "acts committed during insurrection or civil war" are not extraditable offences, unless they constitute "barbarous acts or acts of vandalism prohibited by the laws of war".

1031. Article 7 of the 1948 Genocide Convention provides that:

> Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.
>
> The Contracting parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

1032. Article 3(1) of the 1957 European Convention on Extradition provides that "extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence".

1033. Upon signature of the 1959 European Convention on Mutual Assistance in Criminal Matters, the USSR declared that it would not consider a grave breach, as defined in the 1949 Geneva Conventions and AP I, or a violation of Articles 1–4 AP II, as a "political offence" or "offences connected with a political offence".[1109]

1034. Article 4(5) of the 1962 Extradition Treaty between Venezuela and Chile provides that "in no case may genocide [and] acts of terrorism . . . be considered political crimes".

1035. Article 11 of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid provides that practices of apartheid "shall not be considered political crimes for the purpose of extradition".

1036. Article 1 of the 1975 Additional Protocol to the European Convention on Extradition specifies that:

> For the application of Article 3 of the Convention, political offences shall not be considered to include the following:
>
> a. the crimes against humanity specified in the [1948 Genocide Convention];
> b. the violations specified in Article 50 of [GC I], Article 51 of [GC II], Article 130 of [GC III] and Article 147 of [GC IV];
> c. any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.

1037. Article 5(1) of the 1987 Extradition Treaty between Spain and Argentina stipulates that "extradition shall not be granted for political offences or offences related to offences of such a nature". It provides, however, that "b) acts of terrorism [and] c) war crimes and crimes which are committed against the peace and security of mankind" shall not be considered political crimes.

[1109] USSR, Reservations and declarations made upon signature of the 1959 European Convention on Mutual Assistance in Criminal Matters, 7 November 1996, Article 3.

1038. According to Article 5 of the 1989 Extradition Treaty between Peru and Spain, extradition shall not be granted "with regard to offences considered to be political or connected with offences of such a nature". It provides, however, that "in no case shall . . . b) acts of terrorism, c) war crimes and crimes committed against the peace and security of mankind" be deemed political offences.

1039. Article 5(1) of the 1992 Extradition Treaty between Chile and Spain provides that "extradition shall not be granted for political offences or offences related to offences of such a nature". It provides, however, that "b) acts of terrorism [and] c) war crimes and crimes which are committed against the peace and security of mankind, in conformity with international law" shall in no case be considered political crimes.

1040. Article IV(1) of the 1993 Extradition Treaty between Australia and Chile provides that:

> Extradition shall not be granted: . . . if the offence for which extradition is requested is a political offence . . . To the effect of this paragraph, reference to political offences does not include: . . . b) war crimes and crimes committed against the peace and security of mankind, in conformity with international law.

1041. Article V of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that "the forced disappearance of persons shall not be considered a political offense for purposes of extradition" and "shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties".

1042. Article 4 of the 1997 Extradition Treaty between Argentina and the US provides that:

> 1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.
> 2. For the purposes of this Treaty, the following offenses shall not be considered to be political offenses:
>
> . . .
>
> (b) an offense for which both Parties have the obligation, pursuant to a multilateral international agreement on genocide, acts of terrorism, . . . or other crimes, to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution;
>
> 3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated.
> 4. The Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law.

1043. Article 20 of the 1999 Second Protocol to the 1954 Hague Convention, concerning "Grounds for refusal" of extradition and mutual legal assistance, which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

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

Other Instruments

1044. No practice was found.

II. National Practice

Military Manuals

1045. New Zealand's Military Manual states with respect to the prosecution of alleged war criminals that:

> If the Party concerned does not institute proceedings against offenders, it may, subject to the provisions of its own law, hand such persons over for trial by any party to the Conventions which has made out a prima facie case. This reference to the local law makes the procedure subject to local extradition legislation and some countries are likely to argue that war criminals acting on governmental instruction are political offenders immune from extradition. This argument was expressly rejected by the Ghana Court of Appeal in *Ex p. Schumann* (1949) . . . when put forward to contest an extradition application in respect of a doctor involved in the extermination programme at the Auschwitz concentration camp. AP I Art. 88 requires the parties to assist one another in connection with grave breaches, including cooperation in matters of extradition.[1110]

1046. The UK Military Manual, in a footnote related to the provision on extradition of war criminals, states that "an accused person is not to be surrendered if the offence in respect of which his surrender is demanded is one of a political character or if he proves that the request for surrender has been made with a view to try or punish him for an offence of a political nature".[1111]

[1110] New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.
[1111] UK, *Military Manual* (1958), § 639, footnote 5.

National Legislation

1047. Argentina's Law on International Cooperation in Criminal Matters provides that extradition shall not take place in case of political offences.[1112] However, it also states that the following crimes are not considered to be political offences: war crimes and crimes against humanity or illegal acts against internationally protected persons; illegal acts against the population or innocent civilians not involved in the violence caused by an armed conflict; and crimes for which Argentina, as a signatory to an international convention, has assumed the obligation to extradite or prosecute.[1113]

1048. Colombia's Penal Code provides that "extradition proceedings will not be taken with regard to political offences".[1114]

1049. Under Croatia's Code of Criminal Procedure, the Minister of Justice will not allow extradition for a political offence.[1115]

1050. Germany's Law on International Legal Assistance in Criminal Matters as amended provides that "extradition is not permissible if requested for a political offence or an offence connected with such an offence. It is permissible if the person searched for is prosecuted or convicted for . . . genocide, murder or homicide or the participation therein."[1116]

1051. Ireland's Extradition Act as amended states that "*extradition* shall not be granted for an offence which is a *political offence* or an offence connected with a *political offence*".[1117] (emphasis in original)

1052. Luxembourg's Law on the Punishment of Grave Breaches, in the part dealing with the conditions for a possible extradition of war criminals, states that "the crimes provided for in Article 1 [i.e. grave breaches of the 1949 Geneva Conventions] are neither considered to be political crimes nor acts connected with similar crimes".[1118]

1053. According to the International Crimes Act of the Netherlands, "the crimes defined in this Act [genocide, crimes against humanity, war crimes and torture] shall be deemed not to be offences of a political nature for the purposes of the Extradition Act or the [Act on the Surrender of Persons Suspected of War Crimes as amended]".[1119]

1054. Under Peru's Constitution, political offences are not extraditable offences. Acts of terrorism, murder of high-ranking officials (*magnicidio*) and acts of genocide are not to be considered as political offences.[1120]

[1112] Argentina, *Law on International Cooperation in Criminal Matters* (1997), Article 8(a).
[1113] Argentina, *Law on International Cooperation in Criminal Matters* (1997), Article 9.
[1114] Colombia, *Penal Code* (2000), Article 18.
[1115] Croatia, *Code of Criminal Procedure* (1993), Article 520(2).
[1116] Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 6(1).
[1117] Ireland, *Extradition Act as amended* (1965), Section 11(1).
[1118] Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 11.
[1119] Netherlands, *International Crimes Act* (2003), Article 12.
[1120] Peru, *Constitution* (1979), Article 109; *Constitution* (1993), Article 37.

1055. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended provides that extradition and other forms of cooperation are excluded "where there are well-founded reasons for believing that cooperation is sought for the purpose of persecuting or punishing a person on account of that person's . . . political or ideological beliefs".[1121] It further provides that:

1. A request for co-operation shall also be refused where the proceedings concern:
   a) Any facts that, according to the concepts of Portuguese law, constitute a political offence or an offence connected with a political offence;
   b) any facts that constitute a military offence and do not constitute an offence under ordinary criminal law.
2. The following shall not be regarded as political offences:
   a) genocide, crimes against humanity, war crimes and serious offences under the [Geneva Conventions];
   b) the offences mentioned in Article 1 of the [1977 European Convention on the Suppression of Terrorism];
   c) the acts mentioned in the [1984 Convention against Torture];
   d) any other offences that ought not to be regarded as political under the terms of an international treaty, convention or agreement to which Portugal is a Party.[1122]

1056. Rwanda's Penal Code does not permit extradition for political offences.[1123]

1057. Spain's Law on Passive Extradition provides that:

Extradition will not be granted in the following cases:
1. When it concerns offences of a political character, which does not include acts of terrorism [and] crimes against humanity aimed at in the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations . . .
2. When it concerns military offences classified as such by Spanish legislation, without prejudice, however, to what is established by International Conventions signed and ratified by Spain.[1124]

1058. Zimbabwe's Extradition Act provides that "no extradition to a designated country shall take place . . . if the offence for which the extradition is requested is an offence of a political character".[1125]

National Case-law

1059. In the *Bohne case* in 1966, in which extradition was requested for crimes related to the execution of mentally ill patients during Germany's Nazi regime,

[1121] Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 6(1)(b).
[1122] Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 7.
[1123] Rwanda, *Penal Code* (1977), Article 15.
[1124] Spain, *Law on Passive Extradition* (1985), Article 4(1) and (2).
[1125] Zimbabwe, *Extradition Act* (1982), Section 15(b).

Argentina's Supreme Court of Justice emphasised that "neither claims for political reasons nor arguments based on supposed military necessity shall be admitted as grounds for the denial of extradition for criminal acts which clearly contravene the common opinion of civilized peoples".[1126]

Other National Practice

1060. The Report on the Practice of Croatia, with regard to the Code of Criminal Procedure's provision prohibiting extradition for political offences, states that:

> The European Convention on Extradition and its Protocols are directly applicable in the Croatian legal system, judges as well as the Minister of Justice are bound by their provisions. Consequently war crimes, genocide and violations of the laws of war and customs of war should not be considered as political offences.[1127]

1061. In 1971, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of France stated that "in France war crimes were not regarded as political crimes and that perpetrators could be extradited in the same way as common offenders".[1128]

1062. In 1996, in a diplomatic communiqué issued in reaction to the events linked with the operation by the MRTA at the residence of the Japanese Ambassador in Peru, and to the release of two Peruvians whose extradition was requested, the President of Uruguay declared that:

> The release of the Peruvians Luis Samaniego and Silvia Gora, decided by the Third Criminal Appeals Court, was exclusively the act of the Judicial Power . . . [The appellate court] upheld the same criterion applied in previous court decisions concerning the application of the 1889 Montevideo Treaty on International Penal Law.[1129]

He recognised the limitations of the extradition treaties, concluded over a century ago, that had governed Uruguay's relations with third parties in this respect. He stated that the Executive Power had brought these rules up to date by signing new extradition treaties in 1996 with Argentina, Chile, Spain, France and Mexico, and by pursuing negotiations with other countries. These treaties excluded terrorism from the category of political offences.[1130]

III. Practice of International Organisations and Conferences

United Nations

1063. No practice was found.

[1126] Argentina, Supreme Court of Justice, *Bohne case*, 24 August 1966.
[1127] Report on the Practice of Croatia, 1997, Chapter 6.4.
[1128] France, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1902, 9 December 1971, § 76.
[1129] Uruguay, Communiqué issued by the President of Uruguay, 26 December 1996, § 2.
[1130] Uruguay, Communiqué issued by the President of Uruguay, 26 December 1996, § 3.

Other International Organisations

1064. In a resolution adopted in 1984 on enforced disappearances, the Parliamentary Assembly of the Council of Europe called on the governments of member States:

> to support the preparation and adoption by the United Nations of a declaration setting forth the following principles: . . . enforced disappearance is a crime against humanity which . . . cannot be considered a political offence and is therefore subject to the extradition laws.[1131]

International Conferences

1065. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1066. No practice was found.

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

1067. No practice was found.

VI. Other Practice

1068. No practice was found.

Cooperation with international criminal tribunals

I. Treaties and Other Instruments

Treaties

1069. Article 3 of the 1945 London Agreement provides with regard to the IMT (Nuremberg) that:

> Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

1070. Articles 86–101 of the 1998 ICC Statute deal with "International Cooperation and Judicial Assistance". Article 86 provides that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court

[1131] Council of Europe, Parliamentary Assembly, Res. 828 on enforced disappearances, 26 September 1984, § 13(a)(i)(1).

in its investigation and prosecution of crimes within the jurisdiction of the Court". Article 88 provides that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

1071. Article 93 of the 1998 ICC Statute provides that:

> 1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
> (a) The identification and whereabouts of persons or the location of items;
> (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
> (c) The questioning of any person being investigated or prosecuted;
> (d) The service of documents, including judicial documents;
> (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
> (f) The temporary transfer of persons as provided in paragraph 7;
> (g) The examination of places or sites, including the exhumation and examination of grave sites;
> (h) The execution of searches and seizures;
> (i) The provision of records and documents, including official records and documents;
> (j) The protection of victims and witnesses and the preservation of evidence;
> (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
> (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
>
> . . .
>
> 4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
> 5. Before denying a request for assistance under paragraph 1(l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

1072. Upon ratification of the 1998 ICC Statute, Argentina declared that:

> With regard to article 87, paragraph 2, of the [1998 ICC] Statute, the Argentine Republic hereby declares that requests for cooperation coming from the Court, and any accompanying documentation, shall be in Spanish or shall be accompanied by a translation into Spanish.[1132]

[1132] Argentina, Declaration made upon ratification of the ICC Statute, 8 February 2001.

1073. Upon ratification of the 1998 ICC Statute, Austria declared that "pursuant to article 87, paragraph 2 of the [1998 ICC] Statute the Republic of Austria declares that requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into the German language".[1133]

1074. Upon ratification of the 1998 ICC Statute, Belgium stated that:

> With reference to article 87, paragraph 1, of the [1998 ICC] Statute, the Kingdom of Belgium declares that the Ministry of Justice is the authority competent to receive requests for cooperation.
> ...
> With reference to article 87, paragraph 2 [of the 1998 ICC Statute], the Kingdom of Belgium declares that requests by the Court for cooperation and any documents supporting the request shall be in an official language of the Kingdom.[1134]

1075. Upon ratification of the 1998 ICC Statute, Belize declared that "pursuant to Article 87 (1) (a) of the Statute of the International Criminal Court, Belize declares that all requests made to it in accordance with Chapter 9 be sent through diplomatic channels".[1135]

1076. Upon ratification of the 1998 ICC Statute, Finland stated that:

> Pursuant to article 87 (1) (a) of the [1998 ICC] Statute, the Republic of Finland declares that requests for cooperation shall be transmitted either through the diplomatic channel or directly to the Ministry of Justice, which is the authority competent to receive such requests. The Court may also, if need be, enter into direct contact with other competent authorities of Finland. In matters relating to requests for surrender the Ministry of Justice is the only competent authority.
>
> Pursuant to article 87 (2) of the [1998 ICC] Statute, the Republic of Finland declares that requests from the Court and any documents supporting such requests shall be submitted either in Finnish or Swedish, which are the official languages of Finland, or in English which is one of the working languages of the Court.[1136]

1077. Upon ratification of the 1998 ICC Statute, France stated that "pursuant to article 87, paragraph 2, of the [1998 ICC] Statute, the French Republic declares that requests for cooperation, and any documents supporting the request, addressed to it by the Court must be in the French language".[1137]

1078. Upon ratification of the 1998 ICC Statute, Germany stated that:

> The Federal Republic of Germany declares, pursuant to article 87 (1) of the [1998 ICC] Statute, that requests from the Court can also be transmitted directly to the Federal Ministry of Justice or an agency designated by the Federal Ministry of Justice in an individual case. Requests to the Court can be transmitted directly from the Federal Ministry of Justice or, with the Ministry's agreement, from another competent agency to the Court.

[1133] Austria, Declaration made upon ratification of the ICC Statute, 28 December 2000.
[1134] Belgium, Declarations made upon ratification of the ICC Statute, 28 June 2000.
[1135] Belize, Declaration made upon ratification of the ICC Statute, 5 April 2000.
[1136] Finland, Declarations made upon ratification of the ICC Statute, 29 December 2000.
[1137] France, Declarations made upon ratification of the ICC Statute, 9 June 2000, § II.

The Federal Republic of Germany further declares, pursuant to article 87 (2) of the [1998 ICC] Statute, that requests for cooperation to Germany and any documents supporting the request must be accompanied by a translation into German.[1138]

1079. Upon signature of the 1998 ICC Statute, Israel stated that:

Being an active consistent supporter of the concept of an International Criminal Court, and its realization in the form of the [1998 ICC] Statute, the Government of the State of Israel is proud to thus express its acknowledgment of the importance, and indeed indispensability, of an effective court for the enforcement of the rule of law and the prevention of impunity.[1139]

1080. Upon ratification of the 1998 ICC Statute, Norway stated that:

1. With reference to Article 87, paragraph 1 (a) [of the 1998 ICC Statute], the Kingdom of Norway hereby declares that the Royal Ministry of Justice is designated as the channel for the transmission of requests from the Court.
2. With reference to Article 87, paragraph 2 [of the 1998 ICC Statute], the Kingdom of Norway hereby declares that requests from the Court and any documents supporting the request shall be submitted in English, which is one of the working languages of the Court.[1140]

1081. Upon ratification of the 1998 ICC Statute, Spain stated that:

In relation to article 87, paragraph 1, of the [1998 ICC] Statute, the Kingdom of Spain declares that, without prejudice to the fields of competence of the Ministry of Foreign Affairs, the Ministry of Justice shall be the competent authority to transmit requests for cooperation made by the Court or addressed to the Court.

In relation to article 87, paragraph 2, of the [1998 ICC] Statute, the Kingdom of Spain declares that requests for cooperation addressed to it by the Court and any supporting documents must be in Spanish or accompanied by a translation into Spanish.[1141]

1082. Article 17 of the 2002 Agreement on the Special Court for Sierra Leone, entitled "Cooperation with the Special Court", provides that:

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.
2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:
   (a) Identification and location of persons;
   (b) Service of documents;
   (c) Arrest or detention of persons;
   (d) Transfer of an indictee to the Court.

[1138] Germany, Declarations made upon ratification of the ICC Statute, 11 December 2000.
[1139] Israel, Declaration made upon signature of the ICC Statute, 31 December 2000, § 1.
[1140] Norway, Declarations made upon ratification of the ICC Statute, 16 February 2000, §§ 1 and 2.
[1141] Spain, Declarations made upon ratification of the ICC Statute, 24 October 2000.

Other Instruments

1083. Article 29 of the 1993 ICTY Statute, entitled "Cooperation and judicial assistance", provides that:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
   (a) the identification and location of persons;
   (b) the taking of testimony and the production of evidence;
   (c) the service of documents;
   (d) the arrest or detention of persons;
   (e) the surrender or the transfer of the accused to the International Tribunal.

1084. Article 54 of the 1994 ILC Draft Statute for an International Criminal Tribunal, entitled "Obligation to extradite or prosecute", provides that:

> In a case of a crime referred to in article 20 (e) ["crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct of the alleged, constitute exceptionally serious crimes of international concern"], a custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21 (1) (b) (i) . . . shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

1085. The Annex to the 1994 ILC Draft Statute for an International Criminal Tribunal, entitled "Crimes pursuant to Treaties (see art. 20 (e))", refers, *inter alia*, to grave breaches of the 1949 Geneva Conventions; grave breaches of AP I; crimes defined by Article 2 of the 1973 Convention on Crimes against Internationally Protected Persons; and the crime of torture made punishable by Article 4 of the 1984 Convention against Torture.

1086. Article 28 of the 1994 ICTR Statute provides that:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
   (a) The identification and location of persons;
   (b) The taking of testimony and the production of evidence;
   (c) The service of documents;
   (d) The arrest or detention of persons;
   (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

1087. Article 4 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International

Human Rights and Humanitarian Law states that "violations of international . . . humanitarian law norms that constitute crimes under international law carry the duty to . . . cooperate with and assist . . . appropriate international judicial organs in the investigation and prosecution of these violations".

II. National Practice

Military Manuals

1088. Argentina's Law of War Manual states that:

> In the [Geneva] Conventions and Protocol I, it is provided that the governments shall take such legislative measures as may be necessary to determine adequate penal sanctions to be applied to persons committing or ordering any of the grave breaches; the persons accused of having committed, or of having ordered to commit, those breaches . . . shall be searched for.
>
> . . . It is also possible to hand the author of the violations over to an international tribunal, in case such a tribunal has been established.[1142]

The manual also states that "in the event of grave breaches of the [Geneva] Conventions or of Protocol I, the contracting parties shall cooperate, jointly or individually, with the United Nations and in accordance with the UN Charter".[1143]

1089. Australia's Commanders' Guide states that:

> Where there is widespread evidence of war crimes having been committed, the international community may elect to establish a world forum or war crimes tribunal to conduct trials. The Nuremberg and Tokyo war crimes tribunals conducted after WW II are examples of this approach.[1144]

1090. France's LOAC Teaching Note, in a part dealing with "Grave breaches of the rules of the law of armed conflict", states that:

> On the criminal level, persons charged with [grave breaches of the Geneva Conventions] may be prosecuted before . . . international criminal courts having jurisdiction over war crimes: today this means the International Criminal Tribunals for the Former Yugoslavia and Rwanda for the crimes committed solely on the occasion of these two conflicts; tomorrow, this will mean . . . the International Criminal Court which will have jurisdiction over all war crimes and crimes against humanity in case of the failure of national tribunals.[1145]

1091. France's LOAC Manual states that the ICTY and the ICTR, "having concurrent jurisdiction with national tribunals of each State, have, however, primary jurisdiction and may request national tribunals to hand over cases to [them]".[1146] Regarding the ICC, the manual also states that:

[1142] Argentina, *Law of War Manual* (1989), § 8.02.
[1143] Argentina, *Law of War Manual* (1989), § 8.09.
[1144] Australia, *Commanders' Guide* (1994), § 1308.
[1145] France, *LOAC Teaching Note* (2000), p. 7.
[1146] France, *LOAC Manual* (2001), pp. 77–78.

The Court has jurisdiction as soon as the national State of the alleged perpetrator(s), or the State on the territory of which the crime occurred, is party to the [1998 ICC Statute] or gives its express consent. This Court is additional to national jurisdiction. It intervenes only if national jurisdictions are incapable, or refuse to, try the perpetrators.[1147]

1092. Israel's Manual on the Laws of War recalls the experiences of the Nuremberg and Tokyo trials, stating that "the central importance of the Nuremberg Trials ... is in creating a precedent for the execution of judgement against war criminals by the whole of humanity, without leaving the work to prejudiced internal courts".[1148] It also mentions the ICTY and the ICTR. Referring to the ICC, it states that:

One of the biggest difficulties faced by the Hague court for judging Yugoslavia's war criminals is the extradition of war criminals. The permanent court has been empowered to demand extradition of war criminals into its hands, so that such criminals will not find a haven ...

Israel is in a dilemma regarding the Rome Constitution. On the one hand, in light of the Holocaust experience, Israel has a special interest in seeing war criminals brought to justice. On the other hand, there is a fear that the court will serve as a lever for demanding the extradition and trial of IDF soldiers.[1149]

1093. New Zealand's Military Manual, regarding the prosecution of alleged war criminals, states that "by Art. 89 [AP I] they [States parties] are obliged to act jointly or individually in cooperation with the United Nations in regard to serious 'violations' of the [Geneva] Conventions or [AP I]".[1150]

1094. Spain's LOAC Manual states that:

Historically ... International Tribunals established to judge alleged war criminals have existed (such as the Nuremberg and Tokyo Tribunals), and this possibility remains nowadays and seems to be a developing trend for the action of the International Community, an example of which is the creation by the Security Council of ... [the ICTY]. To cooperate with [this Tribunal], Spain has adopted Organic Law No. 15/94 of 1 June.[1151]

The manual further states that "the obligation devolving on the States to cooperate in the penal repression of grave breaches of the [Geneva] Conventions is not limited to cooperation with other States but also comprises cooperation with the United Nations, in conformity with the United Nations Charter".[1152]

1095. The UK Military Manual, in a footnote related to the provision on extradition of war criminals, states that the handing over of a person suspected of war crimes "can be made with the consent of the States concerned to an international court if one should be established".[1153]

[1147] France, *LOAC Manual* (2001), pp. 76–77.
[1148] Israel, *Manual on the Laws of War* (1998), pp. 66–67.
[1149] Israel, *Manual on the Laws of War* (1998), pp. 68–69.
[1150] New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.
[1151] Spain, *LOAC Manual* (1996), Vol. I, § 7.6.b.(2).
[1152] Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(5).
[1153] UK, *Military Manual* (1958), § 639, footnote 5.

1096. The YPA Military Manual of the SFRY (FRY) provides that "the perpetrators of such criminal acts [war crimes or serious violations of the laws and customs of war] may also be brought to justice before an international court if such court is established".[1154]

National Legislation

1097. Many States have adopted legislation providing for cooperation with both the ICTY and ICTR, including: Australia, Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, New Zealand, Norway, Sweden, Switzerland, UK and US.[1155] Other States have adopted legislation providing for cooperation with the ICTY, including: Bosnia and Herzegovina, Croatia, Finland, Hungary, Iceland, Italy, Netherlands, Romania and Spain.[1156]

1098. Many States have adopted special legislation providing for cooperation with the ICC. Examples are Australia, Canada, Denmark, Finland, France, Germany, Netherlands, New Zealand, Norway, South Africa, Switzerland and UK.[1157]

1099. In October 2001, the Republika Srpska adopted the Law on Cooperation with the ICTY in which it provides that both the ICTY and the national courts are competent for the criminal prosecution of persons responsible for violations of IHL in the territory of the former Yugoslavia, the ICTY, however, being given precedence (Article 1). Article 2 provides that:

> Cooperation with the Tribunal is related to prosecution of persons only for crimes referred to in Article 2, namely grave violations of the Geneva Conventions of 1949, article 3, pertaining to the violations of laws and customs of war, article 4, pertaining to genocide, and article 5 of the Statute of the Tribunal, pertaining to the

[1154] SFRY (FRY), *YPA Military Manual* (1988), § 20.

[1155] Australia, *International War Crimes Tribunal Act* (1995); Austria, *Law on Cooperation with the International Tribunals* (1996); Belgium, *Law on Recognition of and Cooperation with the International Tribunals* (1996); Denmark, *International Tribunals Act* (1994); France, *Law on Cooperation with the ICTY* (1995); France, *Law on Cooperation with the ICTR* (1996); Germany, *Law on Cooperation with the ICTY* (1995); Germany, *Law on Cooperation with the ICTR* (1998); Greece, *Law on Cooperation with the International Tribunals* (1998); Ireland, *War Crimes Tribunal Act* (1998); Luxembourg, *Law on Cooperation with the International Tribunals* (1999); New Zealand, *International War Crimes Act* (1995); Norway, *Law on the Incorporation of UN Resolutions on International Tribunals* (1994); Sweden, *Cooperation with the International Tribunals Act as amended* (1995); Switzerland, *Decree on Cooperation with the International Tribunals Act* (1995); UK, *ICTY Order* (1996); UK, *ICTR Order* (1996); US, *Law on Judicial Assistance to the ICTY and ICTR* (1996).

[1156] Bosnia and Herzegovina, *Decree on Deferral upon Request by the ICTY* (1995); Croatia, *Cooperation with the ICTY Act* (1996); Finland, *ICTY Jurisdiction and Legal Assistance Act* (1994); Hungary, *Law on Cooperation with the ICTY* (1996); Iceland, *Law on Legal Aid to the ICTY* (1994); Italy, *Decree-Law on Cooperation with the ICTY* (1993); Netherlands, *Act on the Establishment of the ICTY* (1994); Romania, *Law on Cooperation with the ICTY* (1998); Spain, *Law on Cooperation with the ICTY* (1994).

[1157] Australia, *ICC Act* (2002); Canada, *Crimes against Humanity and War Crimes Act* (2000); Denmark, *ICC Act* (2001); Finland, *ICC Act* (2000); France, *Law on Cooperation with the ICC* (2002); Germany, *Law on Cooperation with the ICC* (2002); Netherlands, *ICC Implementation Act* (2002); New Zealand, *International Crimes and ICC Act* (2000); Norway, *ICC Act* (2001); South Africa, *ICC Bill* (2001); Switzerland, *Law on Cooperation with the ICC* (2001); UK, *ICC Act* (2001); see also Trinidad and Tobago, *Draft ICC Act* (1999), Part III.

crimes against humanity committed in the territory of former Yugoslavia since 1 January 1991.

Cooperation shall be conducted in the manner stipulated in this Law, Statute of the Tribunal and Rules of Procedure and Evidence of the Tribunal.[1158]

The other provisions of the law namely deal with the "Procedure for gathering evidence upon request of the tribunal" (Part II); the "Transfer of responsibility for leading the criminal proceedings" (Part III); the "Pre-trial detention of the defendant and hand over to the tribunal" (Part IV); the "Legal Assistance to the Tribunal" (Part V); and the "Execution of verdicts of the tribunal" (Part VI).[1159]

National Case-law

1100. In the *Musema case* in 1997, Switzerland agreed to surrender to the ICTR an accused of Rwandan nationality arrested in Switzerland in 1995 for violations of the laws of war in Rwanda, pursuant to Article 109 of the Swiss Military Criminal Code as amended and provisions of the Decree on Cooperation with the International Tribunals.[1160]

Other National Practice

1101. In 1994, in its comments on the report of the Working Group on a draft statute for an international criminal court, Australia stated with regard to the provision on surrender of an accused person to the international tribunal (draft Article 63, now Article 89, of the 1998 ICC Statute) that:

[The draft provision] obliges States parties which have accepted the court's jurisdiction to surrender the accused person to the tribunal. This may be seen as cutting across generally accepted rules of extradition law where States retain the discretion not to extradite the person subject to the request. However, as regards the tribunal it may be argued that, by specifically consenting to jurisdiction, States have already agreed to the tribunal hearing the case and have given up the right not to hand over the accused person. The situation may therefore be distinguished from mere requests for extradition where no prior consent has been given to the exercise of jurisdiction by the courts of a foreign country and where, accordingly, it is entirely appropriate that the requested State retains the discretion not to extradite.[1161]

1102. In 1994, in its comments on the report of the Working Group on a draft statute for an international criminal court, Belarus stated with regard to the provision on surrender of an accused person to the international tribunal (draft Article 63, now Article 89, of the 1998 ICC Statute) that:

[1158] Bosnia and Herzegovina, Republika Srpska, *Law on Cooperation with the ICTY* (2001), Articles 1 and 2.

[1159] Bosnia and Herzegovina, Republika Srpska, *Law on Cooperation with the ICTY* (2001), Parts II-VI.

[1160] Switzerland, Federal Court, *Musema case*, Judgement, 28 April 1997.

[1161] Australia, Comments of 16 February 1994 on the report of the Working Group on a draft statute for an international criminal court, UN Doc. A/CN.4/458, 18 February 1994, p. 16.

In any case, the rule regarding priority should be applied unconditionally in cases involving the surrender of persons accused of crimes within the sphere of exclusive jurisdiction of the court.

It would be desirable to resolve in article 63 the question of the failure to surrender an accused person to the court, in violation of the provisions of the statute. In such situations, the court should be granted the right to request the United Nations Security Council to obtain the surrender of the accused person.[1162]

1103. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Bosnia and Herzegovina thanked the Netherlands for its financial and other contributions to the ICTY and stated that it hoped that "others will follow its example and heed the call for material, political, legal and legislative support for the Tribunal".[1163]

1104. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Colombia stated that "we encourage the international community to cooperate more actively with the [ICTY] so that it can accomplish its task of bringing to justice those who committed atrocities during the war in the former Yugoslavia".[1164]

1105. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Costa Rica stated that:

The lack of cooperation [with the ICTY] on the part of some Governments and local authorities, in violation of their international obligations, is scandalous. The authorities of the Republika Srpska, the Federation of Bosnia and Herzegovina and the Federal Republic of Yugoslavia (Serbia and Montenegro) must comply with their international obligations. The authorities of these entities must arrest and transfer to the custody of the Tribunal the accused who are in their territories. These authorities must also cooperate in the gathering of evidence and facilitate the participation of witnesses.[1165]

1106. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Croatia stated that:

Croatia was among the first countries to enact implementing legislation so as to institutionalize its cooperation with the [ICTY]. The Tribunal opened its Liaison Office in Zagreb, and the Croatian Government established its own office for Cooperation with the Tribunal . . .

Croatia does not condition its cooperation with the Tribunal upon the reciprocal cooperation of any other country. Croatia considers cooperation to be a legal, political and moral duty . . .

[1162] Belarus, Comments of 18 February 1994 on the report of the Working Group on a draft statute for an international criminal court, UN Doc. A/CN.4/458, 18 February 1994, p. 20, § 10.

[1163] Bosnia and Herzegovina, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 8.

[1164] Colombia, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 10.

[1165] Costa Rica, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 17.

It should be duly noted that the Republic of Croatia recently used its good offices in the transfer of 10 additional Bosnian Croat indictees into the custody of the Tribunal.

... The work of the Tribunal, just like that of the future international criminal court and the international protection of justice in general, depends upon the cooperation of individual countries. It is the duty of the United Nations to encourage such cooperation or to take appropriate steps if needed.[1166]

1107. According to the Report on the Practice of Croatia, a suspect of Croatian nationality was surrendered to the ICTY on the basis that such surrender was not to be considered an "extradition" since the suspect was surrendered to an international tribunal rather than to another State.[1167]

1108. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Germany stated that it wished to "underline again the obligation of States to cooperate with the [ICTY] under Security Council resolution 827 (1993)". It further stated that:

[Germany] has made every effort to contribute to the prosecution of violations of humanitarian law in the Balkans and will continue to do so. Germany was one of those actively supporting the establishment of the [ICTY] right from the beginning. We have continued vigorously to support its work in the political and legal fields. We have also assisted with personnel and financial contributions ... The cooperation of German authorities with the Tribunal is regulated in a statute passed by the German parliament in April 1995 [i.e. the Law on Cooperation with the ICTY (1995)]. [The German] Government extradited two men charged with war crimes to the Tribunal. The extradition of Duško Tadić by Germany to The Hague was the very first extradition to the Tribunal by a Member State. Germany has also declared its readiness to execute sentences handed down by the Tribunal. German law enforcement authorities cooperate closely with the Tribunal in order to ensure an effective and transnational prosecution of violations of humanitarian law. The efforts include special protection for those of the many refugees from Bosnia and Herzegovina on German territory who are required by the Tribunal as witnesses.[1168]

1109. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Hungary deplored "the absence of cooperation with the [ICTY] by certain countries and entities" and called upon all members of the international community and all international forums "to continue to support the Tribunal's work and to facilitate the fulfilment of its mandate".[1169]

1110. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Iran stated that:

Since the inception of the [ICTY], the Islamic Republic of Iran has strongly supported its various activities aimed at terminating the culture of impunity.

[1166] Croatia, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, pp. 11–12.
[1167] Report on the Practice of Croatia, 1997, Chapter 6.3.
[1168] Germany, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, pp. 17–18.
[1169] Hungary, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 19.

Accordingly, [Iran], as have done many other States, has already expressed its readiness to accept the convicted persons so that they can serve their sentences in Iranian prisons. However, the report [of the ICTY] indicates that some of the States or entities of the former Yugoslavia, in particular the so-called Republika Srpska, still resist full cooperation with the Tribunal and refuse to arrest and transfer the main indictees to face justice. Such intractable recalcitrance cannot and should not be tolerated by the international community and thus deserves to be condemned.[1170]

1111. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Italy stated that:

The greatest obstacle [to combat impunity of persons indicted by the ICTY] remains the failure by some States and entities in the former Yugoslavia to comply with their obligation to fully cooperate with the Tribunal, in particular with the Tribunal's orders to arrest and deliver indicted persons to The Hague. This obligation was confirmed and reinforced by the 1995 Dayton Agreement. Italy is of the view that it must be met in the most complete and effective way. Respect for State authority cannot be adduced as a pretext for not cooperating with the Tribunal.

. . . Italy has consistently supported the activity of the Tribunal and will continue to do so in order to ensure its complete success.[1171]

1112. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Malaysia stated that:

The Dayton Peace Agreement, signed in December 1995 obliges its signatories to cooperate fully with the [ICTY] by executing the arrest warrants and delivering the indicted criminals to the Tribunal for trial in The Hague. However, to our utter dismay, the parties to the Agreement, notably the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Serb entity, have persistently refused to meet their obligations, and seem to be getting away with it. The Federal Republic of Yugoslavia has not only defied the orders of the Tribunal, but has failed to ensure the Republika Srpska's compliance with the Dayton Agreement by the execution of arrest warrants issued for more than 40 indictees in its territory. We strongly deplore their failure, which constitutes a blatant violation of the relevant Security Council resolutions and their commitment to the Dayton Agreement and shows a gross disrespect for international law.

Full cooperation with the Tribunal by all parties in bringing the war criminals to justice is a fundamental obligation which must be honoured if genuine stability and lasting peace are to be consolidated in Bosnia and Herzegovina . . .

[Malaysia] also wishes to emphasize the need for the parties involved in the implementation of the Dayton Peace Agreement to extend their full cooperation to the Tribunal. In this regard, we commend the recent efforts by the Stabilization Force (SFOR) in arresting an indicted criminal in Serb territory.[1172]

1113. In 1994, during a debate in the Dutch parliament concerning the establishment of the ICTY, the point was made that a State, as regards its cooperation

[1170] Iran, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 11.

[1171] Italy, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 8.

[1172] Malaysia, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 14.

with the Tribunal, may not raise the objection of statutes of limitation arising from its national legal system in order to refuse such cooperation. It was further stated that violations of the laws and customs of war as mentioned in Article 8 of the Criminal Law in Wartime Act as amended of the Netherlands were not subject to statutes of limitation.[1173]

1114. In 1997, when a question was raised by a member of the Dutch parliament concerning the measures taken in order to arrest suspected war criminals, the government of the Netherlands replied that it was in favour of issuing a list of information and photographs of persons indicted by the ICTY to the soldiers of the SFOR mission to ensure that persons suspected of war crimes were brought to trial before the Tribunal. It also stated that the government of the Netherlands had proposed this course of action to NATO on several occasions.[1174]

1115. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, the Netherlands stated that:

> The [ICTY] is justified in asking Member States to put more of an effort into arresting indicted war criminals and bringing them before the Tribunal . . . We urge all those involved, directly or indirectly, to live up to their obligations and cooperate in advancing the course of justice.
>
> We also appeal to all Member States to seek ways and means in the realm of their domestic jurisdiction of assisting the Tribunal in every way possible . . . This can be done, for instance, by actively tracing and handing over indicted persons to the Tribunal, by instituting proceedings against alleged war criminals in their domestic courts, and by allowing war criminals convicted by the Tribunal to be imprisoned within their borders.
>
> . . . We wish to remind all States of their obligations, political and legal, under international law and of their duty to cooperate with the Tribunal under the terms of its Statute. We commend the Tribunal for drawing up model arrangements to this particular end and again urge Member States to seek early the conclusion and implementation of such arrangements.[1175]

1116. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Pakistan stated that:

> Security Council resolution 827 (1993) called upon "all States" to cooperate with the [ICTY] in order to ensure its effective functioning. In this regard, we appreciate the cooperation extended by Croatia and the central authorities of Bosnia and Herzegovina. However, cooperation from the other parties is not satisfactory. Despite repeated appeals from the international community, one of the parties has not yet taken measures to enact legislation enabling it to cooperate with the Tribunal.

[1173] Netherlands, Lower House of Parliament, Debates on the establishment of the International Criminal Tribunal for the former Yugoslavia, 1993–1994 Session, Doc. 23 542, No. 6, p. 3.

[1174] Netherlands, Lower House of Parliament, Reply by the Minister of Defence to a question, 1996–1997 Session, 27 January 1997, Doc. 581, p. 1193.

[1175] Netherlands, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 6.

. . .
[Pakistan] would like to welcome the cooperation extended to the Tribunal by the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and the Stabilization Force (SFOR).[1176]

1117. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Russia stated that:

We continue to attach great importance to the work of the [ICTY] . . . However, we absolutely cannot agree with the attempts to describe as "cooperation" with the Tribunal or as "support" for its work preplanned actions for the armed seizure of suspects, in particular under the aegis of the current peacekeeping operation in Bosnia and Herzegovina . . . The problem of extradition to The Hague of persons indicted of war crimes should be resolved only through cooperation among the parties themselves with the International Tribunal, as was stated in the international documents on the Bosnian settlement, in particular in the decisions of the London Conference of 1996.[1177]

1118. In 1994, in its comments on the report of the Working Group on a draft statute for an international criminal court, Switzerland stated that:

Indeed, the cooperation thus contemplated between the national administrative and judicial authorities on the one hand and the court on the other seems to be essential in order to ensure the effective functioning of the Court. In this connection, however, the draft fails to pronounce on the surrender of nationals . . . this silence no doubt means that such surrender may be demanded by the court. However, certain countries refuse to extradite their nationals. Would it therefore not be preferable to determine the fate of the nationals of the State concerned by applying to it the principle of *aut dedere aut judicare*?[1178]

1119. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Turkey stated that:

[Turkey welcomes] the continuing cooperative approach [with regard to the ICTY] demonstrated by two States, Bosnia and Herzegovina and Croatia . . . On the other hand, it is regrettable that this cooperative attitude was not displayed by the other parties.
. . . Refusal to comply with [the commitments made in the 1995 Dayton Accords], after formal recognition of the Tribunal and the undertaking to cooperate with it, constitutes a violation of the Agreement.[1179]

1120. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, the US stated that:

[1176] Pakistan, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 15.
[1177] Germany, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 19.
[1178] Switzerland, Comments of 8 February 1994 on the report of the Working Group on a draft statute for an international criminal court, UN Doc. A/CN.4/458, 18 February 1994, p. 37.
[1179] Turkey, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 13.

We reaffirm [the ICTY] President Cassese's request that all States and entities cooperate fully with the [ICTY]. There is no justification for the near-total non-cooperation of Republika Srpska and the Federal Republic of Yugoslavia with the order of the Tribunal, particularly in the apprehension of indictees in areas under their control. The recent cooperation of the Government of Croatia in facilitating the surrender of indictees is commendable, but more cooperation from Croatia is required. The United States will continue to use every tool at its disposal to compel cooperation and to strengthen the capabilities of the [ICTY].

The United States joins with other Member States in continuing to support the work of the war crimes tribunals.[1180]

1121. In 1998, in response to the situation in Kosovo, but also referring to the other conflicts in the former Yugoslavia, the US Congress adopted a resolution by unanimous consent stating that:

The United States should engage with other members of the North Atlantic Treaty Organization and other interested states in a discussion of measures to be taken to apprehend indicted war criminals and persons indicted for crimes against humanity with the objective of concluding a plan of action that will result in these indictees' prompt delivery into the custody of the Tribunal.[1181]

1122. The Report on the Practice of the SFRY (FRY) notes that:

In fact, the refusal to amend Article 17 of the FRY Constitution prohibiting extradition of own nationals, or to apply somewhat broader interpretation of its provisions, is an expression of the lack of political will to accept jurisdiction of the [ICTY] and, therefore, a sign of rejection of the obligation to recognise universal jurisdiction based on the Tribunal Statute. This position is clear from numerous statements regarding the calls to the FRY to extradite its nationals indicted by the Prosecutor of the Tribunal for war crimes.[1182]

III. Practice of International Organisations and Conferences

United Nations

1123. In a resolution on the former Yugoslavia adopted in 1992, the UN Security Council called upon States and international humanitarian organisations

to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.[1183]

1124. In its resolution adopted in 1992 on the establishment of the UN Commission of Experts to examine and analyse violations of IHL committed in the

[1180] US, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 16.
[1181] US, Congress, S. Con. Resolution 105 on the Sense of Congress Regarding the Culpability of Slobodan Miloševic, 17 July 1998, *Congressional Record (Senate)*, pp. S8456–S8458.
[1182] Report on the Practice of the SFRY (FRY), 1997, Chapter 6.4.
[1183] UN Security Council, Res. 771, 13 August 1992, § 5.

territory of the former Yugoslavia and in Bosnia and Herzegovina, the UN Security Council reaffirmed its call upon States and, as appropriate, international humanitarian organizations:

to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions of 12 August 1949 being committed in the territory of the former Yugoslavia, and requests States, relevant United Nations bodies, and relevant organizations to make this information available within thirty days of the adoption of the present resolution and as appropriate thereafter, and to provide other appropriate assistance to the Commission of Experts.[1184]

1125. In its resolution on the establishment of the ICTY adopted in 1993 under Chapter VII of the UN Charter, the UN Security Council decided that:

All States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.[1185]

1126. In a resolution on Rwanda adopted in 1994, the UN Security Council called upon States and international humanitarian organisations "to collate substantiated information in their possession or submitted to them relating to grave violations of international humanitarian law committed in Rwanda during the conflict".[1186]

1127. In 1994, in its resolution on the establishment of an International Tribunal for Rwanda adopted under Chapter VII of the UN Charter, the UN Security Council decided that:

All States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures.[1187]

1128. In a resolution on Rwanda adopted in 1995, the UN Security Council:

1. *Urges* States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence

[1184] UN Security Council, Res. 780, 6 October 1992, § 1.
[1185] UN Security Council, Res. 827, 25 May 1993, § 4.
[1186] UN Security Council, Res. 935, 1 July 1994, § 2.
[1187] UN Security Council, Res. 955, 8 November 1994, § 2.

that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda;

2. *Urges* States who detain persons referred to in paragraph 1 above to inform the Secretary-General and the Prosecutor of the International Tribunal for Rwanda of the identity of the persons detained, the nature of the crimes believed to have been committed, the evidence providing probable cause for the detentions, the date when the persons were detained and the place of detention.[1188]

1129. In its resolution adopted in 1995 authorizing the establishment of IFOR, the UN Security Council reaffirmed that:

All States shall cooperate fully with the International Tribunal for the Former Yugoslavia and its organs in accordance with the provisions of resolution 827 (1993) of 25 May 1993 and the Statute of the International Tribunal, and shall comply with requests for assistance or orders issued by a Trial Chamber under article 29 of the Statute, and calls upon them to allow the establishment of offices of the Tribunal.[1189]

1130. In a resolution adopted in 1997, the UN Security Council reiterated its call to all the States "in the region" (Eastern Slavonia, Baranja, and Western Sirmium of the Republic of Croatia), including the government of Croatia, "to cooperate fully with the International Tribunal for the Former Yugoslavia" and recalled "its encouragement by the increased cooperation of the Government of the Republic of Croatia with the Tribunal".[1190]

1131. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council called upon the authorities of the FRY, the leaders of the Kosovo Albanian community and all others concerned "to cooperate fully with the Prosecutor of the [ICTY] in the investigation of possible violations within the jurisdiction of the Tribunal".[1191]

1132. In 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reiterated that "all States shall cooperate fully with the International Tribunal established pursuant to its resolution 827 (1993) and its organs".[1192]

1133. In 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council recalled "the establishment of the International Tribunal pursuant to its resolution 827 (1993)" and reiterated that "all States shall cooperate fully with the Tribunal and its organs".[1193]

1134. In a resolution adopted in 1994, the UN General Assembly requested States, as a matter of urgency "to make available to the [ICTY] expert personnel,

[1188] UN Security Council, Res. 978, 27 February 1995, §§ 1–2.
[1189] UN Security Council, Res. 1031, 15 December 1995, § 4; see also Res. 1034, 21 December 1995, § 12 and Res. 1037, 15 January 1995, § 20.
[1190] UN Security Council, Res. 1145, 19 December 1997, § 11.
[1191] UN Security Council, Res. 1199, 23 September 1998, § 13.
[1192] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 2.
[1193] UN Security Council, Statement by the President, UN Doc. S/PRST/1995/52, 12 October 1995, p. 2.

resources and services to aid in the investigation and prosecution of persons accused of having committed serious violations of international humanitarian law".[1194] The General Assembly requested all States, in particular the FRY (Serbia and Montenegro), "to cooperate, as required under Security Council resolution 827 (1993), with the [ICTY] in providing evidence for investigations and trials and in surrendering persons accused of crimes within the jurisdiction of the Tribunal".[1195]

1135. In a resolution adopted in 1994 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly called upon all States "to cooperate with the International Tribunal and the Office of the Prosecutor in the investigation and prosecution of persons accused of using rape as a weapon of war and in the provision of protection, counselling and support to victims and witnesses".[1196]

1136. In a resolution adopted in 1994 on the situation of human rights in Rwanda, the UN General Assembly urged States "to cooperate fully" with the ICTR.[1197]

1137. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN General Assembly urged all States:

> pursuant to Security Council resolution 978 (1995), to exert, without delay, every effort, including arrest and detention, in order to bring those responsible to justice in accordance with international principles of due process, and also urges States to honour their obligations under international law in this regard, particularly under the Convention on the Prevention and Punishment of the Crime of Genocide.[1198]

1138. In a resolution adopted in 1995 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reminded all States of their obligation

> to cooperate with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and also with the Office of the Prosecutor in the investigation and prosecution of persons accused of using rape as a weapon of war.[1199]

1139. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly reminded all States of their obligation under Security Council resolution 827 (1993):

> to cooperate with the [ICTY], including through compliance with requests for assistance and orders issued by a trial chamber of the Tribunal, and, in this regard,

[1194] UN General Assembly, Res. 49/196, 23 December 1994, § 9.
[1195] UN General Assembly, Res. 49/196, 23 December 1994, § 10.
[1196] UN General Assembly, Res. 49/205, 23 December 1994, § 13.
[1197] UN General Assembly, Res. 49/206, 23 December 1994, § 6.
[1198] UN General Assembly, Res. 50/200, 22 December 1995, § 8.
[1199] UN General Assembly, Res. 50/192, 22 December 1995, § 5.

urges the parties to allow the establishment of offices of the Tribunal in their territories and draws the attention of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Croatia and the Republic of Bosnia and Herzegovina to their obligation to cooperate with the Tribunal, in particular to arrest, detain and facilitate the transfer to the custody of the Tribunal any and all indicted war criminals who reside in or transit through or are otherwise present in their respective territories.[1200]

1140. In a resolution adopted in 1996 on the situation of human rights in Rwanda, the UN General Assembly urged all States:

to cooperate fully, without delay, with the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994, taking into account the obligations contained in Security Council resolutions 955 (1994) of 8 November 1994 and 978 (1995) of 27 February 1995.[1201]

1141. In a resolution adopted in 1996 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reminded all States:

of their obligation to cooperate with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in the investigation and prosecution of persons accused of using rape as a weapon of war.[1202]

1142. In a resolution adopted in 1994, the UN Commission on Human Rights welcomed the establishment of the ICTY and urged that "all States provide all necessary and appropriate support to the Tribunal". It further urged all States and responsible authorities to cooperate with the ICTY, "including the provision of substantiated information and the apprehension of persons accused of violations of international humanitarian law".[1203] It reiterated this appeal in 1995.[1204]

1143. In a resolution adopted in 1994 on the rape and abuse of women in the former Yugoslavia, the UN Commission on Human Rights called upon all States that hosted refugees "to provide the necessary assistance to the Commission of Experts in its efforts to interview or otherwise collect evidence for its investigation of the systematic practice of rape of women".[1205]

1144. In resolutions on Rwanda adopted in 1995 and 1996, the UN Commission on Human Rights urged all States concerned to cooperate fully with the ICTR,

[1200] UN General Assembly, Res. 50/193, 22 December 1995, § 10.
[1201] UN General Assembly, Res. 51/114, 12 December 1996, § 5.
[1202] UN General Assembly, Res. 51/115, 12 December 1996, § 5.
[1203] UN Commission on Human Rights, Res. 1994/72, 9 March 1994, §§ 16 and 19.
[1204] UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 23
[1205] UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 10.

taking into account the obligations contained in Security Council Resolutions 955 (1994) and 978 (1995).[1206]

1145. In a resolution on the former Yugoslavia adopted in 1996, the UN Commission on Human Rights demanded that all States and parties to the 1995 Dayton Accords "meet their obligations to cooperate fully with the Tribunal, as required by Security Council resolution 827 of 25 May 1993, including with respect to surrendering persons sought by the Tribunal". It also demanded that "all States arrest, detain and facilitate the transfer of . . . persons [indicted by the Tribunal] to the custody of the Tribunal and ensure adequate protection of witnesses who have appeared before the Tribunal".[1207]

1146. In a resolution adopted in 2000 on the situation of human rights in the FRY (Serbia and Montenegro), Croatia and Bosnia and Herzegovina, the UN Commission on Human Rights stressed "continuing obstruction of the work of the International Criminal Tribunal for the Former Yugoslavia".[1208] The Commission further stated that it:

> 16. *Notes with grave concern* that Slobodan Miloševic and other senior leaders of the Federal Republic of Yugoslavia (Serbia and Montenegro) continue to maintain positions of power despite their indictment for war crimes and crimes against humanity, that the Federal Republic of Yugoslavia (Serbia and Montenegro) has repeatedly ignored the orders of the International Criminal Tribunal for Yugoslavia to transfer indicted war criminals to The Hague for trial and has not transferred even one indictee to The Hague since the inception of the Tribunal;
> 17. *Stresses* the evidence that the most senior leaders of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) are responsible for the continuing refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to meet its obligations to cooperate with the Tribunal;
> 18. *Demands*, in accordance with Security Council resolution 827 (1993) of 25 May 1993 and the Statute of the International Criminal Tribunal for the Former Yugoslavia, that the Federal Republic of Yugoslavia (Serbia and Montenegro) cooperate fully with the Tribunal and, in particular, permit immediate access to all parts of the Federal Republic of Yugoslavia (Serbia and Montenegro), firstly through prompt issuance of requested visas to officials of the Tribunal to conduct investigations;
> . . .
> 20. *Calls upon* authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to:
> (a) Comply fully with the obligation to cooperate with the International Criminal Tribunal for the Former Yugoslavia;
> . . .
> 36. *Welcomes* the transfer to the International Criminal Tribunal for the Former Yugoslavia by the Government of Croatia of indicted war criminals, including Mladen Naletilic ("Tuta");

[1206] UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 5; Res. 1996/76, 23 April 1996, § 5.
[1207] UN Commission on Human Rights, Res. 1996/71, 23 April 1996, §§ 5 and 6.
[1208] UN Commission on Human Rights, Res. 2000/26, 18 April 2000, § 3(e).

...

45. *Calls upon* all parties to the Peace Agreement, especially the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), to meet their obligations to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia, noting that there is no valid constitutional or statutory reason for failure to cooperate, and urges all parties to respect the "rules of the road" for the submission of cases to the Tribunal;
46. *Urges* all States and the Secretary-General to support the Tribunal to the fullest extent possible, in particular by helping to ensure that persons indicted by the Tribunal stand trial before it, by ensuring that victims and witnesses are given adequate protection and by continuing to make available to the Tribunal adequate resources to aid in the fulfilment of its mandate;
47. *Welcomes* the close cooperation between the Stabilization Force and the Tribunal that has led to a substantial number of arrests of persons indicted for war crimes, the most recent example of which is the arrest of Momcilo Krajisnik;
48. *Calls upon* all indicted persons to surrender voluntarily to the custody of the Tribunal, as required by the Peace Agreement;
49. *Urgently calls once again upon* authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) and in Bosnia and Herzegovina, including those of the Federation and in particular in the Republika Srpska, to apprehend and surrender for prosecution all persons indicted by the Tribunal, as required by Security Council resolution 827 (1993) of 25 May 1993 and the statement by the President of the Security Council of 8 May 1996, and calls upon all parties to cooperate in the apprehension and surrender of indictees who may be in their territory.[1209]

1147. In a resolution adopted in 2001 on the situation of human rights in south-eastern Europe, the UN Commission on Human Rights urged all States and parties to the 1995 Dayton Accords to:

to meet their obligations to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia, as required by Security Council resolution 827 (1993) of 25 May 1993 and all subsequent relevant resolutions, and in particular to comply with their obligations to arrest and transfer to the custody of the Tribunal all those indicted persons present in their territories or under their control.[1210]

The Commission also called upon the authorities of Bosnia and Herzegovina to "cooperate fully with the International Criminal Tribunal for the Former Yugoslavia, in particular for the apprehension of former Republika Srpska President Radovan Karadžić and former Bosnian Serb General Ratko Mladić".[1211] It also welcomed:

the commitment of the Federal Republic of Yugoslavia to cooperate with the International Criminal Tribunal for the Former Yugoslavia, [noted] the first steps it has undertaken in this regard and [urged] all authorities of the Federal Republic of Yugoslavia to comply fully with their obligations to cooperate with the Tribunal,

[1209] UN Commission on Human Rights, Res. 2000/26, 18 April 2000, §§ 16–18, 20(a), 36 and 45–49.
[1210] UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 10.
[1211] UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 19.

in particular concerning the apprehension and extradition of persons indicted for war crimes.[1212]

The Commission further suggested the appointment of a special representative of the Commission with the task to "closely monitor the situation, paying particular attention to those areas that remain a source of concern, including cooperation with the International Criminal Tribunal for the Former Yugoslavia".[1213]

1148. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights called upon States:

> to continue to support the work of the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda and consider ways of supporting the initiatives to establish judicial mechanisms currently under consideration in a few countries in cooperation with the United Nations, and in this regard encourages the continuation or resumption, where needed, of discussions regarding the establishment of appropriate legal frameworks in accordance with international standards of justice, fairness and due process of law.[1214]

1149. In a resolution adopted in 1995 on the situation in the former Yugoslavia, the UN Sub-Commission on Human Rights welcomed the ICTY decision to implement its first indictments as well as:

> the progress made by the Prosecutor of the International Criminal Tribunal and [called] on all States, as required under Security Council resolution 827 (1993) of 23 May 1993, to cooperate with the International Tribunal in providing information and evidence for investigations and trials and in the apprehension and surrender of persons accused of crimes within the jurisdiction of the Tribunal.[1215]

1150. In a resolution on Rwanda adopted in 1996, the UN Sub-Commission on Human Rights appealed "to the international community to provide the [ICTR] and the Government of Rwanda with the necessary means to enable them to prosecute and try those guilty of . . . genocide and massacres". It further urged "all States in whose territory there are persons allegedly responsible for acts of genocide to arrest those persons so that they can be . . . extradited at the request of the International Criminal Tribunal or the Rwandan authorities".[1216]

Other International Organisations

1151. In 1993 and 1995, the Parliamentary Assembly of the Council of Europe welcomed the establishment of the ICTY, insisting that "the perpetrators of

[1212] UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 25.
[1213] UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 40(b).
[1214] UN Commission on Human Rights, Res. 2002/79, 25 April 2002, § 7.
[1215] UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, preamble and § 8.
[1216] UN Sub-Commission on Human Rights, Res. 1996/3, 19 August 1996, § 4 and § 6

such offences be brought to justice with the fullest possible co-operation of those representing the sides concerned".[1217]

1152. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Luxembourg, speaking on behalf of the EU as well as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Cyprus, stated that:

> We would like to stress the need for unstinting cooperation by all States and all parties with the [ICTY], to enable it to perform its duties satisfactorily.
>
> ... The legal obligation to cooperate with the Tribunal is mentioned in article 29 of its statute. The handing over or transfer of indictees for whom arrest warrants have been issued is essential in order to assure the Tribunal's proper functioning and credibility. The European Union believes that the international community must see to it that article 29 of the statute is fully implemented ...
>
> ... Whereas Croatia and the central authorities of Bosnia and Herzegovina have complied, to varying degrees, with the Tribunal's orders, the two entities that make up Bosnia and Herzegovina? the Republika Srpska and the Federation of Bosnia and Herzegovina and the Federal Republic of Yugoslavia has not, thus defying the authority of the United Nations ...
>
> Nothing can justify the non-execution of arrest warrants. It is essential that States adopt the necessary legislative, administrative and judicial measures to ensure the speedy execution of the orders issued by the Tribunal. Although many States have promulgated enforcement legislation to discharge their responsibilities, the European Union continues to be concerned that, generally speaking, the situation is unsatisfactory.
>
> Moreover, the European Union reaffirms that it is imperative to give proper financial support and to ensure effective personnel management in the Tribunal ...
>
> The European Union and its member States will continue to make voluntary contributions to help the Tribunal's work; it will provide full support for its smooth functioning. To that end, a cooperative relationship with the various republics is contingent upon their compliance with the peace accords and their cooperation with the International Tribunal.[1218]

International Conferences

1153. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1154. Several indictments by the ICTY and ICTR have recalled the obligation upon States to cooperate with the international tribunals. For instance, in the *Karadžić and Mladić case* (Review of the Indictments) in 1996, the ICTY Trial Chamber, acting pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence, stated that "the failure to effect personal service of the indictments and

[1217] Council of Europe, Parliamentary Assembly, Rec. 1218, 27 September 1993; Res. 1066, 27 September 1995, § 7.

[1218] EU, Statement by Luxembourg on behalf of the EU and associated States before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 5.

to execute the warrants of arrest issued against Radovan Karadžić and Ratko Mladić may be ascribed to the refusal of Republika Srpska and to the Federal Republic of Yugoslavia to cooperate with the Tribunal".[1219]

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

1155. No practice was found.

VI. Other Practice

1156. In its report to the OSCE on a fact-finding mission to Chechnya in 1996, the International Helsinki Federation for Human Rights recommended that "the OSCE openly and vigorously support in principle the establishment of an appropriate international judicial process for investigating and prosecuting allegations of violations of humanitarian law committed by both parties to the conflict in Chechnya".[1220]

[1219] ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, § 101.
[1220] International Helsinki Federation for Human Rights, Report to the OSCE: Fact-Finding Mission to Chechnya, 1–11 October 1996, Vienna, 16 October 1996, pp. 8–9.

APPENDICES

TREATIES

1864
GC
Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864.

1868
St. Petersburg Declaration
Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November–11 December 1868.

1874
Extradition Treaty between Peru and France
Extradition Treaty between Peru and France, Paris, 30 September 1874.

1881
Extradition Treaty between Argentina and Spain
Extradition Treaty between Argentina and Spain, Buenos Aires, 7 May 1881.

1886
Extradition Treaty between Argentina and Belgium
Extradition Treaty between Argentina and Belgium, Brussels, 12 August 1886.
Extradition Treaty between Argentina and Italy
Extradition Treaty between Argentina and Italy, Rome, 16 June 1886.

1889
Extradition Treaty between Argentina and the UK
Extradition Treaty between Argentina and the United Kingdom, Buenos Aires, 22 May 1889.
Montevideo Treaty on International Criminal Law
Treaty on International Criminal Law concluded between Argentina, Bolivia, Paraguay and Uruguay, Montevideo, 23 January 1889.

1893
Extradition Treaty between Argentina and the Netherlands
Extradition Treaty between Argentina and the Netherlands, Buenos Aires, 7 September 1893.

1899
Hague Convention (II)
Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899.

HR
Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899.
Hague Convention (III)
Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899.
Hague Declaration concerning Asphyxiating Gases
Declaration (IV, 2) concerning Asphyxiating Gases, The Hague, 29 July 1899.
Hague Declaration concerning Expanding Bullets
Declaration (IV, 3) concerning Expanding Bullets, The Hague, 29 July 1899.

1902
Agreement Ending the Boer War
Agreement between Great Britain and the Orange Free State and the South African Republic as to the Terms of Surrender of the Boer Forces in the Field, Pretoria, 31 May 1902.

1904
Extradition Treaty between Peru and the UK
Extradition Treaty between Peru and the United Kingdom**,** Lima, 26 January 1904.

1906
GC
Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906.

1907
Hague Convention (IV)
Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.
HR
Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.
Hague Convention (IX)
Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907.
Hague Convention (X)
Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907.

1919
Extradition Treaty between Brazil and Peru
Extradition Treaty between Brazil and Peru, Rio de Janeiro, 13 February 1919.
Treaty of Versailles
Treaty of Versailles, Versailles, 28 June 1919.

1921

Convention for the Suppression of Traffic in Women and Children

International Convention for the Suppression of the Traffic in Women and Children, Geneva, 30 September 1921, amended by a Protocol adopted by the UN General Assembly, Res. 126 (II), 20 October 1947.

1922

Treaty on the Use of Submarines and Noxious Gases in Warfare

Treaty on the Use of Submarines and Noxious Gases in Warfare between France, Italy, Japan, UK and US, Washington, D.C., 6 February 1922.

1925

Geneva Gas Protocol

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.

1926

Slavery Convention

Convention to Suppress the Slave Trade and Slavery, adopted by the League of Nations, Geneva, 25 September 1926, as amended by the Protocol amending the Slavery Convention, adopted by the UN General Assembly, Res. 794 (VIII), 23 October 1953.

1928

Bustamante Code

Convention on International Private Law, adopted at the 4th Panamerican Conference, Havana, 20 February 1928.

1929

GC

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

Geneva POW Convention

Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.

1930

Forced Labour Convention

Convention concerning Forced or Compulsory Labour, ILO Convention No. 29, adopted by the ILO General Conference, Geneva, 28 June 1930.

1932

Extradition Treaty between Peru and Chile

Extradition Treaty between Peru and Chile, Lima, 5 November 1932.

1933

Inter-American Convention on Extradition

Inter-American Convention on Extradition, Montevideo, 26 December 1933.

1935

Roerich Pact

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Washington, D.C., 15 April 1935.

1944

Chicago Convention

Convention on International Civil Aviation, Chicago, 7 December 1944, as amended by the Protocol relating to an Amendment to the Convention on International Civil Aviation, Montreal, 10 May 1984.

1945

IMT Charter (Nuremberg)

Charter of the International Military Tribunal for Germany, concluded by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, acting in the interests of all the United Nations and by their representatives duly authorized thereto, annexed to the London Agreement, London, 8 August 1945.

London Agreement

Agreement between the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945.

UN Charter

Charter of the United Nations, adopted by the Conference on International Organisations, San Francisco, 26 June 1945.

1946

Paris Agreement on Reparation from Germany

Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, concluded between Albania, the United States of America, Australia, Belgium, Canada, Denmark, Egypt, France, the United Kingdom of Great Britain and Northern Ireland, Greece, India, Luxembourg, Norway, New Zealand, Netherlands, Czechoslovakia, Union of South Africa and Yugoslavia, Paris, 14 January 1946.

1947

Treaty of Peace between the Allied and Associated Powers and Bulgaria

Treaty of Peace between the Allied and Associated Powers on the one part and Bulgaria on the other part, Paris, 10 February 1947.

Treaty of Peace between the Allied and Associated Powers and Finland

Treaty of Peace between the Allied and Associated Powers on the one part and Finland on the other part, Paris, 10 February 1947.

Treaty of Peace between the Allied and Associated Powers and Hungary

Treaty of Peace between the Allied and Associated Powers on the one part and Hungary on the other part, Paris, 10 February 1947.

Treaty of Peace between the Allied and Associated Powers and Italy
Treaty of Peace between the Allied and Associated Powers on the one part and Italy on the other part, Paris, 10 February 1947.
Treaty of Peace between the Allied and Associated Powers and Romania
Treaty of Peace between the Allied and Associated Powers on the one part and Romania on the other part, Paris, 10 February 1947.

1948
Brussels Treaty
Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Brussels, 17 March 1948.
Genocide Convention
Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly, Res. 260 A (III), 9 December 1948.

1949
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted by the UN General Assembly, Res. 317 (IV), 2 December 1949.
GC I
Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949.
GC II
Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949.
GC III
Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.
GC IV
Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.
Karachi Agreement
Karachi Agreement Establishing a Cease-fire Line in the State of Jammu and Kashmir concluded between India and Pakistan, Karachi, 27 July 1949.

1950
ECHR
European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended by Protocol No. 11, Strasbourg, 11 May 1994.
Statute of the UNHCR
Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the UN General Assembly, Res. 428 (V), 14 December 1950.

1951
Peace Treaty for Japan
Treaty of Peace signed between the Allied Powers and Japan, San Francisco, 8 September 1951.

Refugee Convention
Convention relating to the Status of Refugees, adopted by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened pursuant to UN General Assembly Res. 429 (V), Geneva, 28 July 1951, as amended by the 1967 Protocol relating to the Status of Refugees, approved by the UN Economic and Social Council, Res. 1186 (XLI), 18 November 1966, and taken note of by the UN General Assembly, Res. 2198 (XXI), 16 December 1966.

1952

Convention on the Settlement of Matters Arising out of the War and the Occupation
Convention on the Settlement of Matters Arising out of the War and the Occupation (with Annex), Bonn, 26 May 1952, also known as the Transference Treaty, as amended by Schedule IV to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, Paris, 23 October 1954.

Luxembourg Agreement between Germany and Israel
Agreement between the State of Israel and the Federal Republic of Germany (with Schedule, Annexes, Exchanges of Letters and Protocols), Luxembourg, 10 September 1952.

Protocol to the ECHR
Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1950.

1953

Panmunjom Armistice Agreement
Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, concerning a Military Armistice in Korea, Panmunjom, 27 July 1953.

Constitution of the IOM
Constitution of the International Organization for Migration, Brussels, as adopted by a resolution dated 5 December 1951, 19 October 1953, as amended on 20 May 1987.

1954

Agreement on Cessation of Hostilities in Viet-Nam
Agreement on the Cessation of Hostilities in Viet-Nam, concluded between France and the Democratic Republic of Vietnam, Geneva, 20 July 1954.

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

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

Protocols to the Brussels Treaty on the WEU
Protocols to the 1948 Brussels Treaty establishing the Western European Union, Paris, 23 October 1954, also known as the Paris Agreements on the Western European Union.

1955

Austrian State Treaty

State Treaty for the Re-establishment of an Independent and Democratic Austria (with Annexes and Maps), concluded between France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Austria, accession of Australia, Brazil, Canada, Czechoslovakia, Mexico, New Zealand, Poland and Yugoslavia, Vienna, 15 May 1955.

1956

Joint Declaration on Soviet-Japanese Relations

Joint Declaration by the Union of Soviet Socialist Republics and Japan concerning the restoration of diplomatic relations between the two countries, Moscow, 19 October 1956.

Supplementary Convention on the Abolition of Slavery

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by the UN Economic and Social Council pursuant to Res. 608 (XXI), Geneva, 7 September 1956.

Yoshida-Stikker Protocol

Protocol between the Government of the Kingdom of the Netherlands and the Government of Japan relating to settlement of the problem concerning certain types of private claims of Dutch nationals, following the Exchange of Letters between the Minister of Foreign Affairs of the Netherlands, Dirk U. Stikker, and the Prime Minister of Japan, Shigeru Yoshida, 7–8 September 1951, Tokyo, 13 March 1956.

1957

Convention concerning the Abolition of Forced Labour

Convention concerning the Abolition of Forced Labour, ILO Convention No. 105, adopted by the ILO General Conference, Geneva, 25 June 1957.

European Convention on Extradition

European Convention on Extradition, Paris, 13 December 1957.

1959

Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution

Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution (with Exchange of Notes) between the Federal Republic of Germany and Norway, Oslo, 7 August 1959.

European Convention on Mutual Assistance in Criminal Matters

European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959.

1961

Single Convention on Narcotic Drugs

Single Convention on Narcotic Drugs, adopted by the Conference of Plenipotentiaries for the Adoption of a Single Convention on Narcotic Drugs, New York, 30 March 1961.

1962

Extradition Treaty between Venezuela and Chile
Extradition Treaty between Venezuela and Chile, Santiago de Chile, 2 June 1962.

1963

Protocol 4 to the ECHR
Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 16 September 1963.

1965

Convention on the Elimination of Racial Discrimination
International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly, Res. 2106 A (XX), 21 December 1965.

1966

ICCPR
International Covenant on Civil and Political Rights, adopted by the UN General Assembly, Res. 2200 A (XXI), 16 December 1966.

ICESCR
International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly, Res. 2200 A (XXI), 16 December 1966.

1968

UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the UN General Assembly, Res. 2391 (XXIII), 26 November 1968.

1969

ACHR
American Convention on Human Rights, adopted by the OAS Inter-American Specialized Conference on Human Rights, San José, 22 November 1969, also known as Pact of San José.

Convention Governing Refugee Problems in Africa
Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Sixth Ordinary Session of the OAU Assembly of Heads of State and Government, Addis Ababa, 10 September 1969.

Vienna Convention on the Law of Treaties
Convention on the Law of Treaties, Vienna, 23 May 1969.

1970

Convention on the Illicit Trade in Cultural Property
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the 16th Session of the UNESCO General Conference, Paris, 14 November 1970.

Hague Convention for the Suppression of Unlawful Seizure of Aircraft
Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970.

1971

Convention on Psychotropic Substances
Convention on Psychotropic Substances, Vienna, 21 February 1971.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971.

OAS Convention to Prevent and Punish Acts of Terrorism
Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance, adopted by the Third Special Session of the OAS General Assembly, Washington, D.C., 2 February 1971.

1972

BWC
Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature at London, Moscow and Washington, D.C., 10 April 1972.

Extradition Treaty between Argentina and the US
Extradition Treaty between Argentina and the United States of America, Washington, D.C., 21 January 1972, superseded by the 1997 Extradition Treaty between Argentina and the United States of America.

Protocol Amending the 1961 Single Convention on Narcotic Drugs
Protocol Amending the 1961 UN Single Convention on Narcotic Drugs, Geneva, 25 March 1972.

1973

Agreement on Ending the War and Restoring Peace in Viet-Nam
Agreement on Ending the War and Restoring Peace in Viet-Nam, signed on behalf of the United States of America, the Republic of Viet-Nam, the Democratic Republic of Viet-Nam, and the Provisional Revolutionary Government of South Viet-Nam, Paris, 27 January 1973.

Convention on Crimes against Internationally Protected Persons
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the UN General Assembly, Res. 3166 (XXVIII), 14 December 1973.

Extradition Treaty between Uruguay and the US
Treaty on Extradition and Co-operation in Penal Matters between Uruguay and the United States of America, Washington, D.C., 6 April 1973.

International Convention on the Suppression and Punishment of the Crime of Apartheid
International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the UN General Assembly, Res. 3068 (XXVIII), 30 November 1973.

Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam
Protocol on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Personnel, signed on behalf of the United States of America, the Republic of Viet-Nam, the Democratic Republic of Viet-Nam, and

the Provisional Revolutionary Government of South Viet-Nam, Paris, 27 January 1973.

1974

Agreement on Repatriation of Detainees between Bangladesh, India and Pakistan
Agreement on the Repatriation of Prisoners of War and Civilian Internees between Bangladesh, India and Pakistan, New Delhi, 9 April 1974.

Disengagement Agreement between Israel and Syria
Separation of Forces Agreement between Israel and Syria, Geneva, 31 May 1974.

European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes
European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, Strasbourg, 25 January 1974.

NATO STANAG 2132
Standardization Agreement 2132, Edition 2, Documentation Relative to Medical Evacuation, Treatment and Cause of Death of Patients, North Atlantic Treaty Organization, Military Agency for Standardization, Brussels, 7 August 1974.

1975

Additional Protocol to the European Convention on Extradition
Additional Protocol to the European Convention on Extradition, Strasbourg, 15 October 1975.

1976

ENMOD Convention
Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted by the UN General Assembly, Res. 31/72, 10 December 1976.

1977

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

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

European Convention on the Suppression of Terrorism
European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977.

OAU Convention against Mercenarism
Convention for the Elimination of Mercenarism in Africa, adopted by the OAU Council of Ministers at its 29th Session, Res. 817 (XXIX), Libreville, 3 July 1977, OAU Doc. CM/817 (XXIX) Annex II Rev.3 (1977).

1978

Second Additional Protocol to the European Convention on Extradition
Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17 March 1978.

1979

Convention on the Elimination of Discrimination against Women
Convention on the Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly, Res. 34/180, 18 December 1979.

Convention on the Physical Protection of Nuclear Material
Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979.

International Convention against the Taking of Hostages
International Convention against the Taking of Hostages, adopted by the UN General Assembly, Res. 34/146, 17 December 1979.

Peace Treaty between Israel and Egypt
Treaty of Peace between the Government of the State of Israel and the Government of the Arab Republic of Egypt, Washington, D.C., 26 March 1979.

1980

CCW
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

Protocol I to the CCW
Protocol on Non-detectable Fragments, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

Protocol II to the CCW
Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

Protocol III to the CCW
Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

1981

ACHPR
African Charter on Human and Peoples' Rights, adopted by the Eighteenth Ordinary Session of the OAU Assembly of Heads of State and Government, Nairobi, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5.

1983

Protocol 6 to the ECHR
Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Strasbourg, 28 April 1983.

1984

Convention against Torture
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly, Res. 39/46, 10 December 1984.

Protocol Amending the Chicago Convention
Protocol Relating to an Amendment to the Convention on International Civil Aviation, Montreal, 10 May 1984.
Protocol 7 to the ECHR
Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.

1985
Inter-American Convention against Torture
Inter-American Convention to Prevent and Punish Torture, adopted by the Fifteenth Regular Session of the OAS General Assembly, Res. 783 (XV-O/85), Cartagena de Indias, 9 December 1985.

1987
Agreement to Establish Peace and Normalcy in Sri Lanka
Indo-Sri Lankan Agreement to Establish Peace and Normalcy in Sri Lanka, Colombo, 29 July 1987.
Esquipulas II Accords
Procedure for the Establishment of a Firm and Lasting Peace in Central America, signed by the Presidents of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, Guatemala City, 7 August 1987, annexed to Letter dated 27 August 1987 from the Permanent Representatives of Costa Rica, El Salvador, Guatemala and Nicaragua to the UN addressed to the UN Secretary-General, UN Doc. A/42/521-S/19085, 31 August 1987.
European Convention for the Prevention of Torture
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, 26 November 1987.
Extradition Treaty between Argentina and Italy
Extradition Treaty between Argentina and Italy, Rome, 9 December 1987.
Extradition Treaty between Spain and Argentina
Treaty between Spain and the Argentine Republic on Extradition and Judicial Assistance in Criminal Matters, Buenos Aires, 3 March 1987.
NATO STANAG 2067
Standardization Agreement 2067, Edition 5, Control and Return of Stragglers, North Atlantic Treaty Organization, Military Agency for Standardization, Brussels, 10 June 1987.

1988
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988.
Extradition Treaty between Argentina and Australia
Extradition Treaty between Argentina and Australia, Buenos Aires, 6 October 1988.
Protocol of San Salvador
Additional Protocol to the American Convention on Human Rights in the Area of Social, Economic and Cultural Rights, adopted by the Eighteenth Regular Session of the OAS General Assembly, Res. 907 (XVIII-O/88), San Salvador, 17 November 1988.

1989

Extradition Treaty between Peru and Spain
Extradition Treaty between Peru and Spain, Madrid, 28 June 1989.

Convention on the Rights of the Child
Convention on the Rights of the Child, adopted by the UN General Assembly, Res. 44/25, 20 November 1989.

Indigenous and Tribal Peoples Convention
Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, adopted by the ILO General Conference, Geneva, 27 June 1989.

Second Optional Protocol to the ICCPR
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty, adopted by the UN General Assembly, Res. 44/128, 15 December 1989.

UN Mercenary Convention
International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the UN General Assembly, Res. 44/34, 4 December 1989.

US-Soviet Memorandum of Understanding on the Pursuit of Nazi War Criminals
Memorandum of Understanding concerning Cooperation in the Pursuit of Nazi War Criminals between the United States of America and the Union of Soviet Socialist Republics, Moscow, 19 October 1989.

1990

African Charter on the Rights and Welfare of the Child
African Charter on the Rights and Welfare of the Child, adopted by the Sixteenth Ordinary Session of the OAU Assembly of Heads of State and Government, Res. 197 (XVI), Monrovia, 17–20 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

Implementation Agreement to the German Unification Treaty
Vereinbarung zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Durchführung und Auslegung des am 31. August 1990 in Berlin unterzeichneten Vertrags zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, Bonn, 18 September 1990.

US-Soviet Chemical Weapons Agreement
Agreement between the United States of America and the Union of Soviet Socialist Republics on Destruction and Non-Production of Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons, Washington, D.C., 1 June 1990.

1992

Convention on Biodiversity
Convention on Biological Diversity, adopted at the UN Conference on Environment and Development, Rio de Janeiro, 5 June 1992.

Extradition Treaty between Chile and Spain
Treaty on Extradition and Judicial Assistance in Criminal Matters between Chile and Spain, Santiago de Chile, 14 April 1992.

Finnish-Russian Agreement on War Dead
Agreement on Cooperation in Perpetuating the Memory of Finnish Servicemen in Russia and Russian (Soviet) Servicemen in Finland Who Fell in the Second World War, Helsinki, 11 July 1992.
India-Pakistan Declaration on Prohibition of Chemical Weapons
Declaration on the Complete Prohibition of Chemical Weapons between India and Pakistan, New Delhi, 19 August 1992.

1993
CIS Agreement on the Protection of Victims of Armed Conflicts
Agreement on Primary Measures for Protection of Victims of Armed Conflicts, Commonwealth of Independent States, Moscow, 24 September 1993.
CWC
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.
Extradition Treaty between Australia and Chile
Extradition Treaty between Australia and Chile, Canberra, 6 October 1993.

1994
Convention on the Safety of UN Personnel
Convention on the Safety of United Nations and Associated Personnel, adopted by the UN General Assembly, Res. 49/59, 9 December 1994.
Extradition Treaty between Peru and Italy
Extradition Treaty between Peru and Italy, Rome, 24 November 1994.
Inter-American Convention on Violence against Women
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, adopted by the Twenty-fourth Regular Session of the OAS General Assembly, Res. 1257 (XXIV-O/94), Belém do Pará, 9 June 1994.
Inter-American Convention on the Forced Disappearance of Persons
Inter-American Convention on the Forced Disappearance of Persons, adopted by the Twenty-fourth Regular Session of the OAS General Assembly, Res. 1256 (XXIV-O/94), Belém do Pará, 9 June 1994.
Quadripartite Agreement on Georgian Refugees and IDPs
Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons in the Republic of Georgia, between the Abkhaz and Georgian Sides, the Russian Federation and UNHCR, Moscow, 4 April 1994, annexed to Letter dated 5 April 1994 from the permanent representative of Georgia to the UN addressed to the President of the Security Council, UN Doc. S/1994/397, 5 April 1994, Annex II.

1995
Agreement between the Government of Croatia and UNCRO
Agreement between the Government of the Republic of Croatia and the United Nations Peace Forces (UNPF)-United Nations Confidence Restoration Operation (UNCRO) on temporary measures in the areas formerly known as "Sector North" and "Sector South", Zagreb, 6 August 1995, annexed to Letter dated 7 August 1995 from the UN Secretary-General addressed to the President of the UN Security Council, UN Doc. S/1995/666, 7 August 1995, Annex III.
Agreement on Human Rights annexed to the Dayton Accords
General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 6, Agreement on Human Rights, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, Dayton, 22 November 1995.

Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords
General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A, Military Aspects of the Peace Settlement, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, Dayton, 22 November 1995.

Agreement on Refugees and Displaced Persons annexed to the Dayton Accords
General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, Agreement on Refugees and Displaced Persons, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, Dayton, 22 November 1995.

Dayton Accords
General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton, 21 November 1995, signed in Paris, 14 December 1995.

Protocol IV to the CCW
Protocol on Blinding Laser Weapons, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Vienna, 13 October 1995.

US-Germany Agreement concerning Final Benefits to Certain US Nationals Who Were Victims of National Socialist Measures of Persecution
Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, Bonn, 19 September 1995, also known as the Princz Agreement.

1996

Agreement on the Normalization of Relations between Croatia and the FRY
Agreement on Normalization of Relations between the Republic of Croatia and the Federal Republic of Yugoslavia, Belgrade, 23 August 1996.

Amended Protocol II to the CCW
Protocol on Prohibitions on the Use of Mines, Booby-Traps and Other Devices, as amended, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 3 May 1996.

Israel-Lebanon Ceasefire Understanding
Israel-Lebanon Ceasefire Understanding, concluded between the United States of America, Israel and Lebanon, in consultation with Syria, 26 April 1996, also known as the Grapes of Wrath Understanding.

1997

Agreement of the Joint Working Group on Operational Procedures of Return
Agreement of the Joint Working Group on the Operational Procedures of Return between Croatia, UNTAES and UNHCR, Osijek, 23 April 1997, annexed to Letter dated 25 April 1997 from the Permanent Representative of Croatia to the UN addressed to the President of the UN Security Council, UN Doc. S/1997/341, 28 April 1997.

Estonian-Finnish Agreement on War Dead
Agreement on Cooperation in Acknowledging the Memory of the War Victims, concluded between Estonia and Finland, Parnu, 16 August 1997.

Extradition Treaty between Argentina and the US
Extradition Treaty between the Republic of Argentina and the United States of America, Buenos Aires, 10 June 1997.
Ottawa Convention
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, 18 September 1997.

1998
Draft Convention on Forced Disappearance
Draft International Convention on the Protection of all Persons from Forced Disappearance, reprinted in Report of the sessional working group on the administration of justice, UN Doc. E/CN.4/Sub.2/1998/19, 19 August 1998, Annex.
ICC Statute
Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9.

1999
Convention on the Worst Forms of Child Labour
Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182, adopted by the ILO General Conference, Geneva, 17 June 1999.
NATO STANAG 2070
Standardization Agreement 2070, Edition 4, Emergency War Burial Procedures, North Atlantic Treaty Organization, Military Agency for Standardization, Brussels, 6 April 1999.
Second Protocol to the 1954 Hague Convention
Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

2000
Agreement on the Foundation "Remembrance, Responsibility and the Future"
Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future", Berlin, 17 July 2000.
Austrian-Belarussian Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Republik Belarus über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.
Austrian-Czech Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Tschechischen Republik über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.
Austrian-Hungarian Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Republik Ungarn über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-Polish Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Republik Polen über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-Russian Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Russischen Föderation über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 27 November 2000.

Austrian-Ukrainian Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Ukraine über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-US Executive Agreement concerning the Austrian Reconciliation Fund
Agreement between the Austrian Federal Government and the Government of the United States of America concerning the Austrian Fund "Reconciliation, Peace and Cooperation", Vienna, 24 October 2000.

Optional Protocol on Child Trade, Prostitution and Pornography
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by the UN General Assembly, Res. 54/263, 25 May 2000, Annex II.

Optional Protocol on the Involvement of Children in Armed Conflicts
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, adopted by the UN General Assembly, Res. 54/263, 25 May 2000, Annex I.

Peace Agreement between Eritrea and Ethiopia
Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Algiers, 12 December 2000, also known as the Algiers Agreement.

Protocol on Trafficking in Persons
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, adopted by the UN General Assembly, Res. 55/25, 15 November 2000, Annex II.

Protocol 12 to the ECHR
Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the general prohibition of discrimination, Rome, 4 November 2000.

2001

Amendment to Article 1 of the 1980 CCW
Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), Geneva, 21 December 2001.

Annex A to the Austrian-US Agreement concerning the Austrian General Settlement Fund

Joint Settlement Statement on Holocaust Restitution, 17 January 2001, together with Diplomatic Note No. 14 from the US to Austria, Vienna, 23 January 2001 and Annexes A, B and C to the Agreement.

Washington Agreement between France and the US Concerning Payments for Certain Losses Suffered During World War II

Agreement between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II, Washington, 18 January 2001.

2002

SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Kathmandu, 5 January 2002.

Agreement on the Special Court for Sierra Leone

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002, annexed to Letter dated 6 March 2002 from the UN Secretary-General to the President of the Security Council, UN Doc. S/2002/246, 8 March 2002, p. 17.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly, Res. 57/199, 18 December 2002.

Statute of the Special Court for Sierra Leone

Statute of the Special Court for Sierra Leone, annexed to the 2002 Agreement on the Special Court for Sierra Leone, Freetown, 16 January 2002, annexed to Letter dated 6 March 2002 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/2002/246, 8 March 2002, p. 29.

2003

Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights, signed at Ouagadougou on 10 June 1998.

Protocol to the ACHPR on the Rights of Women in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo, 11 July 2003.

STATUS OF RATIFICATIONS
(as of 21 April 2004)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Afghanistan	09.12.1986		26.09.1956			24.01.1983
Albania	20.12.1989		27.05.1957	20.12.1960	20.12.1960	04.10.1991
Algeria	27.01.1992		20.06.1960			12.09.1989
Andorra			17.09.1993			
Angola	08.11.1990		20.09.1984			10.01.1992
Antigua and Barbuda	27.04.1989		06.10.1986			
Argentina	12.05.1969		18.09.1956	22.03.1989		08.08.1986
Armenia			07.06.1993	05.09.1993	05.09.1993	13.09.1993
Australia	23.05.1930		14.10.1958	19.09.1984		10.12.1975
Austria	09.05.1928		27.08.1953	25.03.1964	25.03.1964	10.09.1978
Azerbaijan			01.06.1993	20.09.1993	20.09.1993	13.08.1992
Bahamas			11.07.1975			
Bahrain	09.12.1988		30.11.1971			
Bangladesh	20.05.1989		04.04.1972			05.10.1998
Barbados	16.07.1976		10.09.1968	09.04.2002		05.01.1973
Belarus			03.08.1954	07.05.1957	07.05.1957	12.11.1973
Belgium	04.12.1928		03.09.1952	16.09.1960	16.09.1960	21.04.1983
Belize			29.06.1984			
Benin	09.12.1986		14.12.1961			12.03.1992
Bhutan	19.02.1979		10.01.1991			
Bolivia	13.08.1985		10.12.1976			12.08.1982
Bosnia and Herzegovina			31.12.1992	12.07.1993	12.07.1993	01.09.1993
Botswana			29.03.1968	03.01.2002		
Brazil	28.08.1970	05.08.1936	29.06.1957	12.09.1958	12.09.1958	24.01.1992
Brunei Darussalam			14.10.1991			
Bulgaria	07.03.1934		22.07.1954	07.08.1956	09.10.1958	21.09.1970
Burkina Faso	03.03.1971		07.11.1961	18.12.1969	04.02.1987	04.01.1999
Burundi			27.12.1971			09.05.1990
Cambodia	15.03.1983		08.12.1958	04.04.1962	04.04.1962	26.05.1992
Cameroon	20.07.1989		16.09.1963	12.10.1961	12.10.1961	27.06.1984
Canada	06.05.1930		14.05.1965	11.12.1998		19.05.1976
Cape Verde	15.10.1991		11.05.1984			06.08.1993

(*cont.*)

(*cont.*)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Central African Republic	31.07.1970		01.08.1966			08.05.1981
Chad			05.08.1970			09.06.1995
Chile	20.07.1935	08.09.1936	12.10.1950			10.02.1972
China	13.07.1952		28.12.1956	05.01.2000	05.01.2000	27.03.2001
Colombia		20.02.1937	08.11.1961	18.06.1998	18.06.1998	29.10.1969
Comoros			21.11.1985			
Congo			04.02.1967			05.10.1983
Congo (Dem. Rep. of)			24.02.1961	18.04.1961	18.04.1961	01.11.1976
Cook Islands			11.06.2001			
Costa Rica			15.10.1969	03.06.1998	03.06.1998	29.11.1968
Côte d'Ivoire	27.07.1970		28.12.1961	24.01.1980		26.03.1992
Croatia			11.05.1992	06.07.1992	06.07.1992	12.10.1992
Cuba	24.06.1966	26.08.1935	15.04.1954	26.11.1957	26.11.1957	
Cyprus	12.12.1966		23.05.1962	09.09.1964	09.09.1964	02.04.1969
Czech Republic	16.08.1938		05.02.1993	26.03.1993	26.03.1993	22.02.1993
Denmark	05.05.1930		27.06.1951	26.03.2003	26.03.2003	06.01.1972
Djibouti			06.03.1978			05.11.2002
Dominica			28.09.1981			17.06.1993
Dominican Republic	08.12.1970	02.11.1936	22.01.1958	05.01.1960	21.03.2002	04.01.1978
Ecuador	16.09.1970		11.08.1954	02.10.1956	08.02.1961	06.03.1969
Egypt	16.12.1928		10.11.1952	17.08.1955	17.08.1955	14.01.1982
El Salvador		01.05.1936	17.06.1953	19.07.2001	27.03.2002	30.11.1979
Equatorial Guinea	20.05.1989		24.07.1986	19.11.2003		25.09.1987
Eritrea			14.08.2000			17.04.2001
Estonia	28.08.1931		18.01.1993	04.04.1995		21.10.1991
Ethiopia	07.10.1935		02.10.1969			11.06.1993
Fiji	20.03.1973		09.08.1971			
Finland	26.06.1929		22.02.1955	16.09.1994	16.09.1994	19.08.1975
France	10.05.1926		28.06.1951	07.06.1957	07.06.1957	04.11.1980
Gabon			26.02.1965	04.12.1961	04.12.1961	21.01.1983
Gambia	05.11.1966		20.10.1966			29.12.1978
Georgia			14.09.1993	04.11.1992	04.11.1992	03.05.1994
Germany	25.04.1929		03.09.1954	11.08.1967	11.08.1967	17.12.1973
Ghana	03.05.1967		02.08.1958	25.07.1960	25.07.1960	07.09.2000
Greece	30.05.1931		05.06.1956	09.02.1981	09.02.1981	16.05.1985
Grenada	03.01.1989		13.04.1981			06.09.1991
Guatemala	03.05.1983	16.09.1936	14.05.1952	02.10.1985	19.05.1994	19.05.1988
Guinea			11.07.1984	20.09.1960	11.12.1961	24.01.1978
Guinea-Bissau	20.05.1989		21.02.1974			02.07.1992
Guyana			22.07.1968			15.02.1977
Haiti			11.04.1957			
Holy See	18.10.1966		22.02.1951	24.02.1958	24.02.1958	

(*cont.*)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Honduras			31.12.1965	25.10.2002	25.10.2002	17.02.1981
Hungary	11.10.1952		03.08.1954	17.05.1956	16.08.1956	17.01.1974
Iceland	02.11.1967		10.08.1965			22.08.1979
India	09.04.1930		09.11.1950	16.06.1958	16.06.1958	10.04.1979
Indonesia	20.01.1971		30.09.1958	10.01.1967	26.07.1967	
Iran (Islamic Rep. of)	05.11.1929		20.02.1957	22.06.1959	22.06.1959	24.06.1975
Iraq	08.09.1931		14.02.1956	21.12.1967	21.12.1967	25.01.1971
Ireland	29.08.1930		27.09.1962			08.12.1989
Israel	20.02.1969		06.07.1951	03.10.1957	01.04.1958	03.10.1991
Italy	03.04.1928		17.12.1951	09.05.1958	09.05.1958	15.09.1978
Jamaica	28.07.1970		20.07.1964			03.10.1975
Japan	21.05.1970		21.04.1953			21.06.1979
Jordan	20.07.1977		29.05.1951	02.10.1957	02.10.1957	28.05.1975
Kazakhstan			05.05.1992	14.03.1997	14.03.1997	
Kenya	06.07.1970		20.09.1966			01.05.1972
Kiribati			05.01.1989			
Korea (Dem. People's Rep. of)	04.01.1989		27.08.1957			14.09.1981
Korea (Rep. of)	04.01.1989		16.08.1966			10.04.1990
Kuwait	15.12.1971		02.09.1967	06.06.1969	11.02.1970	21.05.1996
Kyrgyzstan			18.09.1992	03.07.1995		07.10.1994
Lao (People's Dem. Rep.)	20.05.1989		29.10.1956			
Latvia	03.06.1931		24.12.1991	19.12.2003	19.12.2003	14.04.1992
Lebanon	17.04.1969		10.04.1951	01.06.1960	01.06.1960	03.11.1972
Lesotho	10.03.1972		20.05.1968			09.09.1992
Liberia	17.06.1927		29.03.1954			
Libyan Arab Jamahiriya	29.12.1971		22.05.1956	19.11.1957	19.11.1957	15.05.1970
Liechtenstein	06.09.1991		21.09.1950	28.04.1960	28.04.1960	10.12.1998
Lithuania	15.06.1933		03.10.1996	27.07.1998	27.07.1998	20.11.1991
Luxembourg	01.09.1936		01.07.1953	29.09.1961	29.09.1961	18.08.1983
Macedonia			01.09.1993	30.04.1997	30.04.1997	18.01.1994
Madagascar	02.08.1967		18.07.1963	03.11.1961	03.11.1961	22.09.1971
Malawi	14.09.1970		05.01.1968			22.12.1993
Malaysia	10.12.1970		24.08.1962	12.12.1960	12.12.1960	
Maldives	27.12.1966		18.06.1991			
Mali			24.05.1965	18.05.1961	18.05.1961	16.07.1974
Malta	21.09.1964		22.08.1968			13.09.1990
Marshall Islands						
Mauritania			30.10.1962			
Mauritius	12.03.1968		18.08.1970			12.12.1973
Mexico	28.05.1932	02.10.1936	29.10.1952	07.05.1956	07.05.1956	23.03.1981

(*cont.*)

(*cont.*)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Micronesia			19.09.1995			
Moldova (Rep. of)			24.05.1993	09.12.1999	09.12.1999	26.01.1993
Monaco	06.01.1967		05.07.1950	10.12.1957	10.12.1957	28.08.1997
Mongolia	06.12.1968		20.12.1958	04.11.1964		18.11.1974
Morocco	13.10.1970		26.07.1956	30.08.1968	30.08.1968	03.05.1979
Mozambique			14.03.1983			
Myanmar			25.08.1992	10.02.1956	10.02.1956	
Namibia			22.08.1991			28.11.1994
Nauru						
Nepal	09.05.1969		07.02.1964			14.05.1991
Netherlands	30.10.1930		03.08.1954	14.10.1958	14.10.1958	11.12.1978
New Zealand	24.05.1930		02.05.1959			28.12.1978
Nicaragua	05.10.1990		17.12.1953	25.11.1959	25.11.1959	12.03.1980
Niger	05.04.1967		21.04.1964	06.12.1976	06.12.1976	07.03.1986
Nigeria	15.10.1968		20.06.1961	05.06.1961	05.06.1961	29.07.1993
Niue						
Norway	27.07.1932		03.08.1951	19.09.1961	19.09.1961	13.09.1972
Oman			31.01.1974	26.10.1977		
Pakistan	15.04.1960		12.06.1951	27.03.1959	27.03.1959	
Palau			25.06.1996			
Panama	04.12.1970		10.02.1956	17.07.1962	08.03.2001	08.03.1977
Papua New Guinea	02.09.1980		26.05.1976			
Paraguay	22.10.1933		23.10.1961			10.06.1992
Peru	13.08.1985		15.02.1956	21.07.1989	21.07.1989	28.04.1978
Philippines	08.06.1973		06.10.1952			07.06.1974
Poland	04.02.1929		26.11.1954	06.08.1956	06.08.1956	18.03.1977
Portugal	01.07.1930		14.03.1961	04.08.2000		31.07.1978
Qatar	18.10.1976		15.10.1975	31.07.1973		
Romania	23.08.1929		01.06.1954	21.03.1958	21.03.1958	09.12.1974
Russian Federation	05.04.1928		10.05.1954	04.01.1957	04.01.1957	16.10.1973
Rwanda	11.05.1964		05.05.1964	28.12.2000		16.04.1975
Saint Kitts and Nevis	27.04.1989		14.02.1986			
Saint Lucia	21.12.1988		18.09.1981			
Saint Vincent and the Grenadines	24.03.1999		01.04.1981			09.11.1981
Samoa			23.08.1984			
San Marino			29.08.1953	09.02.1956	09.02.1956	18.10.1985
São Tomé and Príncipe			21.05.1976			
Saudi Arabia	27.01.1971		18.05.1963	20.01.1971		
Senegal	15.06.1977		18.05.1963	17.06.1987	17.06.1987	13.02.1978
Seychelles			08.11.1984	08.10.2003		05.05.1992
Sierra Leone	20.03.1967		10.06.1965			23.08.1996
Singapore			27.04.1973			

(*cont.*)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Slovakia	16.08.1938		02.04.1993	31.03.1993	31.03.1993	28.05.1993
Slovenia			26.03.1992	28.10.1992	05.11.1992	06.07.1992
Solomon Islands	01.06.1981		06.07.1981			17.03.1982
Somalia			12.07.1962			24.01.1990
South Africa	24.05.1930		31.03.1952	18.12.2003		
Spain	22.08.1929		04.08.1952	07.07.1960	26.06.1992	27.04.1977
Sri Lanka	20.01.1954		28.02.1959			11.06.1980
Sudan	17.12.1980		23.09.1957	23.07.1970		18.03.1986
Suriname			13.10.1976			28.12.1976
Swaziland	23.07.1991		28.06.1973			26.03.2004
Sweden	25.04.1930		28.12.1953	22.01.1985	22.01.1985	06.12.1971
Switzerland	12.07.1932		31.03.1950	15.05.1962	15.05.1962	18.06.1992
Syrian Arab Republic	17.12.1968		02.11.1953	06.03.1958	06.03.1958	21.04.1969
Tajikistan			13.01.1993	28.08.1992	28.08.1992	04.01.1999
Tanzania (United Rep. of)	22.04.1963		12.12.1962	23.09.1971		11.06.1976
Thailand	06.06.1931		29.12.1954	02.05.1958	02.05.1958	05.09.1999
Timor-Leste			08.05.2003			16.04.2003
Togo	05.04.1971		06.01.1962			24.05.1984
Tonga	19.07.1971		13.04.1978			
Trinidad and Tobago	31.08.1962		24.09.1963			08.12.1978
Tunisia	12.07.1967		04.05.1957	28.01.1981	28.01.1981	18.03.1969
Turkey	05.10.1929		10.02.1954	15.12.1965	15.12.1965	23.09.2003
Turkmenistan			10.04.1992			01.05.1997
Tuvalu			19.02.1981			
Uganda	24.05.1965		18.05.1964			21.01.1987
Ukraine	07.08.2003		03.08.1954	06.02.1957	06.02.1957	12.11.1973
United Arab Emirates			10.05.1972			
United Kingdom	09.04.1930		23.09.1957			20.05.1976
United States of America	10.04.1975	13.07.1935	02.08.1955			
Uruguay	12.04.1977		05.03.1969	24.09.1999	24.09.1999	01.04.1970
Uzbekistan			08.10.1993	21.02.1996		28.09.1995
Vanuatu			27.10.1982			
Venezuela	08.02.1928	11.11.1936	13.02.1956			10.05.1978
Viet Nam	15.12.1980		28.06.1957			24.09.1982
Yemen	17.03.1971		16.07.1970	06.02.1970	06.02.1970	09.02.1987
Yugoslavia	12.04.1929		16.10.2001	11.09.2001	11.09.2001	12.03.2001
Zambia			19.10.1966			10.04.1984
Zimbabwe			07.03.1983	09.06.1998		13.05.1991
Total	133	10	191	109	88	149

Country	1966 ICCPR	1965 Convention on the Elimination of Racial Discrimination	1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Afghanistan	24.01.1983	06.07.1983	22.07.1983		26.03.1975	22.10.1985
Albania	04.10.1991	11.05.1994	19.05.1971	13.06.2002	11.08.1992	
Algeria	12.09.1989	14.02.1972		24.06.1974	22.07.2001	19.12.1991
Andorra						
Angola	10.01.1992			07.11.1991		
Antigua and Barbuda		25.10.1988			29.01.2003	25.10.1988
Argentina	08.08.1986	02.10.1968	26.08.2003	11.01.1973	05.12.1979	20.03.1987
Armenia	23.06.1993	23.06.1993	23.06.1993	05.09.1993	07.06.1994	15.05.2002
Australia	13.08.1980	30.09.1975		30.10.1989	05.10.1977	07.09.1984
Austria	10.09.1978	09.05.1972			10.08.1973	17.01.1990
Azerbaijan	13.08.1992	16.08.1996	16.08.1996	25.08.1999		
Bahamas		05.08.1975		09.10.1997	26.11.1986	
Bahrain		27.03.1990			28.10.1988	
Bangladesh	06.09.2000	11.06.1979		09.12.1987	13.03.1985	03.10.1979
Barbados	05.01.1973	08.11.1972		10.04.2002	16.02.1973	
Belarus	12.11.1973	08.04.1969	08.05.1969	28.04.1988	26.03.1975	07.06.1988
Belgium	21.04.1983	07.08.1975			15.03.1979	12.07.1982
Belize	10.06.1996	14.11.2001		26.01.1990	20.10.1986	
Benin	12.03.1992	30.11.2001			25.04.1975	30.06.1986
Bhutan				26.09.2002	08.06.1978	
Bolivia	12.08.1982	22.09.1970	06.10.1983	04.10.1976	30.10.1975	
Bosnia and Herzegovina	01.09.1993	16.07.1993	01.09.1993	12.07.1993	15.08.1994	
Botswana	08.09.2000	20.02.1974			05.02.1992	
Brazil	24.01.1992	27.03.1968		16.02.1973	27.02.1973	12.10.1984
Brunei Darussalam					31.01.1991	
Bulgaria	21.09.1970	08.08.1966	21.05.1969	15.09.1971	02.08.1972	31.05.1978
Burkina Faso	04.01.1999	18.07.1974		07.04.1987	17.04.1991	
Burundi	09.05.1990	27.10.1977				
Cambodia	26.05.1992	28.11.1983		26.09.1972	09.03.1983	
Cameroon	27.06.1984	24.06.1971	06.10.1972	24.05.1972		
Canada	19.05.1976	14.10.1970		28.03.1978	18.09.1972	11.06.1981
Cape Verde	06.08.1993	03.10.1979			20.10.1977	03.10.1979
Central African Republic	08.05.1981	16.03.1971		01.02.1972		
Chad	09.06.1995	17.08.1977				
Chile	10.02.1972	20.10.1971			22.04.1980	26.04.1994
China		29.12.1981		28.11.1989	15.11.1984	
Colombia	29.10.1969	02.09.1981		24.05.1988	19.12.1983	
Comoros						

(*cont.*)

Country	1966 ICCPR	1965 Convention on the Elimination of Racial Discrimination	1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Congo	05.10.1983	11.07.1988			23.10.1978	
Congo (Dem. Rep. of)	01.11.1976	21.04.1976		23.09.1974	16.09.1975	
Cook Islands						
Costa Rica	29.11.1968	16.01.1967		06.03.1996	17.12.1973	07.02.1996
Côte d'Ivoire	26.03.1992	04.01.1973		30.10.1990		
Croatia	12.10.1992	12.10.1992	12.10.1992	06.07.1992	08.10.1991	
Cuba		15.02.1972	13.09.1972	30.01.1980	21.04.1976	10.04.1978
Cyprus	02.04.1969	21.04.1967		19.10.1979	06.11.1973	12.04.1978
Czech Republic	22.02.1993	22.02.1993	22.02.1993	26.03.1993	05.04.1993	22.02.1993
Denmark	06.01.1972	09.12.1971		26.03.2003	01.03.1973	19.04.1978
Djibouti	05.11.2002					
Dominica	17.06.1993				08.11.1978	09.11.1992
Dominican Republic	04.01.1978	25.05.1983		07.03.1973	23.02.1973	
Ecuador	06.03.1969	22.09.1966		24.03.1971	12.03.1975	
Egypt	14.01.1982	01.05.1967		05.04.1973		01.04.1982
El Salvador	30.11.1979	30.11.1979		20.02.1978	31.12.1991	
Equatorial Guinea	25.09.1987	08.10.2002			16.01.1989	
Eritrea	22.01.2002	31.07.2001				
Estonia	21.10.1991	21.10.1991	21.10.1991	27.10.1995	21.06.1993	
Ethiopia	11.06.1993	23.06.1976			26.05.1975	
Fiji		11.01.1973			01.10.1973	
Finland	19.08.1975	14.07.1970		14.06.1999	04.02.1974	12.05.1978
France	04.11.1980	28.07.1971		07.01.1997	27.09.1984	
Gabon	21.01.1983	29.02.1980		29.08.2003		
Gambia	22.03.1979	29.12.1978	29.12.1978		21.11.1991	
Georgia	03.05.1994	02.06.1999	31.03.1995	04.11.1992	22.05.1996	
Germany	17.12.1973	16.05.1969			07.04.1983	24.05.1983
Ghana	07.09.2000	08.09.1966	07.09.2000		06.06.1975	22.06.1978
Greece	05.05.1997	18.06.1970		05.06.1981	10.12.1975	23.08.1983
Grenada	06.09.1991			10.09.1992	22.10.1986	
Guatemala	05.05.1992	18.01.1983		14.01.1985	19.09.1973	21.03.1988
Guinea	24.01.1978	14.03.1977	07.06.1971	18.03.1979		
Guinea-Bissau					20.08.1976	
Guyana	15.02.1977	15.02.1977				
Haiti	06.02.1991	19.12.1972				
Holy See		01.05.1969			04.01.2002	

(*cont.*)

(*cont.*)

Country	1966 ICCPR	1965 Convention on the Elimination of Racial Discrimination	1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Honduras	25.08.1997	10.10.2002		19.03.1979	14.03.1979	
Hungary	17.01.1974	04.05.1967	24.06.1969	23.10.1978	27.12.1972	19.04.1978
Iceland	22.08.1979	13.03.1967			15.02.1973	
India	10.04.1979	03.12.1968	12.01.1971	24.01.1977	15.07.1974	15.12.1978
Indonesia		25.06.1999			19.02.1992	
Iran (Islamic Rep. of)	24.06.1975	29.08.1968		27.01.1975	22.08.1973	
Iraq	25.01.1971	14.01.1970		12.02.1973	19.06.1991	
Ireland	08.12.1989	29.12.2000			27.10.1972	16.12.1982
Israel	03.10.1991	03.01.1979				
Italy	15.09.1978	05.01.1976		02.10.1978	30.05.1975	27.11.1981
Jamaica	03.10.1975	04.06.1971			13.08.1975	
Japan	21.06.1979	15.12.1995		09.09.2002	18.06.1982	09.06.1982
Jordan	28.05.1975	30.05.1974		15.03.1974	27.06.1975	
Kazakhstan		26.08.1998				
Kenya	01.05.1972	13.09.2001	01.05.1972		07.01.1976	
Kiribati						
Korea (Dem. People's Rep. of)	14.09.1981		08.11.1984	13.05.1983	13.03.1987	08.11.1984
Korea (Rep. of)	10.04.1990	05.12.1978		14.02.1983	25.06.1987	02.12.1986
Kuwait	21.05.1996	15.10.1968	07.03.1995	22.06.1972	26.07.1972	02.01.1980
Kyrgyzstan	07.10.1994	05.09.1997		03.07.1995		
Lao (People's Dem. Rep.)		22.02.1974	28.12.1984		25.04.1973	05.10.1978
Latvia	14.04.1992	14.04.1992	14.04.1992		06.02.1997	
Lebanon	03.11.1972	12.11.1971		25.08.1992	26.03.1975	
Lesotho	09.09.1992	04.11.1971			06.09.1977	
Liberia		05.11.1976				
Libyan Arab Jamahiriya	15.05.1970	03.07.1968	16.05.1989	09.01.1973	19.01.1982	
Liechtenstein	10.12.1998	01.03.2000			06.06.1991	
Lithuania	20.11.1991	10.12.1998	01.02.1996	27.07.1998	10.02.1998	16.04.2002
Luxembourg	18.08.1983	01.05.1978			23.03.1976	
Macedonia	18.01.1994	18.01.1994	18.01.1994	30.04.1997	14.03.1997	
Madagascar	21.06.1971	07.02.1969		21.06.1989		
Malawi	22.12.1993	11.06.1996				05.10.1978
Malaysia					06.10.1991	
Maldives		24.04.1984			02.08.1993	

(*cont.*)

Country	1966 ICCPR	1965 Convention on the Elimination of Racial Discrimination	1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Mali	16.07.1974	16.07.1974		06.04.1987	25.11.2003	
Malta	13.09.1990	27.05.1971			07.04.1975	
Marshall Islands						
Mauritania		13.12.1988		27.04.1977		
Mauritius	12.12.1973	30.05.1972		27.02.1978	11.01.1973	09.12.1992
Mexico	23.03.1981	20.02.1975	15.03.2002	04.10.1972	08.04.1974	
Micronesia						
Moldova (Rep. of)	26.01.1993	26.01.1993	26.01.1993			
Monaco	28.08.1997	27.09.1995			30.04.1999	
Mongolia	18.11.1974	06.08.1969	21.05.1969	23.05.1991	14.09.1972	19.05.1978
Morocco	03.05.1979	18.12.1970		03.02.2003	21.03.2002	
Mozambique	21.07.1993	18.04.1983				
Myanmar						
Namibia	28.11.1994	11.11.1982				
Nauru						
Nepal	14.05.1991	30.01.1971		23.06.1976		
Netherlands	11.12.1978	10.12.1971			22.06.1981	15.04.1983
New Zealand	28.12.1978	22.11.1972			18.12.1972	07.09.1984
Nicaragua	12.03.1980	15.02.1978	03.09.1986	19.04.1977	07.08.1975	
Niger	07.03.1986	27.04.1967		16.10.1972	23.06.1972	17.02.1993
Nigeria	29.07.1993	16.10.1967	01.12.1970	24.01.1972	09.07.1973	
Niue						
Norway	13.09.1972	06.08.1970			01.08.1973	15.02.1979
Oman		02.01.2003		02.06.1978	31.03.1992	
Pakistan		21.09.1966		30.04.1981	03.10.1974	27.02.1986
Palau					03.02.2003	
Panama	08.03.1977	16.08.1967		13.08.1973	20.03.1974	13.05.2003
Papua New Guinea		27.01.1982			27.10.1980	28.10.1980
Paraguay	10.06.1992	18.08.2003			09.06.1976	
Peru	28.04.1978	29.09.1971	11.08.2003	24.10.1979	05.06.1985	
Philippines	23.10.1986	15.09.1967	15.05.1973		21.05.1973	
Poland	18.03.1977	05.12.1968	14.02.1969	31.01.1974	25.01.1973	08.06.1978
Portugal	15.06.1978	24.08.1982		09.12.1985	15.05.1975	
Qatar		22.07.1976		20.04.1977	17.04.1975	
Romania	09.12.1974	15.09.1970	15.09.1969	06.12.1993	26.07.1979	06.05.1983
Russian Federation	16.10.1973	04.02.1969	22.04.1969	28.04.1988	26.03.1975	30.05.1978

(*cont.*)

(*cont.*)

Country	1966 ICCPR	1965 Convention on the Elimination of Racial Discrimination	1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Rwanda	16.04.1975	16.04.1975	16.04.1975	25.09.2001	20.05.1975	
Saint Kitts and Nevis					02.04.1991	
Saint Lucia		14.02.1990			26.11.1986	27.05.1993
Saint Vincent and the Grenadines	09.11.1981	09.11.1981	09.11.1981		13.05.1999	27.04.1999
Samoa						
San Marino	18.10.1985	12.03.2002			11.03.1975	
São Tomé and Príncipe					24.08.1979	05.10.1979
Saudi Arabia		23.09.1997		08.09.1976	24.05.1972	
Senegal	13.02.1978	19.04.1972		09.12.1984	26.03.1975	
Seychelles	05.05.1992	07.03.1978			11.10.1979	
Sierra Leone	23.08.1996	02.08.1967			29.06.1976	
Singapore					02.12.1975	
Slovakia	28.05.1993	28.05.1993	28.05.1993	31.03.1993	17.05.1993	28.05.1993
Slovenia	06.07.1992	06.07.1992	06.07.1992	05.11.1992	07.04.1992	
Solomon Islands		17.03.1982			17.06.1981	19.06.1981
Somalia	24.01.1990	26.08.1975				
South Africa	10.12.1998	10.12.1998		18.12.2003	03.11.1975	
Spain	27.04.1977	13.09.1968		10.01.1986	20.06.1979	19.07.1978
Sri Lanka	11.06.1980	18.02.1982		07.04.1981	18.11.1986	25.04.1978
Sudan	18.03.1986	21.03.1977			17.10.2003	
Suriname	28.12.1976	15.03.1984			06.01.1993	
Swaziland	26.03.2004	07.04.1969			18.06.1991	
Sweden	06.12.1971	06.12.1971		13.01.2003	05.02.1976	27.04.1984
Switzerland	18.06.1992	29.11.1994		03.10.2003	04.05.1976	05.08.1988
Syrian Arab Republic	21.04.1969	21.04.1969		21.02.1975		
Tajikistan	04.01.1999	11.01.1995		28.08.1992		12.10.1999
Tanzania (United Rep. of)	11.06.1976	27.10.1972		02.08.1977		
Thailand	29.10.1996	28.01.2003			28.05.1975	
Timor-Leste	18.09.2003	16.04.2003			07.05.2003	
Togo	24.05.1984	01.09.1972			10.11.1976	
Tonga		16.02.1972			28.09.1976	

(*cont.*)

Country	1966 ICCPR	1965 Convention on the Elimination of Racial Discrimination	1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Trinidad and Tobago	21.12.1978	04.10.1973				
Tunisia	18.03.1969	13.01.1967	15.06.1972	10.03.1975	06.06.1973	11.05.1978
Turkey	23.09.2003	16.09.2002		21.04.1981	04.11.1974	
Turkmenistan	01.05.1997	29.09.1994			11.01.1996	
Tuvalu						
Uganda	21.06.1995	21.11.1980			12.05.1992	
Ukraine	12.11.1973	07.03.1969	19.06.1969	28.04.1988	26.03.1975	13.06.1978
United Arab Emirates		20.06.1974				
United Kingdom	20.05.1976	07.03.1969		01.08.2002	26.03.1975	16.05.1978
United States of America	08.06.1992	21.10.1994		02.09.1983	26.03.1975	17.01.1980
Uruguay	01.04.1970	30.08.1968	21.09.2001	09.08.1977	06.04.1981	16.09.1993
Uzbekistan	28.09.1995	28.09.1995		15.03.1996	11.01.1996	26.05.1993
Vanuatu					12.10.1990	
Venezuela	10.05.1978	10.10.1967			18.10.1978	
Viet Nam	24.09.1982	09.06.1982	06.05.1983		20.06.1980	26.08.1980
Yemen	09.02.1987	18.10.1972	09.02.1987		01.06.1979	20.07.1977
Yugoslavia	12.03.2001	12.03.2001	12.03.2001	11.09.2001	13.06.2001	
Zambia	10.04.1984	04.02.1972		21.06.1985		
Zimbabwe	13.05.1991	13.05.1991			05.11.1990	
Total	152	169	48	103	151	69

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrimination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Afghanistan			05.03.2003				
Albania	16.07.1993	16.07.1993	11.05.1994	28.08.2002	28.08.2002	28.08.2002	28.08.2002
Algeria	16.08.1989	16.08.1989	22.05.1996				
Andorra			15.01.1997				
Angola	20.09.1984		17.09.1986				
Antigua and Barbuda	06.10.1986	06.10.1986	01.08.1989				
Argentina	26.11.1986	26.11.1986	15.07.1985	02.10.1995	02.10.1995	29.09.1995	29.09.1995
Armenia	07.06.1993	07.06.1993	13.09.1993				
Australia	21.06.1991	21.06.1991	28.07.1983	29.09.1983	29.09.1983	29.09.1983	29.09.1983
Austria	13.08.1982	13.08.1982	31.03.1982	14.03.1983	14.03.1983	14.03.1983	14.03.1983
Azerbaijan			10.07.1995				
Bahamas	10.04.1980	10.04.1980	08.10.1993				
Bahrain	30.10.1986	30.10.1986	18.06.2002				
Bangladesh	08.09.1980	08.09.1980	06.11.1984	06.09.2000	06.09.2000	06.09.2000	06.09.2000
Barbados	19.02.1990	19.02.1990	16.10.1980				
Belarus	23.10.1989	23.10.1989	04.02.1981	23.06.1982	23.06.1982	23.06.1982	23.06.1982
Belgium	20.05.1986	20.05.1986	10.07.1985	07.02.1995	07.02.1995	07.02.1995	07.02.1995
Belize	29.06.1984	29.06.1984	16.05.1990				
Benin	28.05.1986	28.05.1986	12.03.1992	27.03.1989	27.03.1989		27.03.1989
Bhutan			31.08.1981				
Bolivia	08.12.1983	08.12.1983	08.06.1990	21.09.2001	21.09.2001	21.09.2001	21.09.2001
Bosnia and Herzegovina	31.12.1992	31.12.1992	01.09.1993	01.09.1993	01.09.1993	01.09.1993	01.09.1993
Botswana	23.05.1979	23.05.1979	13.08.1996				
Brazil	05.05.1992	05.05.1992	01.02.1984	03.10.1995	03.10.1995	03.10.1995	03.10.1995
Brunei Darussalam	14.10.1991	14.10.1991					
Bulgaria	26.09.1989	26.09.1989	08.02.1982	15.10.1982	15.10.1982	15.10.1982	15.10.1982
Burkina Faso	20.10.1987	20.10.1987	14.10.1987	26.11.2003	26.11.2003	26.11.2003	26.11.2003
Burundi	10.06.1993	10.06.1993	08.01.1992				
Cambodia	14.01.1998	14.01.1998	15.10.1992	25.03.1997	25.03.1997	25.03.1997	25.03.1997
Cameroon	16.03.1984	16.03.1984	23.08.1994				
Canada	20.11.1990	20.11.1990	10.12.1981	24.06.1994	24.06.1994	24.06.1994	24.06.1994
Cape Verde	16.03.1995	16.03.1995	05.12.1980	16.09.1997	16.09.1997	16.09.1997	16.09.1997
Central African Republic	17.07.1984	17.07.1984	21.06.1991				
Chad	17.01.1997	17.01.1997	09.06.1995				
Chile	24.04.1991	24.04.1991	07.12.1989	15.10.2003	15.10.2003		15.10.2003
China	14.09.1983	14.09.1983	04.11.1980	07.04.1982	07.04.1982	07.04.1982	07.04.1982
Colombia	01.09.1993	14.08.1995	19.01.1982	06.03.2000	06.03.2000	06.03.2000	06.03.2000
Comoros	21.11.1985	21.11.1985	31.10.1994				

(*cont.*)

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrim-ination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Congo	10.11.1983	10.11.1983	26.07.1982				
Congo (Dem. Rep. of)	03.06.1982	12.12.2002	17.10.1986				
Cook Islands	07.05.2002	07.05.2002					
Costa Rica	15.12.1983	15.12.1983	04.04.1986	17.12.1998	17.12.1998	17.12.1998	17.12.1998
Côte d'Ivoire	20.09.1989	20.09.1989	18.12.1995				
Croatia	11.05.1992	11.05.1992	09.09.1992	02.12.1993	02.12.1993	02.12.1993	02.12.1993
Cuba	25.11.1982	23.06.1999	17.07.1980	02.03.1987	02.03.1987	02.03.1987	02.03.1987
Cyprus	01.06.1979	18.03.1996	23.07.1985	12.12.1988	12.12.1988	12.12.1988	12.12.1988
Czech Republic	05.02.1993	05.02.1993	22.02.1993	22.02.1993	22.02.1993	22.02.1993	22.02.1993
Denmark	17.06.1982	17.06.1982	21.04.1983	07.07.1982	07.07.1982	07.07.1982	07.07.1982
Djibouti	08.04.1991	08.04.1991	02.12.1998	29.07.1996	29.07.1996	29.07.1996	29.07.1996
Dominica	25.04.1996	25.04.1996	15.09.1980				
Dominican Republic	26.05.1994	26.05.1994	02.09.1982				
Ecuador	10.04.1979	10.04.1979	09.11.1981	04.05.1982	04.05.1982	04.05.1982	04.05.1982
Egypt	09.10.1992	09.10.1992	18.09.1981				
El Salvador	23.11.1978	23.11.1978	19.08.1981	26.01.2000	26.01.2000	26.01.2000	26.01.2000
Equatorial Guinea	24.07.1986	24.07.1986	23.10.1984				
Eritrea			05.09.1995				
Estonia	18.01.1993	18.01.1993	21.10.1991	20.04.2000	20.04.2000		20.04.2000
Ethiopia	08.04.1994	08.04.1994	10.09.1981				
Fiji			28.08.1995				
Finland	07.08.1980	07.08.1980	04.09.1986	08.05.1982	08.05.1982	08.05.1982	08.05.1982
France	11.04.2001	24.02.1984	14.12.1983	04.03.1988	04.03.1988	04.03.1988	18.07.2002
Gabon	08.04.1980	08.04.1980	21.01.1983				
Gambia	12.01.1989	12.01.1989	16.04.1993				
Georgia	14.09.1993	14.09.1993	26.10.1994	29.04.1996	29.04.1996	29.04.1996	29.04.1996
Germany	14.02.1991	14.02.1991	10.07.1985	25.11.1992	25.11.1992	25.11.1992	25.11.1992
Ghana	28.02.1978	28.02.1978	02.01.1986				
Greece	31.03.1989	15.02.1993	07.06.1983	28.01.1992	28.01.1992	28.01.1992	28.01.1992
Grenada	23.09.1998	23.09.1998	30.08.1990				
Guatemala	19.10.1987	19.10.1987	12.08.1982	21.07.1983	21.07.1983	21.07.1983	21.07.1983
Guinea	11.07.1984	11.07.1984	09.08.1982				
Guinea-Bissau	21.10.1986	21.10.1986	23.08.1985				
Guyana	18.01.1988	18.01.1988	17.07.1980				

(*cont.*)

(*cont.*)

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrimination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Haiti			20.07.1981				
Holy See	21.11.1985	21.11.1985		22.07.1997	22.07.1997	22.07.1997	22.07.1997
Honduras	16.02.1995	16.02.1995	03.03.1983	30.10.2003	30.10.2003	30.10.2003	30.10.2003
Hungary	12.04.1989	12.04.1989	22.12.1980	14.06.1982	14.06.1982	14.06.1982	14.06.1982
Iceland	10.04.1987	10.04.1987	18.06.1985				
India			09.07.1993	01.03.1984	01.03.1984	01.03.1984	01.03.1984
Indonesia			13.09.1984				
Iran (Islamic Rep. of)							
Iraq			13.08.1986				
Ireland	19.05.1999	19.05.1999	23.12.1985	13.03.1995	13.03.1995	13.03.1995	13.03.1995
Israel			03.10.1991	22.03.1995	22.03.1995	22.03.1995	
Italy	27.02.1986	27.02.1986	10.06.1985	20.01.1995	20.01.1995	20.01.1995	20.01.1995
Jamaica	29.07.1986	29.07.1986	19.10.1984				
Japan			25.06.1985	09.06.1982	09.06.1982	09.06.1982	09.06.1982
Jordan	01.05.1979	01.05.1979	01.07.1992	19.10.1995	19.10.1995		19.10.1995
Kazakhstan	05.05.1992	05.05.1992	26.08.1998				
Kenya	23.02.1999	23.02.1999	09.03.1984				
Kiribati			17.03.2004				
Korea (Dem. People's Rep. of)	09.03.1988		27.02.2001				
Korea (Rep. of)	15.01.1982	15.01.1982	27.12.1984	09.05.2001	09.05.2001		
Kuwait	17.01.1985	17.01.1985	02.09.1994				
Kyrgyzstan	18.09.1992	18.09.1992	10.02.1997				
Lao (People's Dem. Rep.)	18.11.1980	18.11.1980	14.08.1981	03.01.1983	03.01.1983	03.01.1983	03.01.1983
Latvia	24.12.1991	24.12.1991	14.04.1992	04.01.1993	04.01.1993	04.01.1993	04.01.1993
Lebanon	23.07.1997	23.07.1997	16.04.1997				
Lesotho	20.05.1994	20.05.1994	22.08.1995	06.09.2000	06.09.2000	06.09.2000	06.09.2000
Liberia	30.06.1988	30.06.1988	17.07.1984				
Libyan Arab Jamahiriya	07.06.1978	07.06.1978	16.05.1989				
Liechtenstein	10.08.1989	10.08.1989	22.12.1995	16.08.1989	16.08.1989	16.08.1989	16.08.1989
Lithuania	13.07.2000	13.07.2000	18.01.1994	03.06.1998	03.06.1998		03.06.1998
Luxembourg	29.08.1989	29.08.1989	02.02.1989	21.05.1996	21.05.1996	21.05.1996	21.05.1996
Macedonia	01.09.1993	01.09.1993	18.01.1994	30.12.1996	30.12.1996	30.12.1996	30.12.1996
Madagascar	08.05.1992	08.05.1992	17.03.1989				
Malawi	07.10.1991	07.10.1991	12.03.1987				
Malaysia			05.07.1995				
Maldives	03.09.1991	03.09.1991	01.07.1993	07.09.2000	07.09.2000		07.09.2000

(*cont.*)

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrimination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Mali	08.02.1989	08.02.1989	10.09.1985	24.10.2001	24.10.2001	24.10.2001	24.10.2001
Malta	17.04.1989	17.04.1989	08.03.1991	26.06.1995	26.06.1995	26.06.1995	26.06.1995
Marshall Islands							
Mauritania	14.03.1980	14.03.1980	10.05.2001				
Mauritius	22.03.1982	22.03.1982	09.07.1984	06.05.1996	06.05.1996	06.05.1996	06.05.1996
Mexico	10.03.1983		23.03.1981	11.02.1982	11.02.1982	11.02.1982	11.02.1982
Micronesia	19.09.1995	19.09.1995					
Moldova (Rep. of)	24.05.1993	24.05.1993	01.07.1994	08.09.2000	08.09.2000	08.09.2000	08.09.2000
Monaco	07.01.2000	07.01.2000		12.08.1997	12.08.1997		
Mongolia	06.12.1995	06.12.1995	20.07.1981	08.06.1982	08.06.1982	08.06.1982	08.06.1982
Morocco			21.06.1993	19.03.2002		19.03.2002	
Mozambique	14.03.1983	12.11.2002	21.04.1997				
Myanmar			22.07.1997				
Namibia	17.06.1994	17.06.1994	23.11.1992				
Nauru				12.11.2001	12.11.2001	12.11.2001	12.11.2001
Nepal			22.04.1991				
Netherlands	26.06.1987	26.06.1987	23.07.1991	18.06.1987	18.06.1987	18.06.1987	18.06.1987
New Zealand	08.02.1988	08.02.1988	10.01.1985	18.10.1993	18.10.1993	18.10.1993	18.10.1993
Nicaragua	19.07.1999	19.07.1999	27.10.1981	05.12.2000	05.12.2000		05.12.2000
Niger	08.06.1979	08.06.1979	08.10.1999	10.11.1992	10.11.1992	10.11.1992	10.11.1992
Nigeria	10.10.1988	10.10.1988	13.06.1985				
Niue							
Norway	14.12.1981	14.12.1981	21.05.1981	07.06.1983	07.06.1983	07.06.1983	07.06.1983
Oman	29.03.1984	29.03.1984					
Pakistan			12.03.1996	01.04.1985	01.04.1985	01.04.1985	01.04.1985
Palau	25.06.1996	25.06.1996					
Panama	18.09.1995	18.09.1995	29.10.1981	26.03.1997	26.03.1997	26.03.1997	26.03.1997
Papua New Guinea			12.01.1995				
Paraguay	30.11.1990	30.11.1990	06.04.1987				
Peru	14.07.1989	14.07.1989	13.09.1982	03.07.1997	03.07.1997		03.07.1997
Philippines		11.12.1986	05.08.1981	15.07.1996	15.07.1996	15.07.1996	15.07.1996
Poland	23.10.1991	23.10.1991	30.07.1980	02.06.1983	02.06.1983	02.06.1983	02.06.1983
Portugal	27.05.1992	27.05.1992	30.07.1980	04.04.1997	04.04.1997	04.04.1997	04.04.1997
Qatar	05.04.1988						
Romania	21.06.1990	21.06.1990	07.01.1982	26.07.1995	26.07.1995	26.07.1995	26.07.1995
Russian Federation	29.09.1989	29.09.1989	23.01.1981	10.06.1982	10.06.1982	10.06.1982	10.06.1982
Rwanda	19.11.1984	19.11.1984	02.03.1981				

(*cont.*)

(*cont.*)

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrim-ination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Saint Kitts and Nevis	14.02.1986	14.02.1986	25.04.1985				
Saint Lucia	07.10.1982	07.10.1982	08.10.1982				
Saint Vincent and the Grenadines	08.04.1983	08.04.1983	04.08.1981				
Samoa	23.08.1984	23.08.1984	25.09.1992				
San Marino	05.04.1994	05.04.1994	10.12.2003				
São Tomé and Príncipe	05.07.1996	05.07.1996	03.06.2003				
Saudi Arabia	21.08.1987	28.11.2001	07.09.2000				
Senegal	07.05.1985	07.05.1985	05.02.1985	29.11.1999			29.11.1999
Seychelles	08.11.1984	08.11.1984	05.05.1992	08.06.2000	08.06.2000	08.06.2000	08.06.2000
Sierra Leone	21.10.1986	21.10.1986	11.11.1988				
Singapore			05.10.1995				
Slovakia	02.04.1993	02.04.1993	28.05.1993	28.05.1993	28.05.1993	28.05.1993	28.05.1993
Slovenia	26.03.1992	26.03.1992	06.07.1992	06.07.1992	06.07.1992	06.07.1992	06.07.1992
Solomon Islands	19.09.1988	19.09.1988	06.05.2002				
Somalia							
South Africa	21.11.1995	21.11.1995	15.12.1995	13.09.1995	13.09.1995	13.09.1995	13.09.1995
Spain	21.04.1989	21.04.1989	05.01.1984	29.12.1993	29.12.1993	29.12.1993	29.12.1993
Sri Lanka			05.10.1981				
Sudan							
Suriname	16.12.1985	16.12.1985	01.03.1993				
Swaziland	02.11.1995	02.11.1995	26.03.2004				
Sweden	31.08.1979	31.08.1979	02.07.1980	07.07.1982	07.07.1982	07.07.1982	07.07.1982
Switzerland	17.02.1982	17.02.1982	27.03.1997	20.08.1982	20.08.1982	20.08.1982	20.08.1982
Syrian Arab Republic	14.11.1983		28.03.2003				
Tajikistan	13.01.1993	13.01.1993	26.10.1993	12.10.1999	12.10.1999	12.10.1999	12.10.1999
Tanzania (United Rep. of)	15.02.1983	15.02.1983	20.08.1985				
Thailand			09.08.1985				
Timor-Leste			16.04.2003				
Togo	21.06.1984	21.06.1984	26.09.1983	04.12.1995	04.12.1995	04.12.1995	04.12.1995
Tonga	20.01.2003	20.01.2003					

(*cont.*)

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrim-ination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Trinidad and Tobago	20.07.2001	20.07.2001	12.01.1990				
Tunisia	09.08.1979	09.08.1979	20.09.1985	15.05.1987	15.05.1987	15.05.1987	15.05.1987
Turkey			20.12.1985				
Turkmenistan	10.04.1992	10.04.1992	01.05.1997	19.03.2004	19.03.2004	19.03.2004	
Tuvalu			06.10.1999				
Uganda	13.03.1991	13.03.1991	22.07.1985	14.11.1995	14.11.1995	14.11.1995	14.11.1995
Ukraine	25.01.1990	25.01.1990	12.03.1981	23.06.1982	23.06.1982	23.06.1982	23.06.1982
United Arab Emirates	09.03.1983	09.03.1983					
United Kingdom	28.01.1998	28.01.1998	07.04.1986	13.02.1995	13.02.1995	13.02.1995	13.02.1995
United States of America				24.03.1995	24.03.1995	24.03.1995	
Uruguay	13.12.1985	13.12.1985	09.10.1981	06.10.1994	06.10.1994	06.10.1994	06.10.1994
Uzbekistan	08.10.1993	08.10.1993	19.07.1995	29.09.1997	29.09.1997	29.09.1997	29.09.1997
Vanuatu	28.02.1985	28.02.1985	08.09.1995				
Venezuela	23.07.1998	23.07.1998	02.05.1983				
Viet Nam	19.10.1981		17.02.1982				
Yemen	17.04.1990	17.04.1990	30.05.1984				
Yugoslavia	16.10.2001	16.10.2001	12.03.2001	12.03.2001	12.03.2001	12.03.2001	12.03.2001
Zambia	04.05.1995	04.05.1995	21.06.1985				
Zimbabwe	19.10.1992	19.10.1992	13.05.1991				
Total	161	156	177	94	92	83	88

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Convention on the Safety of UN Personnel
Afghanistan	01.04.1987		28.03.1994	19.09.2002	24.09.2003	
Albania	11.05.1984		27.02.1992	05.01.1994	11.05.1994	30.03.2001
Algeria	12.09.1989		16.04.1993	14.08.1995	14.08.1995	
Andorra			02.01.1996		27.02.2003	
Angola			05.12.1990	01.04.1998		
Antigua and Barbuda	19.07.1993		05.10.1993	09.03.1993		
Argentina	24.09.1986		04.12.1990	22.11.1994	02.10.1995	06.01.1997
Armenia	13.09.1993		23.06.1993	14.05.1993	27.01.1995	
Australia	08.08.1989		17.12.1990	18.06.1993	06.05.1994	04.12.2000
Austria	29.07.1987		06.08.1992	18.08.1994	17.08.1995	06.09.2000
Azerbaijan	16.08.1996	04.12.1997	13.08.1992	03.08.2000	29.02.2000	03.08.2000
Bahamas			20.02.1991	02.09.1993		
Bahrain	06.03.1998		13.02.1992	30.08.1996	28.04.1997	
Bangladesh	05.10.1998		03.08.1990	03.05.1994	25.04.1997	22.09.1999
Barbados		10.07.1992	09.10.1990	10.12.1993		
Belarus	13.03.1987	28.05.1997	01.10.1990	08.09.1993	11.07.1996	29.11.2000
Belgium	25.06.1999	31.05.2002	16.12.1991	22.11.1996	27.01.1997	19.02.2002
Belize	17.03.1986		02.05.1990	30.12.1993	01.12.2003	
Benin	12.03.1992		03.08.1990	30.06.1994	14.05.1998	
Bhutan			01.08.1990	25.08.1995		
Bolivia	12.04.1999		26.06.1990	03.10.1994	14.08.1998	
Bosnia and Herzegovina	01.09.1993		01.09.1993	26.08.2002	25.02.1997	11.08.2003
Botswana	08.09.2000		14.03.1995	12.10.1995	31.08.1998	01.03.2000
Brazil	28.09.1989		24.09.1990	28.02.1994	13.03.1996	06.09.2000
Brunei Darussalam			27.12.1995		28.07.1997	20.03.2002
Bulgaria	16.12.1986		03.06.1991	17.04.1996	10.08.1994	04.06.1998
Burkina Faso	04.01.1999		31.08.1990	02.09.1993	08.07.1997	
Burundi	18.02.1993		19.10.1990	15.04.1997	04.09.1998	
Cambodia	15.10.1992		15.10.1992	09.02.1995		
Cameroon	19.12.1986	26.01.1996	11.01.1993	19.10.1994	16.09.1996	
Canada	24.06.1987		13.12.1991	04.12.1992	26.09.1995	03.04.2002
Cape Verde	04.06.1992		04.06.1992	29.03.1995	10.10.2003	
Central African Republic			23.04.1992	15.03.1995		
Chad	09.06.1995		02.10.1990	07.06.1994	13.02.2003	
Chile	30.09.1988		13.08.1990	09.09.1994	12.07.1996	27.08.1997
China	04.10.1988		02.03.1992	05.01.1993	25.04.1997	
Colombia	08.12.1987		28.01.1991	28.11.1994	05.04.2000	
Comoros			22.06.1993	29.09.1994		
Congo	30.07.2003		14.10.1993	01.08.1996		
Congo (Dem. Rep. of)	18.03.1996		27.09.1990	03.12.1994		
Cook Islands			06.06.1997	20.04.1993	15.07.1994	
Costa Rica	11.11.1993	20.09.2001	21.08.1990	26.08.1994	31.05.1996	17.10.2000

(*cont.*)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Convention on the Safety of UN Personnel
Côte d'Ivoire	18.12.1995		04.02.1991	29.11.1994	18.12.1995	13.03.2002
Croatia	12.10.1992	27.03.2000	12.10.1992	07.10.1996	23.05.1995	27.03.2000
Cuba	17.05.1995		21.08.1991	08.03.1994	29.04.1997	
Cyprus	18.07.1991	08.07.1993	07.02.1991	10.07.1996	28.08.1998	01.07.2003
Czech Republic	22.02.1993		22.02.1993	03.12.1993	06.03.1996	13.06.1997
Denmark	27.05.1987		19.07.1991	21.12.93	13.07.1995	11.04.1995
Djibouti	05.11.2002		06.12.1990	01.09.1994		
Dominica			13.03.1991	06.04.1994	12.02.2001	
Dominican Republic			11.06.1991	25.11.1996		
Ecuador	30.03.1988		23.03.1990	23.02.1993	06.09.1995	28.12.2000
Egypt	25.06.1986		06.07.1990	02.06.1994		
El Salvador	17.06.1996		10.07.1990	08.09.1994	30.10.1995	
Equatorial Guinea	08.10.2002		15.06.1992	06.12.1994	25.04.1997	
Eritrea			03.08.1994	21.03.1996	14.02.2000	
Estonia	21.10.1991		21.10.1991	27.07.1994	26.05.1999	
Ethiopia	14.03.1994		14.05.1991	05.04.1994	13.05.1996	
Fiji			13.08.1993	25.02.1993	20.01.1993	01.04.1999
Finland	30.08.1989		20.06.1991	27.07.1994	07.02.1995	05.01.2001
France	18.02.1986		07.08.1990	01.07.1994	02.03.1995	09.06.2000
Gabon	08.09.2000		09.02.1994	14.03.1997	08.09.2000	
Gambia			08.08.1990	10.06.1994	19.05.1998	
Georgia	26.10.1994	08.06.1995	02.06.1994	02.06.1994	27.11.1995	
Germany	01.10.1990		06.03.1992	21.12.1993	12.08.1994	22.04.1997
Ghana	07.09.2000		05.02.1990	29.08.1994	09.07.1997	
Greece	06.10.1988		11.05.1993	04.08.1994	22.12.1994	03.08.2000
Grenada			05.11.1990	11.08.1994		
Guatemala	05.01.1990		06.06.1990	10.07.1995	12.02.2003	
Guinea	10.10.1989	18.07.2003	13.07.1990	07.05.1993	09.06.1997	07.09.2000
Guinea-Bissau			20.08.1990	27.10.1995		
Guyana	19.05.1988		14.01.1991	29.08.1994	12.09.1997	
Haiti			08.06.1995	25.09.1996		
Holy See	26.06.2002		20.04.1990		12.05.1999	
Honduras	05.12.1996		10.08.1990	31.07.1995		
Hungary	15.04.1987		07.10.1991	24.02.1994	31.10.1996	13.07.1999
Iceland	23.10.1996		28.10.1992	12.09.1994	28.04.1997	10.05.2001
India			11.12.1992	18.02.1994	03.09.1996	
Indonesia	28.10.1998		05.09.1990	23.08.1994	12.11.1998	
Iran (Islamic Rep. of)			13.07.1994	06.08.1996	03.11.1997	
Iraq			15.06.1994			
Ireland	11.04.2002		28.09.1992	22.03.1996	24.06.1996	28.03.2002
Israel	03.10.1991		03.10.1991	07.08.1995		
Italy	12.01.1989	21.08.1995	05.09.1991	15.04.1994	08.12.1995	05.04.1999

(*cont.*)

(*cont.*)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Convention on the Safety of UN Personnel
Jamaica			14.05.1991	06.01.1995	08.09.2000	08.09.2000
Japan	29.06.1999		22.04.1994	28.05.1993	15.09.1995	06.06.1995
Jordan	13.11.1991		24.05.1991	12.11.1993	29.10.1997	
Kazakhstan	26.08.1998		12.08.1994	06.09.1994	23.03.2000	
Kenya	21.02.1997		30.07.1990	26.07.1994	25.04.1997	
Kiribati			11.12.1995	16.08.1994	07.09.2000	08.10.2003
Korea (Dem. People's Rep. of)			21.09.1990	26.10.1994		
Korea (Republic of)	09.01.1995		20.11.1991	03.10.1994	28.04.1997	08.12.1997
Kuwait	08.03.1996		21.10.1991	02.08.2002	28.05.1997	
Kyrgyzstan	05.09.1997		07.10.1994	06.08.1996	29.09.2003	
Lao (People's Dem. Rep.)			08.05.1991	20.09.1996	25.02.1997	22.08.2002
Latvia	14.04.1992		14.04.1992	14.12.1995	23.07.1996	
Lebanon	05.10.2000		14.05.1991	15.12.1994		25.09.2003
Lesotho	12.11.2001		10.03.1992	10.01.1995	07.12.1994	06.09.2000
Liberia			04.06.1993	08.11.2000		
Libyan Arab Jamahiriya	16.05.1989	22.09.2000	15.04.1993	12.07.2001	06.01.2004	22.09.2000
Liechtenstein	02.11.1990		22.12.1995	19.11.1997	24.11.1999	11.12.2000
Lithuania	01.02.1996		31.01.1992	01.02.1996	15.04.1998	08.09.2000
Luxembourg	29.09.1987		07.03.1994	09.05.1994	15.04.1997	30.07.2001
Macedonia	12.12.1994		02.12.1993	02.12.1997	20.06.1997	06.03.2002
Madagascar			19.03.1991	04.03.1996		
Malawi	11.06.1996		02.01.1991	02.02.1994	11.06.1998	
Malaysia			17.02.1995	24.06.1994	20.04.2000	
Maldives	20.04.2004	11.09.1991	11.02.1991	09.11.1992	31.05.1994	
Mali	26.02.1999	12.04.2002	20.09.1990	29.03.1995	28.04.1997	
Malta	13.09.1990		30.09.1990	29.12.2000	28.04.1997	
Marshall Islands			04.10.1993	08.10.1992		
Mauritania		09.02.1998	16.05.1991	16.08.1996	09.02.1998	
Mauritius	09.12.1992		26.07.1990	04.09.1992	09.02.1993	
Mexico	23.01.1986		21.09.1990	11.03.1993	29.08.1994	
Micronesia			05.05.1993	20.06.1994	21.06.1999	
Moldova (Rep. of)	28.11.1995		26.01.1993	20.10.1995	08.07.1996	
Monaco	06.12.1991		21.06.1993	20.11.1992	01.06.1995	05.03.1999
Mongolia	24.01.2002		05.07.1990	30.09.1993	17.01.1995	25.02.2004
Morocco	21.06.1993		21.06.1993	21.08.1995	28.12.1995	
Mozambique	14.09.1999		26.04.1994	25.08.1995	15.08.2000	
Myanmar			15.07.1991	25.11.1994		
Namibia	28.11.1994		30.09.1990	16.05.1997	24.11.1995	
Nauru			27.07.1994	11.11.1993	12.11.2001	12.11.2001
Nepal	14.05.1991		14.09.1990	23.11.1993	18.11.1997	08.09.2000

(*cont.*)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Convention on the Safety of UN Personnel
Netherlands	21.12.1988		06.02.1995	12.07.1994	30.06.1995	07.02.2002
New Zealand	10.12.1989		06.04.1993	16.09.1993	15.07.1996	16.12.1998
Nicaragua			05.10.1990	20.11.1995	05.10.1999	
Niger	05.10.1998		30.09.1990	25.07.1995	09.04.1997	
Nigeria	28.06.2001		19.04.1991	29.08.1994	20.05.1999	
Niue			20.12.1995	28.02.1996		
Norway	09.07.1986		08.01.1991	09.07.1993	07.04.1994	03.07.1995
Oman			09.12.1996	08.02.1995	08.02.1995	
Pakistan			12.11.1990	26.07.1994	28.10.1997	
Palau			04.08.1995	06.01.1999	03.02.2003	
Panama	24.08.1987		12.12.1990	17.01.1995	07.10.1998	04.04.1996
Papua New Guinea			02.03.1993	16.03.1993	17.04.1996	
Paraguay	12.03.1990		25.09.1990	24.02.1994	01.12.1994	
Peru	07.07.1988		04.09.1990	07.06.1993	20.07.1995	
Philippines	18.06.1986		21.08.1990	08.10.1993	11.12.1996	07.06.1997
Poland	26.07.1989		07.06.1991	18.01.1996	23.08.1995	22.05.2000
Portugal	09.02.1989		21.09.1990	21.12.1993	10.09.1996	14.10.1998
Qatar	11.01.2000	26.03.1999	03.04.1995	21.08.1996	03.09.1997	
Romania	18.12.1990		28.09.1990	17.08.1994	15.02.1995	29.12.1997
Russian Federation	03.03.1987		16.08.1990	05.04.1995	05.11.1997	25.06.2001
Rwanda			24.01.1991	29.05.1996	31.03.2004	
Saint Kitts and Nevis			24.07.1990	07.01.1993		
Saint Lucia			16.06.1993	28.07.1993	09.04.1997	
Saint Vincent and the Grenadines	01.08.2001		26.10.1993	03.06.1996	18.09.2002	
Samoa			29.11.1994	09.02.1994	27.09.2002	
San Marino			25.11.1991	28.10.1994	10.12.1999	
São Tomé and Príncipe			14.05.1991	29.09.1999	09.09.2003	
Saudi Arabia	23.09.1997	14.04.1997	26.01.1996	03.10.2001	09.08.1996	
Senegal	21.08.1986	09.06.1999	31.07.1990	17.10.1994	20.07.1998	09.06.1999
Seychelles	05.05.1992	12.03.1990	07.09.1990	22.09.1992	07.04.1993	
Sierra Leone	25.04.2001		18.06.1990	12.12.1994		
Singapore			05.10.1995	21.12.1995	21.05.1997	26.03.1996
Slovakia	28.05.1993		28.05.1993	25.08.1994	27.10.1995	26.06.1996
Slovenia	16.07.1993		06.07.1992	09.07.1996	11.06.1997	21.01.2004
Solomon Islands			10.04.1995	03.10.1995		
Somalia	24.01.1990					
South Africa	10.12.1998		16.06.1995	02.11.1995	13.09.1995	
Spain	21.10.1987		06.12.1990	21.12.1993	03.08.1994	13.01.1998
Sri Lanka	03.01.1994		12.07.1991	23.03.1994	19.08.1994	23.09.2003
Sudan			03.08.1990	30.10.1995	24.05.1999	

(*cont.*)

(*cont.*)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Convention on the Safety of UN Personnel
Suriname		10.08.1990	01.03.1993	12.01.1996	28.04.1997	
Swaziland	26.03.2004		07.09.1995	09.11.1994	20.09.1996	
Sweden	08.01.1986		29.06.1990	16.12.1993	17.06.1993	25.06.1996
Switzerland	02.12.1986		24.02.1997	21.11.1994	10.03.1995	
Syrian Arab Republic			15.07.1993	04.01.1996		
Tajikistan	11.01.1995		26.10.1993	29.10.1997	11.01.1995	
Tanzania (United Rep. of)			10.06.1991	08.03.1996	25.06.1998	
Thailand			27.03.1992	31.10.2003	10.12.2002	
Timor-Leste	16.04.2003		16.04.2003		07.05.2003	
Togo	18.11.1987	25.02.1991	01.08.1990	04.10.1995	23.04.1997	
Tonga			06.11.1995	19.05.1998	29.05.2003	
Trinidad and Tobago			05.12.1991	01.08.1996	24.06.1997	
Tunisia	23.09.1988		30.01.1992	15.07.1993	15.04.1997	12.09.2000
Turkey	02.08.1988		04.04.1995	14.02.1997	12.05.1997	
Turkmenistan	25.06.1999	18.09.1996	20.09.1993	18.09.1996	29.09.1994	29.09.1998
Tuvalu			22.09.1995	20.12.2002	19.01.2004	
Uganda	03.11.1986		17.08.1990	08.09.1993	30.11.2001	
Ukraine	24.02.1987	13.09.1993	28.08.1991	07.02.1995	16.10.1998	17.08.1995
United Arab Emirates			03.01.1997	10.02.2000	28.11.2000	
United Kingdom	08.12.1988		16.12.1991	03.06.1994	13.05.1996	06.05.1998
United States of America	21.10.1994				25.04.1997	
Uruguay	24.10.1986	14.07.1999	20.11.1990	05.11.1993	06.10.1994	03.09.1999
Uzbekistan	28.09.1995	19.01.1998	29.06.1994	19.07.1995	23.07.1996	03.07.1996
Vanuatu			07.07.1993	25.03.1993		
Venezuela	29.07.1991		13.09.1990	13.09.1994	03.12.1997	
Viet Nam			28.02.1990	16.11.1994	30.09.1998	
Yemen	05.11.1991		01.05.1991	21.02.1996	02.10.2000	
Yugoslavia	12.03.2001		12.03.2001	01.03.2002	20.04.2000	31.07.2003
Zambia	07.10.1998		06.12.1991	28.05.1993	09.02.2001	
Zimbabwe			11.09.1990	11.11.1994	25.04.1997	
Total	136	25	192	188*	162	71

*According to UN treaty database, the European Community approved this convention on 21.12.1993

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Afghanistan			11.09.2002	10.02.2003		24.09.2003
Albania	28.08.2002	28.08.2002	29.02.2000	31.01.2003		
Algeria			09.10.2001			
Andorra			29.06.1998	30.04.2001		30.04.2001
Angola			05.07.2002			
Antigua and Barbuda			03.05.1999	18.06.2001		
Argentina	21.10.1998	21.10.1998	14.09.1999	08.02.2001	07.01.2002	10.09.2002
Armenia						
Australia	22.08.1997	22.08.1997	14.01.1999	01.07.2002		
Austria	27.07.1998	27.07.1998	29.06.1998	28.12.2000	01.03.2002	01.02.2002
Azerbaijan					17.04.2001	03.07.2002
Bahamas			31.07.1998			
Bahrain						
Bangladesh	06.09.2000	06.09.2000	06.09.2000			06.09.2000
Barbados			26.01.1999	10.12.2002		
Belarus	13.09.2000	02.03.2004	03.09.2003		13.12.2000	
Belgium	10.03.1999	10.03.1999	04.09.1998	28.06.2000		06.05.2002
Belize			23.04.1998	05.04.2000		01.12.2003
Benin			25.09.1998	22.01.2002		
Bhutan						
Bolivia	21.09.2001	21.09.2001	09.06.1998	27.06.2002		
Bosnia and Herzegovina	11.10.2001	07.09.2000	08.09.1998	11.04.2002		10.10.2003
Botswana			01.03.2000	08.09.2000		
Brazil	04.10.1999	04.10.1999	30.04.1999	20.06.2002		27.01.2004
Brunei Darussalam						
Bulgaria	03.12.1998	03.12.1998	04.09.1998	11.04.2002	14.06.2000	12.02.2002
Burkina Faso	26.11.2003	26.11.2003	16.09.1998			16.04.2004
Burundi			22.10.2003			
Cambodia	25.03.1997	25.03.1997	28.07.1999	11.04.2002		
Cameroon			19.09.2002			
Canada	05.01.1998	05.01.1998	03.12.1997	07.07.2000		07.07.2000
Cape Verde	16.09.1997	16.09.1997	14.05.2001			10.05.2002
Central African Republic			08.11.2002	04.10.2001		
Chad			06.05.1999			28.09.2003
Chile	15.10.2003	15.10.2003	10.09.2001			31.07.2003
China	04.11.1998	04.11.1998				
Colombia	06.03.2000	06.03.2000	06.09.2000	05.08.2002		
Comoros			19.09.2002			

(*cont.*)

(*cont.*)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Congo			04.05.2001			
Congo (Dem. Rep. of)			02.05.2002	11.04.2002		11.11.2001
Cook Islands						
Costa Rica	17.12.1998	17.12.1998	17.03.1999	07.06.2001	09.12.2003	24.01.2003
Côte d'Ivoire			30.06.2000			
Croatia	25.04.2002	25.04.2002	20.05.1998	21.05.2001		01.11.2002
Cuba						
Cyprus	22.07.2003	22.07.2003	17.01.2003	07.03.2002	16.05.2001	
Czech Republic	10.08.1998	10.08.1998	26.10.1999			30.11.2001
Denmark	30.04.1997	30.04.1997	08.06.1998	21.06.2001		27.08.2002
Djibouti			18.05.1998	05.11.2002		
Dominica			26.03.1999	12.02.2001		20.09.2002
Dominican Republic			30.06.2000			
Ecuador	16.12.2003	14.08.2000	29.04.1999	05.02.2002		
Egypt						
El Salvador	26.01.2000	26.01.2000	27.01.1999		27.03.2002	18.04.2002
Equatorial Guinea			16.09.1998		19.11.2003	
Eritrea			27.08.2001			
Estonia	20.04.2000	20.04.2000		30.01.2002		
Ethiopia						
Fiji			10.06.1998	29.11.1999		
Finland	11.01.1996	03.04.1998		29.12.2000		10.04.2002
France	30.06.1998	23.07.1998	23.07.1998	09.06.2000		05.02.2003
Gabon			08.09.2000	20.09.2000	29.08.2003	
Gambia			23.09.2002	28.06.2002		
Georgia				05.09.2003		
Germany	27.06.1997	02.05.1997	23.07.1998	11.12.2000		
Ghana			30.06.2000	20.12.1999		
Greece	05.08.1997	20.01.1999	25.09.2003	15.05.2002		22.10.2003
Grenada			19.08.1998			
Guatemala	30.08.2002	29.10.2001	26.03.1999			09.05.2002
Guinea			08.10.1998	14.07.2003		
Guinea-Bissau			22.05.2001			
Guyana			05.08.2003			
Haiti						
Holy See	22.07.1997	22.07.1997	17.02.1998			24.10.2001
Honduras	30.10.2003	30.10.2003	24.09.1998	01.07.2002	26.01.2003	14.08.2002
Hungary	30.01.1998	30.01.1998	06.04.1998	30.11.2001		
Iceland			05.05.1999	25.05.2000		01.10.2001

(*cont.*)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
India	02.09.1999	02.09.1999				
Indonesia						
Iran (Islamic Rep. of)						
Iraq						
Ireland	27.03.1997	27.03.1997	03.12.1997	11.04.2002		18.11.2002
Israel	30.10.2000	30.10.2000				
Italy	13.01.1999	13.01.1999	23.04.1999	26.07.1999		09.05.2002
Jamaica			17.07.1998			09.05.2002
Japan	10.06.1997	10.06.1997	30.09.1998			
Jordan		06.09.2000	13.11.1998	11.04.2002		
Kazakhstan						10.04.2003
Kenya			23.01.2001			28.01.2002
Kiribati			07.09.2000			
Korea (Dem. People's Rep. of)						
Korea (Rep. of)		09.05.2001		13.11.2002		
Kuwait						
Kyrgyzstan						13.08.2003
Lao (People's Dem. Rep.)						
Latvia	11.03.1998	22.08.2002		28.06.2002		
Lebanon						
Lesotho			02.12.1998	06.09.2000		24.09.2003
Liberia			23.12.1999			
Libyan Arab Jamahiriya					20.07.2001	
Liechtenstein	19.11.1997	19.11.1997	05.10.1999	02.10.2001		
Lithuania	03.06.1998	03.06.1998	12.05.2003	12.05.2003	13.03.2002	20.02.2003
Luxembourg	05.08.1999	05.08.1999	14.06.1999	08.09.2000		
Macedonia			09.09.1998	06.03.2002	19.04.2002	12.01.2004
Madagascar			16.09.1999			
Malawi			13.08.1998	19.09.2002		
Malaysia			22.04.1999			
Maldives	07.09.2000	07.09.2000	07.09.2000			
Mali	24.10.2001	24.10.2001	02.06.1998	16.08.2000		16.05.2002
Malta			07.05.2001	29.11.2002		09.05.2002
Marshall Islands				07.12.2000		
Mauritania			21.07.2000			
Mauritius	24.12.2002		03.12.1997	05.03.2002		
Mexico	10.03.1998		09.06.1998		07.10.2003	15.03.2002

(*cont.*)

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Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Micronesia						
Moldova (Rep. of)	08.09.2000	16.07.2001	08.09.2000			07.04.2004
Monaco		04.05.1997	17.11.1998			13.11.2001
Mongolia	06.04.1999			11.04.2002		
Morocco	19.03.2002	19.03.2002				22.05.2002
Mozambique			25.08.1998			
Myanmar						
Namibia			21.09.1998	26.06.2002		16.04.2002
Nauru	12.11.2001	12.11.2001	07.08.2000	12.11.2001		
Nepal						
Netherlands	25.03.1999	25.03.1999	12.04.1999	17.07.2001		
New Zealand	08.01.1998	08.01.1998	27.01.1999	07.09.2000		12.11.2001
Nicaragua	05.12.2000	05.12.2000	30.11.1998		01.06.2001	
Niger			23.03.1999	11.04.2002		
Nigeria			27.09.2001	27.09.2001		
Niue			15.04.1998			
Norway	20.04.1998	20.04.1998	09.07.1998	16.02.2000		23.09.2003
Oman						
Pakistan	05.12.2000	09.03.1999				
Palau						
Panama	26.03.1997	03.10.1999	07.10.1998	21.03.2002	08.03.2001	08.08.2001
Papua New Guinea						
Paraguay			13.11.1998	14.05.2001		27.09.2002
Peru	03.07.1997	03.07.1997	17.06.1998	10.11.2001		08.05.2002
Philippines	12.06.1997	12.06.1997	15.02.2000			26.08.2003
Poland		14.10.2003		12.11.2001		
Portugal	12.11.2001	31.03.1999	19.02.1999	05.02.2002		19.08.2003
Qatar			13.10.1998		04.09.2000	25.07.2002
Romania	25.08.2003	25.08.2003	30.11.2000	11.04.2002		10.11.2001
Russian Federation	09.09.1999					
Rwanda			08.06.2000			23.04.2002
Saint Kitts and Nevis			02.12.1998			
Saint Lucia			13.04.1999			
Saint Vincent and the Grenadines			01.08.2001	03.12.2002		
Samoa			23.07.1998	16.09.2002		
San Marino			18.03.1998	13.05.1999		
São Tomé and Príncipe			31.03.2003			
Saudi Arabia						

(*cont.*)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Senegal		29.11.1999	24.09.1998	02.02.1999		03.03.2004
Seychelles	08.06.2000	08.06.2000	02.06.2000			
Sierra Leone			25.04.2001	15.09.2000		15.05.2002
Singapore						
Slovakia	30.11.1999	30.11.1999	25.02.1999	11.04.2002	11.02.2004	
Slovenia	03.12.2002	03.12.2002	27.10.1998	31.12.2001		
Solomon Islands			26.01.1999			
Somalia						
South Africa	26.06.1998	26.06.1998	26.06.1998	27.11.2000		
Spain	19.01.1998	27.01.1998	19.01.1999	24.10.2000	06.07.2001	08.03.2002
Sri Lanka						08.09.2000
Sudan			13.10.2003			
Suriname			23.05.2002			
Swaziland			22.12.1998			
Sweden	15.01.1997	16.07.1997	30.11.1998	28.06.2001		20.02.2003
Switzerland	24.03.1998	24.03.1998	24.03.1998	12.10.2001		26.06.2002
Syrian Arab Republic						17.10.2003
Tajikistan	12.10.1999	12.10.1999	12.10.1999	05.05.2000		05.08.2002
Tanzania (United Rep. of)			13.11.2000	20.08.2002		
Thailand			27.11.1998			
Timor-Leste			07.05.2003	06.09.2002		
Togo			09.03.2000			
Tonga						
Trinidad and Tobago			27.04.1998	06.04.1999		
Tunisia			09.07.1999			02.01.2003
Turkey			25.09.2003			
Turkmenistan		19.03.2004	19.01.1998			
Tuvalu						
Uganda			25.02.1999	14.06.2002		06.05.2002
Ukraine	28.05.2003	15.12.1999				
United Arab Emirates						
United Kingdom	11.02.1999	11.02.1999	31.07.1998	04.10.2001		24.06.2003
United States of America		24.05.1999				23.12.2002
Uruguay	18.08.1998	18.08.1998	07.06.2001	28.06.2002		09.09.2003

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Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Uzbekistan	29.09.1997					
Vanuatu						
Venezuela			14.04.1999	07.06.2000		23.09.2003
Viet Nam						20.12.2001
Yemen			01.09.1998			
Yugoslavia	12.08.2003		18.09.2003	06.09.2001	02.09.2002	10.10.2002
Zambia			23.02.2001	13.11.2002		
Zimbabwe			18.06.1998			
Total	75	76	141	93	21	71

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1943

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1945

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1946

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1948

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1950

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1952

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1955

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1956

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1969

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1972

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1974

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1975

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1979

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1981

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1982

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1985

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1986

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1987

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1988

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1989

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1990

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Basic Principles for the Treatment of Prisoners

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1991

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Law of the Republic of Armenia on the Use and Protection of the Red Cross and Red Crescent Emblem, adopted on 5 February 2002, not yet published.
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Belgium

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Arrêté du Gouvernement de la Région de Bruxelles-Capitale relatif à l'apposition d'un signe distinctif sur les monuments et sites protégés, 16 mars 1995, published in the Moniteur Belge, No. 190, 30 September 1995, F. 95-2669, p. 27954.

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Bolivia

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Bosnia and Herzegovina

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Federation of Bosnia and Herzegovina

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Law No. 249 on Sale of Apartments with Occupancy Rights, adopted by the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina on 11 June 1997 and by the House of Peoples of the Federation of Bosnia and Herzegovina on 21 October 1997, published in Sluzbene Novine Federacije Bosne i Hercegovine (Official Gazette of the Federation of Bosnia and Herzegovina), No. 27/97, 28 November 1997, pp. 525–533 (amendments published in Nos. 11/98, 22/99, 27/99 and 7/00).

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Law No. 76 on the Cessation of the Application of the Law on Abandoned Apartments, adopted by the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina on 12 March 1998 and by the House of Peoples of the Federation of Bosnia and Herzegovina on 26 February 1998, published in Sluzbene Novine Federacije Bosne i Hercegovine (Official Gazette of the Federation of Bosnia and Herzegovina), No. 11/98, 3 April 1998, pp. 273–278 (amendments published in Nos. 38/98, 12/99, 18/99 and 27/99).

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Wet van 19 mei 1954 tot overlevering inzake oorlogsmisdrijven (Law of 19 May 1954), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 215, 19 May 1954, pp. 560–561, entry into force: 3 February 1955, as amended by the International Crimes Act (2003).

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Rijkswet van 14 juni 1990 tot herziening van het militair tuchtrecht (Military Discipline Act), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 367, 14 June 1990, pp. 1–21, entry into force: 1 January 1991, Besluit van 30 november 1990, regelende de inwerkingtreding van de Wet militair tuchtrecht, de Wet militaire strafrechtspraak, de Rijkswet van 14 juni 1990 tot wijziging van het Wetboek van Militair Strafrecht in verband met de herziening van het militair tuchtrecht en ter afschaffing van de doodstraf (Stb 368) en de Rijkswet van 14 juni 1990 tot wijziging van het Wetboek van Militair Strafrecht in verband met de nieuwe regels inzake de militaire strafrechtspraak, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), 30 November 1990, pp. 1–2.

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Rijkswet van 20 juni 2002 tot uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof) (Act of 20 June 2002 to implement the Statute of the International Criminal Court in relation to cooperation with and the provision of assistance to the International Criminal Court and the enforcement of its decisions) (International Criminal Court Implementation Act)), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 314, 27 June 2002, pp. 1–25, entry into force: 1 July 2002.

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Wet van 19 juni 2003, houdende regels met betrekking tot ernstige schendingen van het internationaal humanitair recht (Wet internationale misdrijven) (Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act)), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 270, 2003, pp. 1–13, entry into force: 1 October 2003.

New Zealand

Geneva Conventions Act as amended (1958)
An Act to enable effect to be given to certain International Conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine, and for purposes connected therewith, Act No. 19 of 1958, 18 September 1958, published in The Statutes of New Zealand 1958, Vol. 11, pp. 85–219 (also applicable to the Cook Islands, Niue and Samoa), amended by the Act to amend the Geneva Conventions Act, Act No. 144 of 1987, 10 July 1987, published in The Statutes of New Zealand 1987, Vol. 4, printed under the authority of the New Zealand Government by V. R. Ward, Government Printer, Wellington, 1989, pp. 2149–2206.

Armed Forces Discipline Act (1971)
An Act to consolidate and amend certain enactments of the General Assembly of New Zealand and the Parliament of the United Kingdom relating to the discipline of and the administration of justice within those forces, Act No. 53 of 1971, 12 November 1971, published in The Statutes of New Zealand 1971, Vol. 23, pp. 33–212, as amended by Act No. 13 of 1976, Act No. 37 of 1980, Act No. 48 of 1981, Act No. 199 of 1985, Act No. 89 of 1988, Act No. 176 of

1988, Act No. 34 of 1997, Act No. 27 of 1998, Act No. 28 of 1999 and Act No. 55 of 2001.

Disarmament Act (1987)

An Act to establish in New Zealand a Nuclear Free Zone, to promote and encourage an active and effective contribution by New Zealand to the essential process of disarmament and international arms control, and to implement in New Zealand the following treaties:

(a) The South Pacific Nuclear Free Zone Treaty of 6 August 1985 (the text of which is set out in the First Schedule to this Act);
(b) The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of 5 August 1963 (the text of which is set out in the Second Schedule to this Act);
(c) The Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 (the text of which is set out in the Third Schedule of this Act);
(d) The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean floor and in the Subsoil Thereof of 11 February 1971 (the text of which is set out in the Fourth Schedule to this Act);
(e) The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 (the text of which is set out in the Fifth Schedule to this Act).

Act No. 86 of 1987, 8 June 1987, published in The Statutes of New Zealand 1987, Vol. 2, printed under the authority of the New Zealand Government by V. R. Ward, Government Printer, Wellington, 1989, pp. 940–976.

International War Crimes Act (1995)

An Act to provide for New Zealand to assist –

(a) The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and
(b) The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994; and
(c) Other ad hoc tribunals that may be established by the Security Council of the United Nations under chapter VII of the Charter of the United Nations for the prosecution of violations of international humanitarian law –

in the performance of their functions, Act No. 27 of 1995, 9 June 1995, published in The Statutes of New Zealand 1995, Vol. 41, pp. 577–627.

Chemical Weapons Act (1996)

An Act to implement in the law of New Zealand the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Act No. 37 of 1996, 24 June 1996, published in The Statutes of New Zealand, 1996, Vol. 2, pp. 1044–1182.

Crimes (Internationally Protected Persons and Hostages) Amendment Act (1998)
Crimes (Internationally Protected Persons and Hostages) Amendment Act, Act No. 36 of 1998, 2 December 1998, published in The Statutes of New Zealand 1998, Vol. 41, pp. 343–359.
Anti-Personnel Mines Act (1998)
An Act to implement in the law of New Zealand the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Act No. 111 of 1998, 8 December 1998, published in The Statutes of New Zealand 1998, Vol. 3, pp. 1808–1836.
International Crimes and ICC Act (2000)
International Crimes and International Criminal Court Act 2000, Act No. 26 of 2000, 6 September 2000, published in The Statutes of New Zealand 2000, Vol. 1, pp. 589–797.

Nicaragua
Military Penal Law (1980)
Ley Provisional de los Delitos Militares, Decreto No. 600, 12 December 1980, published in La Gaceta, Diario Oficial, No. 296, 23 December 1980, pp. 2901–2910.
Constitution (1987)
Constitución Política, adopted by the National Assembly at Managua on 9 January 1987, published in La Gaceta, Diario Oficial, Year XCI, No. 5, 9 January 1987, pp. 33–62; amended by Ley No. 192, Ley de Reforma Parcial a la Constitución Política de la República de Nicaragua, published in La Gaceta, Diario Oficial, Year XCVIII, No. 124, 4 July 1995, pp. 2405–2423.
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Código Penal Militar, 1 January 1996.
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Law on the Prohibition of Anti-Personnel Mines (1999) Ley No. 321 de prohibición para la producción, compra, venta, importación, exportación, tránsito, utilización y posesión de minas terrestres antipersonales, 24 November 1999, published in La Gaceta, Diario Oficial, Year CIV, No. 8, 12 January 2000, pp. 169–170.
Draft Penal Code (1999)
Proyecto de Código Penal de la República de Nicaragua, Comisión de Justicia de la Asemblea Nacional, 24 de noviembre de 1999.
Emblem Law (2002)
Ley No. 418, Ley de protección y uso del nombre y del emblema de la Cruz Roja, 26 February 2002, published in La Gaceta, Diario Oficial, Year CVI, No. 57, 22 March 2002, pp. 1995–1998.

Niger
Penal Code as amended (1961)
Loi No. 61-027 du 15 juillet 1961 portant institution du Code Pénal, published in the Journal officiel spécial, No. 7, 15 November 1961, pp. 1–99, as amended

by the Loi No. 2003-025 du 13 juin 2003 modifiant la loi No. 61-027 du 15 juillet 1961 portant institution du Code Pénal.

Nigeria

Geneva Conventions Act (1960)

An Act to enable effect to be given in the Federal Republic of Nigeria to certain international conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine and for purposes connected therewith, Act No. 54 of 30 September 1960, published in Laws of the Federation of Nigeria, Revised Edition, 1990, printed by the Grosvenor Press (Portsmouth) Limited, Vol. IX, CAP. 162, pp. 6265–6280.

Army Act (1960)

An Act to consolidate and amend the law as to the establishment, government and discipline of the Nigerian Army and its reserves and to provide for appeals from courts-martial and purposes connected therewith and incidental thereto, Act No. 26 of 1 October 1960, published in Laws of the Federation of Nigeria, Revised Edition, 1990, printed by the Grosvenor Press (Portsmouth) Limited, Vol. XVIII, CAP. 294, pp. 11401–11546.

Revised Red Cross Society Act (1990)

The Nigerian Red Cross Society Act, published in Laws of the Federation of Nigeria, Revised Edition, 1990, printed by the Grosvenor Press (Portsmouth) Limited, CAP. 324, pp. 12033–12039.

Armed Forces Decree 105 as amended (1993)

The Armed Forces Decree 105 of 1993, as amended in 1994.

Norway

Penal Code (1902)

General Civil Penal Code of 1902.

Military Penal Code as amended (1902)

Militaer Straffelov (Military Penal Act), Act No. 13 of 22 May 1902, published in Norwegian Law Journal, Volume I, Law and central Regulations (Norsk Lovtidend, 1ste avdeling, lover og sentrale forskrifter).

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Act No. 10 of 6 May 1994, published in Norwegian Law Journal, Volume I, Law and central Regulations (Norsk Lovtidend, 1ste avdeling, lover og sentrale forskrifter), 1994, pp. 566–567.

Act on the Incorporation of UN Resolutions on International Tribunals (1994)

Act No. 38 of 24 June 1994 relating to the incorporation into Norwegian law of the UN Security Council resolutions on the establishment of international tribunals for crimes committed in the former Yugoslavia and Rwanda, Published in Norwegian Law Journal, Volume I, Law and central Regulations (Norsk Lovtidend, 1ste avdeling, lover og sentrale forskrifter), 1998, pp. 802–803.

Anti-Personnel Mines Act (1998)
An Act relating to the implementation of the Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction, Act No. 54 of 17 July 1998.

ICC Act (2001)
Act No. 65 of 15 June 2001 relating to the implementation of the Statute of the International Criminal Court of 17 July 1998 (the Rome Statute) in Norwegian Law.

Pakistan

Prisons Act (1894)
An Act to amend the law relating to Prisons, Act No. IX of 1894, 22 March 1894, printed in The Pakistan Code, Vol. 3 (1882–1897) pp. 449–472, published by, Government of Pakistan, Ministry of Law & Parliamentary Affairs (Law Division).

Official Secrets Act (1923)
An Act to consolidate and amend the law in Pakistan relating to official secrets, Act No. XIX of 1923, 2 April 1923, printed in The Pakistan Code, Vol. 7 (1920–1923) pp. 471–485, published by Government of Pakistan, Ministry of Law & Parliamentary Affairs (Law Division).

Army Act (1952)
The Pakistan Army Act, Act No. XXXIX of 1955, 1 April 1955, printed in The Pakistan Code, Vol. 11 (1947–1952) pp. 381–457, published by Government of Pakistan, Ministry of Law & Parliamentary Affairs (Law Division).

Air Force Act (1953)
The Pakistan Air Force Act, Act VI of 1953, 23 March 1958, printed in The Pakistan Code, Vol. 12 (1953–1957) pp. 26–102, published by Government of Pakistan, Ministry of Law & Parliamentary Affairs (Law Division).

Public Order Ordinance (1958)
An Ordinance to prohibit the wearing of uniforms in connection with political purposes and the maintenance by private persons of associations of a military or semi-military character, and matters connected therewith, Ordinance No. XV of 1958, 19 September 1958, printed in The Pakistan Code, Vol. 13 (1958–1960) pp. 186–201, published by Government of Pakistan, Ministry of Law & Parliamentary Affairs (Law Division).

Frontier Corps Ordinance (1959)
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Zambia

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An Act to provide for the creation and maintenance in Zambia of a Defence Force consisting of an Army comprising the Regular Force of the Army, the Territorial Force of the Army, the Army Reserve and the Territorial Army Reserve, and an Air Force comprising the Regular Force of the Air Force, the Auxiliary Air Force, the Air Force Reserve and the Auxiliary Air Force Reserve; to charge the Defence Force with the defence of Zambia and with such other duty as may from time to time be determined by the President; to provide for the creation of a Defence Council to advise the President in matters of policy and matters affecting the command, discipline and administration of the Defence Force; to provide for the commissioning, appointment and transfer of officers in the Defence Force and to set out the terms and conditions of enlistment and service of soldiers in the Regular Force of the Defence Force; to provide the conditions of discharge of soldiers from the Regular Force and for their transfer to the Reserve Force; to provide for the discipline of the Defence Force and for the trial and punishment of members of the Force who commit such military offences as are set out in the Act, or civil offences; to make provision for the arrest of members of the Defence Force who commit an offence against any provision of the Act and for the investigation of and summary dealing with charges preferred against such members; to provide for the creation and constitution of courts-martial to try persons subject to military law under the Act, for the procedure to be followed by such courts-martial, for the awarding of punishments and for the confirmation, revision and review of proceedings of courts-martial and the review of summary findings and awards; to make provision for the carrying out of sentences of imprisonment awarded by courts-martial, for a right of appeal from the decision of a court-martial to the court of appeal and for the procedure in and the determination of such appeals; to provide for the enforcement of maintenance and affiliation orders against members of the Defence Force by deduction from pay and for the imposition of forfeitures and deductions from the pay of such members in certain circumstances; to set out the order of precedence of officers and soldiers of the Defence Force and to make provision for the command of the Army and the command of the Air Force and for the exemption of officers and soldiers

from serving as assessors in civil courts; to provide for the arrest of deserters and absentees without leave and for the bringing of such persons before a civil court; to set out the offences relating to military matters which are punishable by civil courts and to make provision with respect to evidence in proceedings under this Act, whether before a court-martial or a civil court; to provide for the composition of and enlistment of persons in the Territorial Force, for the training of persons enlisted in such Force, for the embodiment of such Force when necessary in the public interest, for the discharge of persons from that Force and for all other matters affecting the discipline of such Force; to set out the persons who are subject to military law under the Act and generally to provide for matters incidental to or connected with the foregoing; to repeal the Defence Act, 1955, and to give effect to the transitional provisions and savings set out in the Act, Act No. 45 of 1964, 18 September 1964, as subsequently amended, Chapter 131 of the Laws of Zambia, printed and published by the Government Printer, Lusaka, 267 pp.

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An Act to consolidate and amend the law relating to procedure and evidence in criminal cases, and to make provision for other matters incidental to such procedure and evidence, 1 June 1927, amended several times, published in The Statute Law of Rhodesia, Vol. II, printed by the Government Printer, Salisbury, 1974, pp. 69–205.

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An Act to consolidate and amend the law relating to the Defence Council, the establishment, constitution, command, administration, organization, duties, conditions of service, training, co-operation with other Military Forces and discipline of the Defence Forces, the declaration of cantonments and protected areas, the requisitioning of buildings, vehicles and other things for the use of the Defence Forces in certain circumstances, the expropriation of land for defence purposes and the protection of defence stores; to provide for the publication of defence agreements and to create powers in connexion with the training of units of the Defence Forces; and to provide for matters incidental to or connected with the foregoing, Act No. 27/1972, 3 November 1972, published in Official Gazette, 3 November 1972, as amended by Act No. 37 of 1974, Act No. 23 of 1975, Act No. 35 of 1976, Act No. 51 of 1976, Act No. 2 of 1978, Act No. 41 of 1978, Act No. 29 of 1981, Statutory Instrument No. 363 of 1983, Act No. 21 of 1985, Statutory Instrument No. 324 of 1986, Act No. 3 of 1992 and Act No. 8 of 1993.

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Communication No. 577/1994, R. Espinoza de Polay (on behalf of her husband Victor Alfredo Polay Campos) v. Peru, Views under Article 5(4) of the Optional Protocol, adopted on 6 November 1997, UN Doc. A/53/40, Vol. II, p. 36.

Estrella v. Uruguay
Communication No. 74/1980, Miguel Ángel Estrella v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 29 March 1983, UN Doc. A/38/40, p. 150.

Francis v. Jamaica
Communication No. 320/1988, Victor Francis v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 24 March 1993, UN Doc. A/48/40 (Part II), p. 62.

Fuenzalida v. Ecuador
Communication No. 480/1991, José Luis García Fuenzalida v. Ecuador, Views under Article 5(4) of the Optional Protocol, adopted on 12 July 1996, UN Doc. A/51/40, Vol. II, p. 50.

García Lanza de Netto v. Uruguay
Communication No. 8/1977, Ana María García Lanza de Netto (on behalf of her aunt Beatriz Weismann Lanza and her uncle Alcides Lanza Perdomo, who later joined as submitting parties) v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 3 April 1980, UN Doc. A/35/40, p. 111.

Gómez de Voituret v. Uruguay
Communication No. 109/1981, Teresa Gómez de Voituret v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 10 April 1984, UN Doc. A/39/40, p. 164.

L. Grant v. Jamaica
Communication No. 353/1988, Lloyd Grant v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 31 March 1994, UN Doc. A/49/40, Vol. II, p. 50.

P. Grant v. Jamaica
Communication No. 597/1994, Peter Grant v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 22 March 1996, UN Doc. A/51/40, Vol. II, p. 206.

Gridin v. Russia
Communication No. 770/1997, Dimitry L. Gridin v. Russia, Views under Article 5(4) of the Optional Protocol, adopted on 20 July 2000, UN Doc. A/55/40, Vol. II, p. 172.

Guesdon v. France
Communication No. 219/1986, Dominique Guesdon v. France, Views under Article 5(4) of the Optional Protocol, adopted on 25 July 1990, UN Doc. A/45/40, Vol. II, p. 61.

Harward v. Norway
Communication No. 451/1991, Barry Stephen Harward v. Norway, Views under Article 5(4) of the Optional Protocol, adopted on 15 July 1994, UN Doc. A/49/40, Vol. II, p. 146.

Henry v. Jamaica
Communication No. 230/1987, Raphaël Henry v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 1 November 1991, UN Doc. A/47/40, p. 210.

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Communication No. 5/1977, Moriana Hernández Valentini de Bazzano (on her own behalf as well as on behalf of Luis María Bazzano Ambrosini, Martha Valentini de Massera and José Luis Massera) v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 15 August 1979, UN Doc. A/34/40, p. 124.

Herrera Rubio v. Colombia
Communication No. 161/1983, Herrera Rubio v. Colombia, Views under Article 5(4) of the Optional Protocol, adopted on 2 November 1987, UN Doc. A/43/40, p. 190.

Hiber Conteris v. Uruguay
Communication No. 139/1983, Hiber Conteris v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 17 July 1985, UN Doc. A/40/40, p. 196.

Johnson v. Jamaica
Communication No. 588/1994, Errol Johnson v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 22 March 1996, UN Doc. A/51/40, Vol. II, p. 174.

Karttunen v. Finland
Communication No. 387/1989, Arvo O. Karttunen v. Finland, Views under Article 5(4) of the Optional Protocol, adopted on 23 October 1992, UN Doc. A/48/40, p. 362.

Kelly v. Jamaica
Communication No. 253/1987, Paul Kelly v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 8 April 1991, UN Doc. A/46/40, p. 241.

Lafuente Peñarrieta and Others v. Bolivia
Communication No. 176/1984, Lafuente Peñarrieta and Others v. Bolivia, Views under Article 5(4) of the Optional Protocol, adopted on 2 November 1987, UN Doc. A/43/40, p. 199.

Larrosa Bequio v. Uruguay
Communication No. 88/1981, Gustavo Raúl Larrosa Bequio v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 29 March 1983, UN Doc. A/38/40, p. 180.

Little v. Jamaica
Communication No. 283/1988, Aston Little v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 1 November 1991, UN Doc. A/47/40, p. 268.

Lumley v. Jamaica
Communication No. 662/1995, Peter Lumley v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 31 March 1999, UN Doc. A/54/40, Vol. II, p. 142.

Luyeye Magana ex-Philibert v. Zaire
Communication No. 90/1981, Luyeye Magana ex-Philibert v. Zaire, Views under Article 5(4) of the Optional Protocol, adopted on 21 July 1983, UN Doc. A/38/40, p. 197.

Lyashkevich v. Belarus
Communication No. 887/1999, Mariya Staselovich (on her behalf and on behalf of her son Igor Lyashkevich) v. Belarus, Views under Article 5(4) of the Optional Protocol, adopted on 3 April 2003, UN Doc. A/58/40, Vol. II, p. 169.

Marais v. Madagascar
Communication No. 49/1979, Dave Marais, Jr. v. Madagascar, Views under Article 5(4) of the Optional Protocol, adopted on 24 March 1983, UN Doc. A/38/40, p. 141.

Martínez Machado v. Uruguay
Communication No. 83/1981, Raúl Noel Martínez Machado v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 4 November 1983, UN Doc. A/39/40, p. 148.

Martínez Portorreal v. the Dominican Republic
Communication No. 188/1984, Martínez Portorreal v. the Dominican Republic, Views under Article 5(4) of the Optional Protocol, adopted on 5 November 1987, UN Doc. A/43/40, p. 207.

Mukong v. Cameroon
Communication No. 458/1991, Alber Womah Mukong v. Cameroon, Views under Article 5(4) of the Optional Protocol, adopted on 8 July 1992, UN Doc. A/49/40, p. 171.

O. F. v. Norway
Communication No. 158/1983, O. F. v. Norway, Decision on admissibility, adopted on 26 October 1984, UN Doc. A/40/40, p. 204.

Pietraroia v. Uruguay
Communication No. 44/1979, Alba Pietraroia (on behalf of her father, Rosario Pietraroia, also known as Rosario Pietraroia (or Roya) Zapala) v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 27 March 1981, UN Doc. A/36/40, p. 153.

Quinteros v. Uruguay
Communication No. 107/1981, Elena Quinteros and M. C. Almeida de Quinteros v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 21 July 1983, UN Doc. A/38/40, p. 216.

Sala de Tourón v. Uruguay
Communication No. 32/1978, Lucía Sala de Tourón v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 31 March 1981, UN Doc. A/36/40, p. 120.

Saldías López v. Uruguay
Communication No. 52/1979, Delia Saldías de López (on behalf of her husband, Sergio Rubén López Burgos) v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 29 July 1981, UN Doc. A/36/40, p. 176.

Salgar de Montejo v. Colombia
Communication No. 64/1979, Consuelo Salgar de Montejo v. Colombia, Views under Article 5(4) of the Optional Protocol, adopted on 24 March 1982, UN Doc. A/37/40, p. 168.

Santullo Valcada v. Uruguay
Communication No. 9/1977, Edgardo Dante Santullo Valcada v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 26 October 1979, UN Doc. A/35/40, p. 107.

Sequeria v. Uruguay
Communication No. 6/1977, Miguel A. Millán Sequeria v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 29 July 1980, UN Doc. A/35/40, p. 127.

Soriano de Bouton v. Uruguay
Communication No. 37/1978, Esther Soriano de Bouton v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 27 March 1981, UN Doc. A/36/40, p. 143.

Stephens v. Jamaica
Communication No. 373/1989, Lennon Stephens v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 18 October 1995, UN Doc. A/51/40, Vol. II, p. 1.

Terán Jijón v. Ecuador
Communication No. 277/1988, Juan Terán Jijón v. Ecuador, Views under Article 5(4) of the Optional Protocol, adopted on 26 March 1992, UN Doc. A/47/40, p. 261.

Teti Izquierdo v. Uruguay
Communication No. 73/1980, Ana María Teti Izquierdo (on behalf of her brother, Mario Alberto Teti Izquierdo) v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 1 April 1982, UN Doc. A/37/40, p. 179.

Thomas v. Jamaica
Communication No. 532/1993, Maurice Thomas v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 3 November 1997, UN Doc. A/53/40, Vol. II, p. 1.

Torres Ramírez v. Uruguay
Communication No. 4/1977, William Torres Ramírez v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 23 July 1980, UN Doc. A/35/40, p. 121.

Tshitenge Muteba v. Zaire
Communication No. 124/1982, Tshitenge Muteba v. Zaire, Views under Article 5(4) of the Optional Protocol, adopted on 24 July 1984, UN Doc. A/39/40, p. 182.

Wight v. Madagascar
Communication No. 115/1982, John Wight v. Madagascar, Views under Article 5(4) of the Optional Protocol, adopted on 1 April 1985, UN Doc. A/40/40, p. 171.

Wolf v. Panama
Communication No. 289/1988, Dieter Wolf v. Panama, Views under Article 5(4) of the Optional Protocol, adopted on 26 March 1992, UN Doc. A/47/40, p. 277.

Z. P. v. Canada
Communication No. 341/1988, Z. P. v. Canada, Decision on admissibility, adopted on 11 April 1991, UN Doc. A/46/40, p. 297.

RESOLUTIONS ADOPTED BY THE UN SECURITY COUNCIL

Number	Date of adoption	Title
188	9 April 1964	Resolution on complaint by Yemen regarding British air attack on Yemeni territory
190	9 June 1964	Resolution urging the Government of South Africa to end the Rivonia trial against the leaders of the anti-apartheid movement
191	18 June 1964	Resolution on persons imprisoned, interned or sentenced to death for their opposition to the policy of apartheid
361	30 August 1974	Resolution on emergency UN humanitarian assistance to Cyprus
378	23 October 1975	Resolution on renewal of the mandate of UNEF
387	31 March 1976	Resolution on South Africa's military activities against Angola
392	19 June 1976	Resolution on killings and violence by the South African apartheid régime in Soweto and other areas
405	14 April 1977	Resolution condemning the armed aggression against Benin of 16 January 1977
417	31 October 1977	Resolution condemning the South African Government for its resort to massive violence and repression against the black people
419	24 November 1977	Resolution on assistance to Benin to repair the damage caused by the aggression of 16 January 1977
427	3 May 1978	Resolution on strengthening of the UN Interim Force in Lebanon and withdrawal of Israeli forces from Lebanon
436	6 October 1978	Resolution on a cease-fire in Lebanon
446	22 March 1979	Resolution on establishment of a commission to examine the situation relating to settlements in the Arab territories occupied by Israel
452	20 July 1979	Resolution on Israeli settlement policies in the occupied territories

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Number	Date of adoption	Title
455	23 November 1979	Resolution on Southern Rhodesia's policies towards Zambia
459	19 December 1979	Resolution on extension of the mandate of the UN Interim Force in Lebanon
463	2 February 1980	Resolution calling upon United Kingdom to create conditions in Southern Rhodesia which will ensure free and fair elections
465	1 March 1980	Resolution on Israeli settlement policies in the occupied territories
467	24 April 1980	Resolution condemning the deliberate shelling of the headquarters of the UN Interim Force in Lebanon
469	20 May 1980	Resolution on deportation of Palestinian leaders from territories occupied by Israel
471	5 June 1980	Resolution on assassination attempts against the Mayors of Nablus, Ramallah and Al Bireh
473	13 June 1980	Resolution calling upon South Africa to take measures to eliminate the policy of apartheid and grant to all South African citizens equal rights
475	27 June 1980	Resolution on policies of South Africa towards Angola
476	30 June 1980	Resolution on the status of Jerusalem
496	15 December 1981	Resolution deciding to send a commission of inquiry to Seychelles
507	28 May 1982	Resolution on South Africa's military activities against Seychelles
513	4 July 1982	Resolution on the civilian population in Lebanon
525	7 December 1982	Resolution on death sentences imposed on members of the African National Congress of South Africa
527	15 December 1982	Resolution on South Africa's military actions against Lesotho
533	7 June 1983	Resolution on death sentences imposed on 3 members of the African National Congress
540	31 October 1983	Resolution on the situation between the Islamic Republic of Iran and Iraq
546	6 January 1984	Resolution on South Africa's military attacks on Angola
552	1 June 1984	Resolution on attacks on commercial ships in the Gulf region
556	23 October 1984	Resolution demanding the immediate eradication of apartheid
560	12 March 1985	Resolution condemning the arbitrary arrests of members of the United Democratic Front in South Africa

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Number	Date of adoption	Title
564	31 May 1985	Resolution on humanitarian assistance to civilian persons in Lebanon
567	20 June 1985	Resolution on South Africa's military activities against Angola
569	26 July 1985	Resolution on sanctions against South Africa
571	20 September 1985	Resolution on South Africa's military activities against Angola
572	30 September 1985	Resolution on international relief to Botswana
579	18 December 1985	Resolution on hostage-taking and abduction
580	30 December 1985	Resolution on South Africa's military activities against Lesotho and compensation for Lesotho
581	13 February 1986	Resolution on South Africa's threats against States in southern Africa
582	24 February 1986	Resolution calling for cease-fire and exchange of prisoners between Iraq and the Islamic Republic of Iran
587	23 September 1986	Resolution on security of the personnel of the UN Interim Force in Lebanon
598	20 July 1987	Resolution requesting the Secretary-General to dispatch observers to supervise the cease-fire between Iraq and the Islamic Republic of Iran
610	16 March 1988	Resolution on death sentences imposed on 6 South Africans
612	9 May 1988	Resolution on chemical weapons use in the conflict between Iraq and the Islamic Republic of Iran
615	17 June 1988	Resolution on death sentences imposed on 6 South Africans
620	26 August 1988	Resolution on chemical weapons use in the conflict between Iraq and the Islamic Republic of Iran
623	23 November 1988	Resolution on death sentence imposed on an anti-apartheid activist in South Africa
638	31 July 1989	Resolution on incidents of hostage-taking and abduction
664	18 August 1990	Resolution on safety of third-State nationals in Iraq and Kuwait
666	13 September 1990	Resolution on the situation regarding foodstuffs in Iraq and Kuwait
667	16 September 1990	Resolution on Iraqi actions against diplomatic missions and their personnel in Kuwait
670	25 September 1990	Resolution on air embargo against Iraq

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Number	Date of adoption	Title
674	29 October 1990	Resolution on protection of third-State nationals in Iraq and Kuwait
677	28 November 1990	Resolution on Iraqi attempt to alter the demographic composition of Kuwait
678	29 November 1990	Resolution authorizing Member States to use all necessary means to implement Security Council resolution 660 (1990) and all relevant resolutions
681	20 December 1990	Resolution on Palestinian civilians under Israeli occupation
686	2 March 1991	Resolution on the end of hostilities in the Gulf region
687	3 April 1991	Resolution on restoration of the sovereignty, independence and territorial integrity of Kuwait
688	5 April 1991	Resolution on repression of the Iraqi civilian population, including Kurds in Iraq
692	20 May 1991	Resolution on establishment of the UN Compensation Fund and the UN Compensation Commission under Security Council Resolution 687 (1991)
699	17 June 1991	Resolution on destruction, removal or rendering harmless of weapons in Iraq
706	15 August 1991	Resolution authorizing States to permit the import of petroleum and petroleum products originating in Iraq sufficient to produce a sum to be determined by the Council
726	6 January 1992	Resolution on the deportation by Israel of 12 Palestinian civilians from the territories occupied by Israel
733	23 January 1992	Resolution calling for a complete embargo on deliveries of weapons and military equipment to Somalia
740	7 February 1992	Resolution on the political settlement of the situation in Yugoslavia
743	21 February 1992	Resolution on establishment of the United Nations Protection Force
746	17 March 1992	Resolution on humanitarian assistance to Somalia
751	24 April 1992	Resolution on establishment of a UN Operation in Somalia
752	15 May 1992	Resolution on political conditions in Bosnia and Herzegovina
757	30 May 1992	Resolution on sanctions against Yugoslavia

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Number	Date of adoption	Title
758	8 June 1992	Resolution on enlargement of the mandate and the strength of the UN Protection Force and humanitarian assistance to Bosnia and Herzegovina
761	29 June 1992	Resolution on deployment of additional elements of the United Nations Protection Force in Bosnia and Herzegovina
764	13 July 1992	Resolution on deployment of additional elements of the UN Protection Force in Bosnia and Herzegovina
770	13 August 1992	Resolution on humanitarian assistance to Sarajevo and other parts of Bosnia and Herzegovina
771	13 August 1992	Resolution on violations of humanitarian law in the territory of the former Yugoslavia and in Bosnia and Herzegovina
776	14 September 1992	Resolution on enlargement of the mandate of the UN Protection Force
779	6 October 1992	Resolution on implementation of the UN peace-keeping plan in Croatia
780	6 October 1992	Resolution on establishment of the Commission of Experts to Examine and Analyse the Information submitted pursuant to Security Council Resolution 771 (1992) on the situation in the former Yugoslavia
786	10 November 1992	Resolution on a ban on military flights in the airspace of Bosnia and Herzegovina
787	16 November 1992	Resolution demanding that all forms of interference from outside Bosnia and Herzegovina cease immediately
788	19 November 1992	Resolution on a general and complete embargo on all deliveries of weapons and military equipment to Liberia
794	3 December 1992	Resolution on measures to establish a secure environment for humanitarian relief operations in Somalia
798	18 December 1992	Resolution supporting initiative of the European Council to dispatch a fact-finding mission to Bosnia and Herzegovina
802	25 January 1993	Resolution on the situation in the UN Protected Areas in Croatia
804	29 January 1993	Resolution extending the mandate of the UN Angola Verification Mission II and demanding a cease-fire

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Number	Date of adoption	Title
808	22 February 1993	Resolution on establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia
811	12 March 1993	Resolution demanding a cease-fire and inviting the Secretary-General to organize a meeting between the Angolan Government and UNITA
813	26 March 1993	Resolution on implementation of the peace process in Liberia
814	26 March 1993	Resolution on the expansion of the size and mandate of the UN Operation in Somalia II
819	16 April 1993	Resolution demanding that Srebrenica and the surrounding areas, Bosnia and Herzegovina, be treated as a safe area
820	17 April 1993	Resolution on the peace plan for Bosnia and Herzegovina and the strengthening of the measures imposed by the earlier resolutions on the situation in the former Yugoslavia
822	30 April 1993	Resolution on the conflict between Armenia and Azerbaijan
824	6 May 1993	Resolution on treatment of certain towns and surroundings in Bosnia and Herzegovina as safe areas
827	25 May 1993	Resolution on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
834	1 June 1993	Resolution on extension of the mandate of the UN Angola Verification Mission II and the peace process in Angola
836	4 June 1993	Resolution extending the mandate of the UN Protection Force and authorizing the Force to use all necessary measures in reply to bombardments against the safe areas
837	6 June 1993	Resolution on unprovoked armed attacks against the personnel of the UN Operation in Somalia II on 5 June 1993
851	15 July 1993	Resolution on extension of the mandate of UN Angola Verification Mission II and implementation of the Peace Accords for Angola

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Number	Date of adoption	Title
853	29 July 1993	Resolution on the seizure of the district of Agdam and of all other recently occupied areas of Azerbaijan
859	24 August 1993	Resolution on a comprehensive political settlement of the situation in Bosnia and Herzegovina
864	15 September 1993	Resolution on extension of the mandate of the UN Angola Verification Mission II and possible arms and oil embargo against UNITA
865	22 September 1993	Resolution on continuation of the process of national reconciliation and political settlement in Somalia
868	29 September 1993	Resolution on security and safety of UN forces and personnel
874	14 October 1993	Resolution on settlement of the conflict in and around Nagorny Karabakh
876	19 October 1993	Resolution condemning violation of the cease-fire agreement and the killing of the Chairman of the Defence Council and Council of Ministers of the Autonomous Republic of Abkhazia
882	5 November 1993	Resolution on renewal of the mandate of the UN Operation in Mozambique and implementation of the General Peace Agreement for Mozambique
884	12 November 1993	Resolution on the conflict in and around Nagorny Karabakh
892	22 December 1993	Resolution on authorization of the phased deployment of additional military observers to the UN Observer Mission in Georgia
896	31 January 1994	Resolution on possible establishment of a peace-keeping force in Abkhazia, Georgia and on political settlement of the Abkhazia conflict
897	4 February 1994	Resolution on continuation of the UN Operation in Somalia II and the process of national reconciliation, reconstruction and political settlement in Somalia
898	23 February 1994	Resolution on establishment of a UN police component of the UN Operation in Mozambique and implementation of the General Peace agreement for Mozambique

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Number	Date of adoption	Title
904	18 March 1994	Resolution on measures to guarantee the safety and protection of the Palestinian civilians in territories occupied by Israel
906	25 March 1994	Resolution on extension of the mandate of the UN Observer Mission in Georgia and on political settlement of the situation in Abkhazia, Georgia
908	31 March 1994	Resolution on extension of the mandate and increase of the personnel of the UN Protection Force
912	21 April 1994	Resolution on adjustment of the mandate of the UN Assistance Mission for Rwanda due to the current situation in Rwanda and settlement of the Rwandan conflict
913	22 April 1994	Resolution on the situation in Bosnia and Herzegovina, particularly in the safe area of Gorazde and political settlement of the situation in the former Yugoslavia
917	6 May 1994	Resolution on expansion of the sanctions until the return of the legitimately elected President to Haiti
918	17 May 1994	Resolution on expansion of the mandate of the UN Assistance Mission for Rwanda and imposition of an arms embargo on Rwanda
923	31 May 1994	Resolution on renewal of the mandate of the UN Operation in Somalia II and process of national reconciliation in Somalia
925	8 June 1994	Resolution on extension of the mandate and deployment of the two additional battalions of the UN Assistance Mission for Rwanda and settlement of the conflict in Rwanda
929	22 June 1994	Resolution on establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded UN Assistance Mission for Rwanda
931	29 June 1994	Resolution on an immediate and durable cease-fire in Yemen
935	1 July 1994	Resolution requesting the Secretary-General to establish a Commission of Experts to examine violations of international humanitarian law committed in Rwanda

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Number	Date of adoption	Title
940	31 July 1994	Resolution on authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti
941	23 September 1994	Resolution on violations of international humanitarian law in Banja Luka, Bijeljina and other areas of Bosnia and Herzegovina under the control of Bosnian Serb forces
945	29 September 1994	Resolution on extension of the mandate of the UN Angola Verification Mission II and continuation of the efforts aimed at the earliest resolution of the Angolan crisis through negotiations within the framework of the Peace Accords
946	30 September 1994	Resolution on extension of the mandate of the UN Operation in Somalia II
947	30 September 1994	Resolution on extension of the mandate of the UN Protection Force and requesting the Secretary-General to report on progress towards implementation of the UN Peace-keeping Plan for Croatia and all relevant Security Council resolutions
950	21 October 1994	Resolution on extension of the mandate of the UN Observer Mission in Liberia and peace process in Liberia
952	27 October 1994	Resolution on extension of the mandate of the UN Angola Verification Mission II and reaching of an agreement for establishing an effective and sustainable cease-fire as a matter of urgency
954	4 November 1994	Resolution on extension of the mandate of the UN Operation in Somalia II for a final period until 31 Mar. 1995 and secure withdrawal of personnel and assets from Somalia
955	8 November 1994	Resolution on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal
957	15 November 1994	Resolution on extension of the mandate of the UN Operation in Mozambique until the new Government of Mozambique takes office and completion of the residual operations prior to the withdrawal of the UN Operation in Mozambique on or before 31 Jan. 1995

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Number	Date of adoption	Title
959	19 November 1994	Resolution on efforts of the UN Protection Force to ensure implementation of Security Council resolutions on safe areas in Bosnia and Herzegovina
965	30 November 1994	Resolution on extension and expansion of the mandate of the UN Assistance Mission for Rwanda
968	16 December 1994	Resolution on establishment of a UN Mission of Observers in Tajikistan and on the process of national reconciliation
978	27 February 1995	Resolution on arrest and detention of persons responsible for acts within the jurisdiction of the International Tribunal for Rwanda
985	13 April 1995	Resolution on extension of the mandate of the UN Observer Mission in Liberia and establishment of the Security Council Committee on arms embargo against Liberia
987	19 April 1995	Resolution on security and safety of the UN Protection Force
993	12 May 1995	Resolution on extension of the mandate of the UN Observer Mission in Georgia and settlement of the conflict in Abkhazia, Georgia
994	17 May 1995	Resolution on withdrawal of the Croatian Government troops from the zone of separation in Croatia and full deployment of the UN Confidence Restoration Operation in Croatia
998	16 June 1995	Resolution on establishment of a rapid-reaction force within the UN Protection Force
999	16 June 1995	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan and on the process of national reconciliation
1001	30 June 1995	Resolution on extension of the mandate of the UN Observer Mission in Liberia and on national reconciliation in Liberia
1004	12 July 1995	Resolution demanding withdrawal of the Bosnian Serb forces from the safe area of Srebrenica, Bosnia and Herzegovina
1005	17 July 1995	Resolution on supply of an appropriate quantity of explosives for use in the demining operations in Rwanda

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Number	Date of adoption	Title
1008	7 August 1995	Resolution on extension of the mandate of the UN Angola Verification Mission III and monitoring of the compliance with the cease-fire in Angola
1009	10 August 1995	Resolution on compliance by Croatia with the agreement signed on 6 Aug. 1995 between Croatia and the UN Peace Forces/UN Protection Force, including the right of the local Serb population to receive humanitarian assistance
1010	10 August 1995	Resolution on access by international agencies to displaced persons in Srebrenica and Zepa and on release of detained persons in Bosnia and Herzegovina
1011	16 August 1995	Resolution on lifting of restrictions imposed by paragraph 13 of resolution 918 (1994) on the sale or supply of arms and matériel to the Government of Rwanda
1012	28 August 1995	Resolution on establishment of an international commission of inquiry in Burundi
1014	15 September 1995	Resolution on extension of the mandate of the UN Observer Mission in Liberia
1019	9 November 1995	Resolution on violations of international humanitarian law in the former Yugoslavia
1031	15 December 1995	Resolution on implementation of the Peace Agreement for Bosnia and Herzegovina and transfer of authority from the UN Protection Force to the multinational Implementation Force (IFOR)
1034	21 December 1995	Resolution on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia
1036	12 January 1996	Resolution extending the mandate of the UN Observer Mission in Georgia
1037	15 January 1996	Resolution on establishment of the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
1040	29 January 1996	Resolution on deterioration in the situation and efforts to facilitate a comprehensive political dialogue in Burundi
1041	29 January 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia and efforts to restore peace, security and stability in Liberia

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Number	Date of adoption	Title
1049	5 March 1996	Resolution requesting the Secretary-General to intensify the preparations for convening a regional conference for peace, security and development in the Great Lakes region
1052	18 April 1996	Resolution calling for an immediate cease-fire by all parties involved in military activities in Lebanon
1055	8 May 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III and efforts to advance the peace process in Angola
1059	31 May 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia and the security situation in Liberia
1062	28 June 1996	Resolution on extension of the mandate of the UN Peace-keeping Force in Cyprus and restoration of confidence between the two communities in Cyprus
1064	11 July 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III and efforts to advance the peace process in Angola
1065	12 July 1996	Resolution extending the mandate of the UN Observer Mission in Georgia
1067	26 July 1996	Resolution on the conclusions of the ICAO report on the shooting down of two civilian aircraft by the Cuban Air Force
1071	30 August 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia
1072	30 August 1996	Resolution on a comprehensive political settlement of the crisis in Burundi
1073	28 September 1996	Resolution on the situation in Jerusalem and the areas of Nablus, Ramallah, Bethlehem and the Gaza Strip
1075	11 October 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III and efforts to advance the peace process in Angola
1076	22 October 1996	Resolution on the political, military and humanitarian situation in Afghanistan
1078	9 November 1996	Resolution requesting the Secretary-General to make all necessary arrangements to convene an international conference for peace, security and development in the Great Lakes region

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Number	Date of adoption	Title
1080	15 November 1996	Resolution on establishment of a multinational humanitarian intervention force for the Great Lakes region
1083	27 November 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia
1087	11 December 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III
1088	12 December 1996	Resolution on authorization of the establishment of a multinational stabilization force (SFOR) and extension of the mandate of the UN Mission in Bosnia and Herzegovina
1089	13 December 1996	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan
1092	23 December 1996	Resolution on extension of the mandate of the UN Peace-keeping Force in Cyprus
1095	28 January 1997	Resolution on extension of the mandate of the UN Interim Force in Lebanon (UNIFIL)
1096	30 January 1997	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1097	18 February 1997	Resolution on the 5-point peace plan for eastern Zaire
1099	14 March 1997	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan (UNMOT)
1118	30 June 1997	Resolution on establishment of the UN Observer Mission in Angola (MONUA)
1120	14 July 1997	Resolution on extension of the mandate of the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
1122	29 July 1997	Resolution on extension of the mandate of the UN Interim Force in Lebanon (UNIFIL)
1124	31 July 1997	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1127	28 August 1997	Resolution on measures against UNITA for non-compliance with its obligations under the Lusaka peace accords
1132	8 October 1997	Resolution on oil and arms embargo against Sierra Leone

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Number	Date of adoption	Title
1145	19 December 1997	Resolution on the establishment of a support group of civilian police monitors in the Danube region
1150	30 January 1998	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1151	30 January 1998	Resolution on extension of the mandate of the UN Interim Force in Lebanon
1157	20 March 1998	Resolution on modalities of UN presence in Angola
1160	31 March 1998	Resolution on the imposition of an arms embargo against Yugoslavia
1161	9 April 1998	Resolution on the reactivation of the International Commission of Inquiry to investigate violations of the arms embargo against Rwanda
1164	29 April 1998	Resolution on extension of the mandate of the UN Mission of Observers in Angola (MONUA)
1165	30 April 1998	Resolution on the establishment of a 3rd Trial Chamber of the International Tribunal for Rwanda
1166	13 May 1998	Resolution on the establishment of a 3rd Trial Chamber of the International Tribunal for Yugoslavia
1173	12 June 1998	Resolution on measures against UNITA for non-compliance with its obligations under the Lusaka Protocol, relevant Security Council resolutions and the plan of the Special Representative to the Joint Commission
1180	29 June 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA) and the resumption of the withdrawal of its military component
1181	13 July 1998	Resolution on establishment of the UN Observer Mission in Sierra Leone (UNOMSIL)
1187	30 July 1998	Resolution on extension of the mandate of the UN Observer Mission in Georgia
1188	30 July 1998	Resolution on extension of the mandate of the UN Interim Force in Lebanon
1193	28 August 1998	Resolution on the situation in Afghanistan
1195	15 September 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA)

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Number	Date of adoption	Title
1199	23 September 1998	Resolution on the situation in Kosovo, Yugoslavia
1202	15 October 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA)
1203	24 October 1998	Resolution on agreements for the verification of compliance with the provisions of resolution 1199 (1998) on the situation in Kosovo, Yugoslavia
1206	12 November 1998	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan (UNMOT)
1208	19 November 1998	Resolution on the maintenance of the security and civilian and humanitarian character of refugee camps and settlements in Africa
1212	25 November 1998	Resolution on extension of the mandate of the UN Civilian Police Mission in Haiti (MIPONUH)
1213	3 December 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA)
1214	8 December 1998	Resolution on the situation in Afghanistan
1225	28 January 1999	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1239	14 May 1999	Resolution on relief assistance to Kosovo refugees and internally displaced persons in Kosovo, the Republic of Montenegro and other parts of Yugoslavia
1244	10 June 1999	Resolution on the deployment of international civil and security presences in Kosovo
1261	25 August 1999	Resolution on children in armed conflicts
1264	15 September 1999	Resolution on establishment of a multinational peace force in East Timor
1265	17 September 1999	Resolution on protection of civilians in armed conflicts
1272	25 October 1999	Resolution on establishment of the UN Transitional Administration in East Timor (UNTAET)
1284	17 December 1999	Resolution on establishment of the UN Monitoring, Verification and Inspection Commission (UNMOVIC)

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Number	Date of adoption	Title
1291	24 February 2000	Resolution on extension of the mandate and expansion of the UN Organization Mission in the Democratic Republic of the Congo (MONUC)
1296	19 April 2000	Resolution on protection of civilians in armed conflicts
1312	31 July 2000	Resolution on establishment of the UN Mission in Ethiopia and Eritrea
1313	4 August 2000	Resolution on extension of the mandate of the UN Mission in Sierra Leone (UNAMSIL)
1314	11 August 2000	Resolution on the protection of children in situations of armed conflicts
1315	14 August 2000	Resolution on establishing a special court in Sierra Leone
1320	15 September	Resolution on deployment of troops and military observers within the UN Mission in Ethiopia and Eritrea (UNMEE)
1322	7 October 2000	Resolution on recent events in Jerusalem and other areas throughout the territories occupied by Israel
1325	31 October 2000	Resolution on women and peace and security
1329	30 November 2000	Resolution on increasing the membership of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda
1333	19 December 2000	Resolution on measures against the Taliban

RESOLUTIONS ADOPTED BY THE UN GENERAL ASSEMBLY

Number	Date of Adoption	Title	Voting Record
3 (I)	13 February 1946	Extradition and punishment of war criminals	Without a vote
92 (I)	7 December 1946	Official Seal and Emblem of the United Nations	Without a vote
95 (I)	11 December 1946	Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal	Without a vote
167 (II)	20 October 1947	United Nations Flag	52-0-3
170 (II)	31 October 1947	Surrender of war criminals and traitors	42-7-6
177 (II)	21 November 1947	Formulation of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgement of the Tribunal	42-1-8
217 A (III)	10 December 1948	International Bill of Human Rights: A. Universal Declaration on Human Rights	48-0-8
260 A (III)	9 December 1948	Prevention and punishment of the crime of genocide	56-0-0
317 (IV)	2 December 1949	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	35-2-15
428 (V)	14 December 1950	Statute of the office of the United Nations High Commissioner for Refugees	48-5-4
794 (VIII)	23 October 1953	Transfer to the United Nations of the functions exercized by the League of Nations under the Slavery Convention of 25 September 1926	50-0-6

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Number	Date of Adoption	Title	Voting Record
1653 (XVI)	24 November 1961	Declaration on the prohibition of the use of nuclear and thermonuclear weapons	55-20-26
2106 A (XX)	21 December 1965	International Convention on the Elimination of All Forms of Racial Discrimination	106-0-1
2162 B (XXI)	5 December 1966	Question of general and complete disarmament	91-0-4
2189 (XXI)	13 December 1966	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	76-7-20
2198 (XXI)	16 December 1966	Protocol relating to the Status of Refugees	90-0-11
2200 A (XXI)	16 December 1966	International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights	Without a vote
2262 (XXII)	3 November 1967	Question of Southern Rhodesia	92-2-18
2312 (XXII)	14 December 1967	Declaration on Territorial Asylum	Without a vote
2326 (XXII)	16 December 1967	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	86-6-17
2338 (XXII)	18 December 1967	Question of the punishment of war criminals and of persons who have committed crimes against humanity	90-2-22
2391 (XXIII)	26 November 1968	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	58-7-36

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Number	Date of Adoption	Title	Voting Record
2443 (XXIII)	19 December 1968	Respect for and implementation human rights in occupied territories	60-22-37
2444 (XXIII)	19 December 1968	Respect for human rights in armed conflicts	111-0-0
2454 A (XXIII)	20 December 1968	Question of general and complete disarmament	107-0-2
2465 (XXIII)	20 December 1968	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	87-7-17
2546 (XXIV)	11 December 1969	Respect for and implementation of human rights in occupied territories	52-13-49
2547 (XXIV)	11 December 1969	Measures for effectively combating racial discrimination and the policies of apartheid and segregation in southern Africa	87-1-23
2548 (XXIV)	11 December 1969	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	78-5-16
2583 (XXIV)	15 December 1969	Question of the punishment of war criminals and of persons who have committed crimes against humanity	74-5-32
2597 (XXIV)	16 December 1969	Respect for human rights in armed conflicts	91-0-23
2603 A (XXIV)	16 December 1969	Question of chemical and bacteriological (biological) weapons	80-3-36
2603 B (XXIV)	16 December 1969	Question of chemical and bacteriological (biological) weapons	120-0-1
2662 (XXV)	7 December 1970	Question of chemical and bacteriological (biological) weapons	113-0-2

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Number	Date of Adoption	Title	Voting Record
2673 (XXV)	9 December 1970	Protection of journalists engaged in dangerous missions in areas of armed conflict	78-10-28
2674 (XXV)	9 December 1970	Respect for human rights in armed conflicts	77-2-36
2675 (XXV)	9 December 1970	Basic principles for the protection of civilian populations in armed conflicts	109-0-8
2676 (XXV)	9 December 1970	Respect for human rights in armed conflicts	67-30-20
2677 (XXV)	9 December 1970	Respect for human rights in armed conflicts	111-0-4
2707 (XXV)	14 December 1970	Question of Territories under Portuguese administration	94-6-16
2708 (XXV)	14 December 1970	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	93-5-22
2712 (XXV)	15 December 1970	Question of the punishment of war criminals and of persons who have committed crimes against humanity	55-4-33
2727 (XXV)	15 December 1970	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	52-20-43
2795 (XXVI)	10 December 1971	Question of Territories under Portuguese administration	105-8-5
2826 (XXVI)	16 December 1971	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	110-0-1
2827 A (XXVI)	16 December 1971	Question of chemical and bacteriological (biological) weapons	110-0-1
2827 B (XXVI)	16 December 1971	Question of chemical and bacteriological (biological) weapons	101-0-10

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Number	Date of Adoption	Title	Voting Record
2840 (XXVI)	18 December 1971	Question of the punishment of war criminals and of persons who have committed crimes against humanity	71-0-42
2852 (XXVI)	20 December 1971	Respect for human rights in armed conflicts	110-1-5
2853 (XXVI)	20 December 1971	Respect for human rights in armed conflicts	83-15-14
2854 (XXVI)	20 December 1971	Protection of journalists engaged in dangerous missions in areas of armed conflicts	96-2-20
2918 (XXVII)	14 November 1972	Question of Territories under Portuguese administration	96-2-20
2932 A (XXVII)	29 November 1972	General and complete disarmament	99-0-15
2933 (XXVII)	29 November 1972	Chemical and bacteriological (biological) weapons	113-0-2
3005 (XXVII)	15 December 1972	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	63-10-49
3020 (XXVII)	18 December 1972	Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity	105-0-18
3032 (XXVII)	18 December 1972	Respect for human rights in armed conflicts	103-0-25
3058 (XXVIII)	2 November 1973	Protection of journalists engaged in dangerous missions in areas of armed conflict	Without a vote
3068 (XXVIII)	30 November 1973	International Convention on the Suppression and Punishment of the Crime of Apartheid	91-4-26

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Number	Date of Adoption	Title	Voting Record
3074 (XXVIII)	3 December 1973	Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity	94-0-29
3076 (XXVIII)	6 December 1973	Napalm and other incendiary weapons and all aspects of their possible use	103-0-18
3077 (XXVIII)	6 December 1973	Chemical and bacteriological (biological) weapons	118-0-0
3102 (XXVIII)	12 December 1973	Respect for human rights in armed conflicts	107-0-6
3103 (XXVIII)	12 December 1973	Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes	83-13-19
3113 (XXVIII)	12 December 1973	Question of Territories under Portuguese administration	105-8-16
3166 (XXVIII)	14 December 1973	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents	Without a vote
3220 (XXIX)	6 November 1974	Assistance and co-operation in accounting for persons who are missing or dead in armed conflicts	95-0-32
3255 A (XXIX)	9 December 1974	Napalm and other incendiary weapons and all aspects of their possible use	108-0-13
3255 B (XXIX)	9 December 1974	Napalm and other incendiary weapons and all aspects of their possible use	98-0-27
3256 (XXIX)	9 December 1974	Chemical and bacteriological (biological) weapons	Without a vote
3318 (XXIX)	14 December 1974	Declaration on the Protection of Women and Children in Emergency and Armed Conflict	110-0-14
3319 (XXIX)	14 December 1974	Respect for human rights in armed conflicts	Without a vote

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Number	Date of Adoption	Title	Voting Record
3452 (XXX)	9 December 1975	Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Without a vote
3465 (XXX)	11 December 1975	Chemical and bacteriological (biological) weapons	Without a vote
3500 (XXX)	15 December 1975	Respect for human rights in armed conflicts	Without a vote
31/19	24 November 1976	Respect for human rights in armed conflicts	Without a vote
31/64	10 December 1976	Incendiary and other specific conventional weapons which may be the subject of prohibitions or restrictions of use for humanitarian reasons	Without a vote
31/65	10 December 1976	Chemical and bacteriological (biological) weapons	Without a vote
31/72	10 December 1976	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques	96-8-3
32/14	7 November 1977	Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights	113-3-18
32/44	8 December 1977	Respect for human rights in armed conflicts	Without a vote
32/77	12 December 1977	Chemical and bacteriological (biological) weapons	Without a vote
32/91 A	13 December 1977	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	132-1-1
32/152	19 December 1977	Incendiary and other specific conventional weapons which may be the subject of prohibitions or restrictions of use for humanitarian reasons	115-0-21
33/59 A	14 December 1978	Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
33/70	14 December 1978	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
33/113 A	18 December 1978	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-1
33/183	24 January 1979	Policies of apartheid of the Government of South Africa B. International mobilization against apartheid	122-4-0
34/72	11 December 1979	Chemical and bacteriological (biological) weapons	124-0-13
34/82	11 December 1979	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
34/90 A	12 December 1979	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	111-2-31
34/90 C	12 December 1979	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-4
34/93 A	12 December 1979	Policies of apartheid of the Government of South Africa A. Situation in South Africa	109-12-21

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Number	Date of Adoption	Title	Voting Record
34/93 H	12 December 1979	Policies of apartheid of the Government of South Africa H. Political prisoners in South Africa	109-12-21
34/140	14 December 1979	Drafting of an international convention against activities of mercenaries	Without a vote
34/146	17 December 1979	International Convention against the Taking of Hostages	Without a vote
34/169	17 December 1979	Code of conduct for law enforcement officials	Without a vote
34/180	18 December 1979	Convention on the Elimination of All Forms of Discrimination against Women	130-0-10
35/122 A	11 December 1980	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	141-1-1
35/122 B	11 December 1980	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied	140-1-3
35/144 A	12 December 1980	Chemical and bacteriological (biological) weapons	Without a vote
35/144 B	12 December 1980	Chemical and bacteriological (biological) weapons	Without a vote
35/144 C	12 December 1980	Chemical and bacteriological (biological) weapons	78-17-36
35/153	12 December 1980	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote

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Number	Date of Adoption	Title	Voting Record
36/9	28 October 1981	Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights	120-17-9
36/55	25 November 1981	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief	Without a vote
36/93	9 December 1981	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
36/96 A	9 December 1981	Chemical and bacteriological (biological) weapons	147-0-1
36/96 B	9 December 1981	Chemical and bacteriological (biological) weapons	109-1-33
36/147 A	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	142-1-3
36/147 B	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	142-1-3
36/147 C	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	111-2-31

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Number	Date of Adoption	Title	Voting Record
36/147 D	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	143-1-2
36/147 G	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-2
37/7	28 October 1982	World Charter for Nature	111-1-18
37/79	9 December 1982	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
37/88 A	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	134-1-1
37/88 B	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	134-1-1
37/88 C	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	112-2-21
37/88 D	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	133-1-1

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Number	Date of Adoption	Title	Voting Record
37/98 A	13 December 1982	Chemical and bacteriological (biological) weapons A. Chemical and bacteriological (biological) weapons	95-1-46
37/98 B	13 December 1982	Chemical and bacteriological (biological) weapons B. Chemical and bacteriological (biological) weapons	Without a vote
37/98 C	13 December 1982	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	124-15-1
37/98 D	13 December 1982	Chemical and bacteriological (biological) weapons D. Provisional Procedures to uphold the authority of the 1925 Geneva Protocol	86-119-33
37/98 E	13 December 1982	Chemical and bacteriological (biological) weapons E. Chemical and bacteriological (biological) weapons	83-22-33
37/123 A	16 December 1982	The situation in the Middle East	87-22-31
37/194	18 December 1982	Principles of Medical Ethics	Without a vote
38/9	10 November 1983	Armed Israeli aggression against the Iraqi nuclear installations and its grave consequences for the established international system concerning the peaceful uses of nuclear energy, the non-proliferation of nuclear weapons and international peace and security	123-2-12
38/66	15 December 1983	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote

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Number	Date of Adoption	Title	Voting Record
38/69	15 December 1983	Israeli nuclear armament	99-2-39
38/79 A	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	110-2-29
38/79 B	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	146-1-1
38/79 C	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	147-1-1
38/79 D	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	115-2-27
38/79 E	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	146-1-1
38/79 F	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	144-1-1
38/79 G	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	116-2-28

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Number	Date of Adoption	Title	Voting Record
38/79 H	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	145-1-1
38/101	16 December 1983	Situation of human rights and fundamental freedoms in El Salvador	84-14-45
38/180 A	19 December 1983	The situation in the Middle East	85-23-31
38/187 A	20 December 1983	Chemical and bacteriological (biological) weapons A. Prohibition of chemical and bacteriological weapons	98-1-49
38/187 B	20 December 1983	Chemical and bacteriological (biological) weapons B. Chemical and bacteriological (biological) weapons	Without a vote
39/46	10 December 1984	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Without a vote
39/56	12 December 1984	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
39/65 A	12 December 1984	Chemical and bacteriological (biological) weapons	118-16-14
39/65 C	12 December 1984	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	Without a vote
39/65 E	12 December 1984	Chemical and bacteriological (biological) weapons E. Chemical and bacteriological (biological) weapons	87-18-30

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Number	Date of Adoption	Title	Voting Record
39/95 A	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	120-2-15
39/95 B	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-3
39/95 D	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	115-2-28
39/95 E	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	143-1-1
39/119	14 December 1984	Situation of human rights and fundamental freedoms in El Salvador	93-11-40
40/33	29 November 1985	United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")	Without a vote
40/84	12 December 1985	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
40/92 A	12 December 1985	Chemical and bacteriological (biological) weapons A. Prohibition of Chemical and Biological Weapons	93-15-41
40/92 B	12 December 1985	Chemical and bacteriological (biological) weapons B. Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
40/92 C	12 December 1985	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	112-16-22
40/137	13 December 1985	Question of human rights and fundamental freedoms in Afghanistan	80-22-40
40/139	13 December 1985	Situation of human rights and fundamental freedoms in El Salvador	100-2-42
40/140	13 December 1985	Situation of human rights and fundamental freedoms in Guatemala	91-8-47
40/161 B	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	137-1-6
40/161 C	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	138-1-6
40/161 D	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	109-2-34 (as regards the resolution as a whole); 136-1-7 (as regards operative paragraph 21)
40/161 E	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	126-1-19 (as regards the resolution as a whole); 110-2-33 (as regards operative paragraph 1)
41/35 A	10 November 1986	Policies of apartheid of the Government of South Africa, A. Situation in South Africa and assistance to liberation movements	130-8-18

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Number	Date of Adoption	Title	Voting Record
41/50	3 December 1986	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
41/58 A	3 December 1986	Chemical and bacteriological (biological) weapons A. Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on their Destruction	Without a vote
41/58 B	3 December 1986	Chemical and bacteriological (biological) weapons B. Prohibition of chemical and bacteriological weapons	100-11-43
41/58 C	3 December 1986	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	137-0-14
41/58 D	3 December 1986	Chemical and bacteriological (biological) weapons D. Chemical and bacteriological (biological) weapons	Without a vote
41/157	4 December 1986	Situation of human rights in El Salvador	110-0-40
42/30	30 November 1987	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effect	Without a vote
42/37 A	30 November 1987	Chemical and bacteriological (biological) weapons A. Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
42/37 C	30 November 1987	Chemical and bacteriological (biological) weapons C. Measures to uphold the authority of the 1925 Geneva Protocol and to support the conclusion of a Chemical Weapons Convention	Without a vote
42/96	7 December 1987	Use of mercenaries as a means to violate rights and to impede the exercise of the right of peoples to self-determination human	125-10-19
43/21	3 November 1988	The uprising (intifadah) of the Palestinian people	130-2-16
43/67	7 December 1988	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
43/74 A	7 December 1988	Chemical and bacteriological (biological) weapons A. Measures to uphold the authority of the 1925 Geneva Protocol and to support the conclusion of a Chemical Weapons Convention	Without a vote
43/74 B	7 December 1988	Chemical and bacteriological (biological) weapons B. Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) Toxin Weapons and on Their Destruction	Without a vote
43/74 C	7 December 1988	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
43/107	8 December 1988	Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination	125-10-21
43/173	9 December 1988	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	Without a vote
44/25	20 November 1989	Convention on the Rights of the Child	Without a vote
44/34	4 December 1989	International Convention against the Recruitment, Use, Financing and Training of Mercenaries	Without a vote
44/81	8 December 1989	Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination	125-10-21
44/115 A	15 December 1989	Chemical and bacteriological (biological) weapons A. Chemical and bacteriological (biological) weapons	Without a vote
44/115 B	15 December 1989	Chemical and bacteriological (biological) weapons B. Measures to uphold the authority of the 1925 Geneva Protocol and to support the conclusion of a Chemical Weapons Convention	Without a vote
44/128	15 December 1989	Elaboration of a 2nd Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty	59-26-48
44/165	15 December 1989	Situation of human rights and fundamental freedoms in El Salvador	Without a vote

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Number	Date of Adoption	Title	Voting Record
45/57 A	4 December 1990	Chemical and bacteriological (biological) weapons A. Chemical and bacteriological (biological) weapons	Without a vote
45/57 B	4 December 1990	Chemical and Bacteriological (biological) weapons B. Implementation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction and Preparations for the Third Review Conference of the Parties to the Convention	Without a vote
45/57 C	4 December 1990	Chemical and bacteriological (biological) weapons C. Measures to uphold the authority of the 1925 Geneva Protocol	Without a vote
45/58	4 December 1990	General and complete disarmament J. Prohibition of attacks on nuclear facilities	Without a vote
45/64	4 December 1990	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
45/111	14 December 1990	Basic Principles for the Treatment of Prisoners	Without a vote
45/112	14 December 1990	United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)	Without a vote
45/113	14 December 1990	United Nations Rules for the Protection of Juveniles Deprived of Their Liberty	Without a vote
45/170	18 December 1990	The situation of human rights in occupied Kuwait	144-1-0

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Number	Date of Adoption	Title	Voting Record
46/35 A	6 December 1991	Chemical and bacteriological (biological) weapons A. Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on Their Destruction	113-2-14
46/35 B	6 December 1991	Chemical and bacteriological (biological) weapons B. Measures to uphold the authority of the 1925 Geneva Protocol	Without a vote
46/35 C	6 December 1991	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	Without a vote
46/40	6 December 1991	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
46/134	17 December 1991	Situation of human rights in Iraq	129-1-17
46/136	17 December 1991	Situation of human rights in Afghanistan	Without a vote
46/182	19 December 1991	Strengthening of the coordination of humanitarian emergency assistance of the United Nations	Without a vote
46/216	20 December 1991	International cooperation to mitigate the environmental consequences on Kuwait and other countries in the region resulting from the situation between Iraq and Kuwait	135-0-1
46/242	25 August 1992	The situation in Bosnia and Herzegovina	136-1-5

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Number	Date of Adoption	Title	Voting Record
47/37	25 November 1992	Protection of the environment in times of armed conflict	Without a vote
47/39	30 November 1992	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
47/44	9 December 1992	The role of science and technology in the context of international security, disarmament and other related fields	Without a vote
47/52 E	9 December 1992	General and complete disarmament E. Second Review Conference of the Parties to the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques	Without a vote
47/56	9 December 1992	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
47/80	16 December 1992	"Ethnic cleansing" and racial hatred	Without a vote
47/121	18 December 1992	The situation in Bosnia and Herzegovina	102-0-57
47/133	18 December 1992	Declaration on the Protection of All Persons from Enforced Disappearance	Without a vote
47/141	18 December 1992	Situation of human rights in Afghanistan	Without a vote
47/145	18 December 1992	Situation of Human Rights in Iraq	126-2-26
47/147	18 December 1992	Situation of human rights in the territory of the former Yugoslavia	Without a vote

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Number	Date of Adoption	Title	Voting Record
47/151	18 December 1992	International cooperation to mitigate the environmental consequences on Kuwait and other countries in the region resulting from the situation between Iraq and Kuwait	159-0-2
47/190	22 December 1992	Report of the United Nations Conference on Environment and Development	Without a vote
47/191	22 December 1992	Institutional arrangements to follow up the United Nations Conference on Environment and Development	Without a vote
48/30	9 December 1993	United Nations Decade of International Law	Without a vote
48/37	9 December 1993	Question of responsibility for attacks on United Nations and associated personnel and measures to ensure that those responsible for such attacks are brought to justice	Without a vote
48/65	16 December 1993	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
48/75 K	16 December 1993	General and complete disarmament K. Moratorium on the export of anti-personnel landmines	Without a vote
48/79	16 December 1993	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote

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Number	Date of Adoption	Title	Voting Record
48/88	20 December 1993	The situation in Bosnia and Herzegovina	109-0-57
48/92	20 December 1993	Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination	108-14-39
48/104	20 December 1993	Declaration on the Elimination of Violence against Women	Without a vote
48/116	20 December 1993	Office of the United Nations High Commissioner for Refugees	Without a vote
48/143	20 December 1993	Rape and abuse of women in the areas of armed conflict in the former Yugoslavia	Without a vote
48/144	20 December 1993	Situation of human rights in Iraq	116-2-43
48/152	20 December 1993	Situation of human rights in Afghanistan	Without a vote
48/153	20 December 1993	Situation of human rights in the territory of the former Yugoslavia: violations of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote
48/157	20 December 1993	Protection of children affected by armed conflicts	Without a vote
49/10	3 November 1994	The situation in Bosnia and Herzegovina	97-0-61
49/50	9 December 1994	United Nations Decade of International Law	Without a vote
49/59	9 December 1994	Convention on the Safety of United Nations and Associated Personnel	Without a vote
49/75 D	15 December 1994	General and complete disarmament D. Moratorium on the exports of anti-personnel land-mines	Without a vote

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Number	Date of Adoption	Title	Voting Record
49/79	15 December 1994	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
49/86	15 December 1994	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
49/113	19 December 1994	Dissemination of the principles of the Rio Declaration on Environment and Development	Without a vote
49/126	19 December 1994	Agenda for development	Without a vote
49/169	23 December 1994	Office of the United Nations High Commissioner for Refugees	Without a vote
49/196	23 December 1994	Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	150-0-14
49/198	23 December 1994	Situation of human rights in the Sudan	101-13-49
49/199	23 December 1994	Situation of human rights in Cambodia	Without a vote
49/205	23 December 1994	Rape and abuse of women in the areas of armed conflict in the former Yugoslavia	Without a vote
49/206	23 December 1994	Situation of human rights in Rwanda	Without a vote
49/207	23 December 1994	Situation of human rights in Afghanistan	Without a vote
49/215	23 December 1994	Assistance in mine clearance	Without a vote
50/22 C	25 April 1996	The situation in the Middle East	64-2-65
50/44	11 December 1995	United Nations Decade of International Law	Without a vote

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Number	Date of Adoption	Title	Voting Record
50/70 O	12 December 1995	General and complete disarmament O. Moratorium on the exports of anti-personnel landmines	Without a vote
50/74	12 December 1995	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
50/79	12 December 1995	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
50/82	14 December 1995	Assistance in mine clearance	Without a vote
50/178	22 December 1995	Situation of human rights in Cambodia	Without a vote
50/189	22 December 1995	Situation of human rights in Afghanistan	Without a vote
50/192	22 December 1995	Rape and abuse of women in the areas of armed conflicts in the former Yugoslavia	Without a vote
50/193	22 December 1995	Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	144-1-20
50/197	22 December 1995	Situation of human rights in the Sudan	94-15-54
50/200	22 December 1995	Situation of human rights in Rwanda	Without a vote
51/30 B	5 December 1996	Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance: special economic assistance to individual countries or regions B. Assistance for the rehabilitation and reconstruction of Liberia	Without a vote

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Number	Date of Adoption	Title	Voting Record
51/30 G	13 December 1996	Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance: special economic assistance to individual countries or regions G. Assistance for humanitarian relief and the economic and social rehabilitation of Somalia	Without a vote
51/45 P	10 December 1996	Measures to uphold the authority of the 1925 Geneva Protocol	165-0-7
51/45 S	10 December 1996	General and complete disarmament S. An international agreement to ban anti-personnel landmines	155-0-10
51/45 T	10 December 1996	General and complete disarmament T. Status of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
51/49	10 December 1996	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
51/54	10 December 1996	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
51/77	12 December 1996	The rights of the child	Without a vote

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Number	Date of Adoption	Title	Voting Record
51/83	12 December 1996	Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination	117-17-39
51/98	12 December 1996	Situation of human rights in Cambodia	Without a vote
51/108	12 December 1996	Situation of human rights in Afghanistan	Without a vote
51/112	12 December 1996	Situation of human rights in the Sudan	100-16-50
51/114	12 December 1996	Situation of human rights in Rwanda	Without a vote
51/115	12 December 1996	Rape and abuse of women in the areas of armed conflict in the former Yugoslavia	Without a vote
51/134	13 December 1996	Israeli practices affecting the human rights of the Palestinian people in the occupied Palestinian territory, including Jerusalem	149-2-8
51/137	13 December 1996	Convention on the Safety of United Nations and Associated Personnel	Without a vote
51/157	16 December 1996	United Nations Decade of International Law	Without a vote
52/38 A	9 December 1997	General and complete disarmament: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction	142-0-18
52/38 H	9 December 1997	General and complete disarmament: Contributions towards banning anti-personnel landmines	147-0-15
52/38 T	9 December 1997	General and complete disarmament: Status of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote

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Number	Date of Adoption	Title	Voting Record
52/42	9 December 1997	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
52/47	9 December 1997	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
52/107	12 December 1997	The rights of the child	Without a vote
52/140	12 December 1997	Situation of human rights in the Sudan	93-16-58
52/145	12 December 1997	Situation of human rights in Afghanistan	Without a vote
52/167	16 December 1997	Safety and security of humanitarian personnel	Without a vote
53/26	17 November 1998	Assistance in mine action	Without a vote
53/77 L	4 December 1998	General and complete disarmament L. Measures to uphold the authority of the 1925 Geneva Protocol	168-0-5
53/77 N	4 December 1998	General and complete disarmament: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction	147-0-21
53/77 R	4 December 1998	General and complete disarmament R. Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote

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Number	Date of Adoption	Title	Voting Record
53/81	4 December 1998	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
53/87	7 December 1998	Safety and security of humanitarian personnel and protection of United Nations personnel	Without a vote
53/116	9 December 1998	Traffic in women and girls	Without a vote
53/128	9 December 1998	The rights of the child	Without a vote
53/164	9 December 1998	Situation of human rights in Kosovo	122-3-34
54/54 B	1 December 1999	General and complete disarmament B. Implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction	139-1-20
54/54 E	1 December 1999	General and complete disarmament E. Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
54/58	1 December 1999	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
54/61	1 December 1999	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote

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Number	Date of Adoption	Title	Voting Record
54/78	6 December 1998	Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, and the occupied Syrian Golan	149-3-3
54/151	17 December 1999	Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination	110-16-35
54/183	17 December 1999	Situation of human rights in Kosovo	108-4-45
54/192	17 December 1999	Safety and security of humanitarian personnel and protection of United Nations personnel	Without a vote
54/263	25 May 2000	Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography	Without a vote
55/2	8 September 2000	United Nations Millennium Declaration	Without a vote
55/24	14 November 2000	The situation in Bosnia and Herzegovina	Without a vote
55/25	15 November 2000	United Nations Convention against Transnational Organized Crime	Without a vote
55/33 H	20 November 2000	General and Complete Disarmament H. Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
55/33 J	20 November 2000	General and Complete Disarmament J. Measures to uphold the authority of the 1925 Geneva Protocol	163-0-5

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Number	Date of Adoption	Title	Voting Record
55/33 V	20 November 2000	General and Complete Disarmament V. Implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction	143-0-22
55/40	20 November 2000	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
55/73	4 December 2000	New international humanitarian order	Without a vote
55/116	4 December 2000	Situation of human rights in the Sudan	85-32-49
56/4	5 November 2001	Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict	Without a vote
56/83	12 December 2001	Responsibility of States for internationally wrongful acts	Without a vote

RESOLUTIONS ADOPTED BY ECOSOC

Number	Date	Title	Voting Record
608 (XXI)	30 April 1956	Slavery	12-1-5
663 (XXIV)	31 July 1957	World social situation 663 C Recommendations of the first UN Congress on the Prevention of Crime and the treatment of Offenders	Unanimously
1158 (XLI)	5 August 1966	Question of punishment of war criminals and of persons who have committed crimes against humanity	22-0-2
1186 (XLI)	18 November 1966	Annual report of the United Nations High Commissioner for Refugees: Measures to extend the personal scope of the Convention of 28 July 1951 relating to the status of refugees	Without a vote
2075 (LXII)	13 May 1977	Report of the Committee on Crime Prevention and Control on its 4th session	Without a vote
2076 (LXII)	13 May 1977	Extension of the Standard Minimum Rules for the Treatment of Prisoners to persons arrested or imprisoned without charge	Without a vote
1979/38	10 May 1979	Disappeared persons	Without a vote
1980/4	16 April 1980	Measures to prevent the exploitation of prostitution	Without a vote
1980/41	2 May 1980	Conditions in which women are detained	Without a vote
1982/24	4 May 1982	Women and children under apartheid	35-1-6

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Number	Date	Title	Voting Record
1982/25	4 May 1982	Women and children refugees	Without a vote
1984/19	24 May 1984	Physical violence against detained women that is specific to their sex	Without a vote
1986/29	23 May 1986	Physical violence against detained women that is specific to their sex	Without a vote
1989/65	24 May 1989	Effective prevention and investigation of extra-legal, arbitrary and summary executions	Without a vote
1990/5	24 May 1990	Physical violence against detained women that is specific to their sex	Without a vote
1991/23	30 May 1991	Refugee and displaced women and children	Without a vote
1998/9	28 July 1998	Situation of women and girls in Afghanistan	Without a vote

RESOLUTIONS ADOPTED BY THE UN COMMISSION ON HUMAN RIGHTS

Number	Date	Title	Voting record
3 (XXI)	9 April 1965	Question of punishment of war criminals and of persons who have committed crimes against humanity	Unanimously (as regards to the resolution as a whole), 19-0-2 (as regards subparagraph (b) of operative paragraph 1)
1 (XXXIII)	15 February 1977	Question of the violation of human rights in the territories occupied as a result of hostilities in the Middle East	23-3-6
1 (XXXIV)	14 February 1978	Question of the violation of human rights in the occupied Arab territories, including Palestine	23-2-7
1 (XXXV)	21 February 1979	Question of the violation of human rights in the occupied Arab territories, including Palestine	20-2-9
1 (XXXVI)	13 February 1980	Question of the violation of human rights in the occupied Arab territories, including Palestine	28-3-8
29 (XXXVI)	11 March 1980	Human rights situation in Democratic Kampuchea	20-4-6
1 A (XXXVII)	11 February 1981	Question of the violation of human rights in the occupied Arab territories, including Palestine	31-3-8

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Number	Date	Title	Voting record
1982/1	11 February 1982	Question of the violation of human rights in the occupied Arab territories, including Palestine	Without a vote
1983/1	15 February 1983	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-1-12
1983/5	15 February 1983	The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation	28-9-4
1983/23	4 March 1983	Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 35th session: discrimination against indigenous populations	Without a vote
1983/29	8 March 1983	Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories: situation of human rights in El Salvador	23-6-10
1984/1	20 February 1984	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-1-11
1984/52	14 March 1984	Situation of human rights in El Salvador	24-5-13
1985/1	19 February 1985	Question of the violation of human rights in the occupied Arab territories, including Palestine	28-5-8
1985/36	13 March 1985	Situation of human rights in Guatemala	32-0-1
1986/1	20 February 1986	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-7-6

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Number	Date	Title	Voting record
1986/24	10 March 1986	Situation in southern Africa	31-5-7
1986/39	12 March 1986	Situation of human rights in El Salvador	39-0-4
1986/40	12 March 1986	Question of human rights and fundamental freedoms in Afghanistan	28-9-5
1986/43	12 March 1986	Situation in southern Lebanon	25-1-17
1987/2	19 February 1987	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-1-12
1987/6	19 February 1987	Situation in Kampuchea	29-8-3
1987/50	11 March 1987	Question of human rights in Cyprus	25-3-15
1987/51	11 March 1987	Situation of human rights in El Salvador	36-0-7
1987/54	11 March 1987	Situation of human rights in southern Lebanon	26-1-15
1987/58	11 March 1987	Question of human rights and fundamental freedoms in Afghanistan	26-8-7
1987/60	12 March 1987	Question of human rights in Chile	Without a vote
1987/61	12 March 1987	Situation in Sri Lanka	Without a vote
1988/1	15 February 1988	Question of the violation of human rights in the occupied Arab territories, including Palestine	31-1-11
1988/6	22 February 1988	Situation in Kampuchea	31-7-3
1988/7	22 February 1988	The use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	30-11-1
1988/13	29 February 1988	The adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to colonial and racist régimes in southern Africa	32-7-4
1988/47	8 March 1988	Prosecution and punishment of all war criminals and persons who have committed crimes against humanity	Without a vote

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Number	Date	Title	Voting record
1988/65	10 March 1988	Situation of human rights in El Salvador	Without a vote
1988/66	10 March 1988	Situation of human rights in southern Lebanon	26-1-15
1989/2	17 February 1989	Question of violations of human rights in occupied Palestine	32-1-9
1989/9	23 February 1989	Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination	Without a vote
1989/20	6 March 1989	Situation in Kampuchea	35-7-1
1989/21	6 March 1989	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	32-10-1
1989/65	8 March 1989	Situation of human rights in southern Lebanon	30-1-12
1989/67	8 March 1989	Question of human rights and fundamental freedoms in Afghanistan	Without a vote
1989/68	8 March 1989	Situation of human rights and fundamental freedoms in El Salvador	Without a vote
1990/7	19 February 1990	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1990/53	6 March 1990	Situation of human rights in Afghanistan	Without a vote
1990/54	6 March 1990	Situation of human rights in southern Lebanon	41-1-1
1990/77	7 March 1990	Situation of human rights in El Salvador	Without a vote
1991/4	15 February 1991	Situation in Afghanistan	Without a vote
1991/7	22 February 1991	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1991/51	6 March 1991	Assistance to Guatemala in the field of human rights	Without a vote
1991/66	6 March 1991	Situation of human rights in southern Lebanon	41-1-0

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Number	Date	Title	Voting record
1991/67	6 March 1991	Situation of human rights in Kuwait under Iraqi occupation	41-1-0
1991/75	6 March 1991	Situation of human rights in El Salvador	Without a vote
1991/78	6 March 1991	Situation of human rights in Afghanistan	Without a vote
1992/6	21 February 1992	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1992/19	28 February 1992	Situation of human rights in South Africa	Without a vote
1992/60	3 March 1992	Situation of human rights in Kuwait under Iraqi occupation	47-1-1
1992/68	4 March 1992	Situation of human rights in Afghanistan	Without a vote
1992/70	4 March 1992	Situation of human rights in Lebanon	49-1-1
1992/71	5 March 1992	Situation of human rights in Iraq	35-1-16
1992/S-1/1	14 August 1992	The situation of human rights in the territory of the former Yugoslavia	Without a vote
1992/S-2/1	1 December 1992	The situation of human rights in the territory of the former Yugoslavia	45-1-1
1993/2 A	19 February 1993	Question of the violation of human rights in the occupied Arab territories, including Palestine	26-16-5
1993/5	19 February 1993	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1993/7	23 February 1993	Situation of human rights in the territory of the former Yugoslavia	Without a vote
1993/8	23 February 1993	Rape and abuse of women in the territory of the former Yugoslavia	Without a vote

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Number	Date	Title	Voting record
1993/11	26 February 1993	Implementation of the Programme of Action for the Second Decade to Combat racism and Racial Discrimination and launching of a Third Decade for Action to Combat Racism and Racial Discrimination	Without a vote
1993/33	5 March 1993	Human rights and forensic science	Without a vote
1993/45	5 March 1993	Right to freedom of opinion and expression	Without a vote
1993/60	10 March 1993	Situation of human rights in the Sudan	35-9-8
1993/66	10 March 1993	Situation of human rights in Afghanistan	Without a vote
1993/67	10 March 1993	Situation of human rights in Southern Lebanon	50-1-0
1993/83	10 March 1993	Effects of armed conflicts on children's lives	Without a vote
1994/7	18 February 1994	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	35-1-15
1994/37	4 March 1994	Torture and other cruel, inhumane or degrading treatment or punishment	Without a vote
1994/39	4 March 1994	Question of enforced disappearances	Without a vote
1994/58	4 March 1994	Assistance to Guatemala in the filed of human rights	Without a vote
1994/59	4 March 1994	Assistance to the republic of Georgia in the field of human rights	Without a vote
1994/60	4 March 1994	Assistance to Somalia in the field of human rights	Without a vote
1994/67	19 March 1994	Civil defence forces	Without a vote
1994/72	9 March 1994	Situation of human rights in the territory of the former Yugoslavia: violations of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote

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Number	Date	Title	Voting record
1994/74	9 March 1994	Situation of human rights in Iraq	34-1-18
1994/75	9 March 1994	Situation of human rights in Bosnia and Herzegovina	41-1-10
1994/77	9 March 1994	Rape and abuse of women in the territory of the former Yugoslavia	Without a vote
1994/79	9 March 1994	Situation of human rights in Sudan	35-9-9
1994/83	9 March 1994	Situation of human rights in Southern Lebanon	48-1-3
1994/84	9 March 1994	Situation of human rights in Afghanistan	Without a vote
1994/85	9 March 1994	Situation of human rights in Myanmar	Without a vote
1994/87	9 March 1994	Situation of human rights in Zaire	Without a vote
1994/94	9 March 1994	Effects of armed conflicts on children's lives	Without a vote
1995/5	17 February 1995	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	34-1-15
1995/7	16 January 1995	Question of Western Sahara	Without a vote
1995/8	17 February 1995	Violations of human rights in southern Africa: report of the Ad Hoc Working Group of experts	Without a vote
1995/29	3 March 1995	Minimum humanitarian standards	Without a vote
1995/35	3 March 1995	Special process dealing with the problem of missing persons in the territory of the former Yugoslavia	Without a vote
1995/51	3 March 1995	Assistance to Guatemala in the field of human rights	Without a vote
1995/55	3 March 1995	The situation of human rights in Cambodia	Without a vote
1995/56	3 March 1995	Assistance to Somalia in the field of human rights	Without a vote
1995/67	7 March 1995	Human rights situation in Southern Lebanon and the western Bekaa	48-1-4
1995/69	8 March 1995	Situation of human rights in Zaire	Without a vote

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Number	Date	Title	Voting record
1995/72	8 March 1995	Situation of human rights in Myanmar	Without a vote
1995/73	8 March 1995	Extra-judicial, summary or arbitrary executions	Without a vote
1995/74	8 March 1995	Situation of human rights in Afghanistan	Without a vote
1995/76	8 March 1995	Situation of human rights in Iraq	31-1-21
1995/77	8 March 1995	Situation of human rights in the Sudan	33-7-10
1995/79	8 March 1995	Rights of the child	Without a vote
1995/89	8 March 1995	Situation of human rights in the Republic of Bosnia and Herzegovina, in the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	44-0-7
1995/91	8 March 1995	Situation of human rights in Rwanda	Without a vote
1996/1	27 March 1996	Situation of human rights in Burundi	Without a vote
1996/13	11 April 1996	Human Rights and the environment	Without a vote
1996/41	19 April 1996	A permanent forum for indigenous people in the United Nations System	Without a vote
1996/53	19 April 1996	Right to freedom of opinion and expression	Without a vote
1996/54	19 April 1996	Situation of human rights in Cambodia	Without a vote
1996/71	23 April 1996	Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote
1996/73	23 April 1996	Situation of human rights in the Sudan	Without a vote
1996/74	23 April 1996	Extra-judicial, summary or arbitrary executions	Without a vote
1996/75	23 April 1996	Situation of human rights in Afghanistan	Without a vote
1996/76	23 April 1996	Situation of human rights in Rwanda	Without a vote
1996/80	23 April 1996	Situation of human rights in Myanmar	Without a vote

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Number	Date	Title	Voting record
1996/84	24 April 1996	Situation of human rights in the Islamic Republic of Iran	Without a vote
1996/85	24 April 1996	Rights of the child	Without a vote
1997/2	26 March 1997	Human rights in the occupied Syrian Golan	26-1-23
1997/38	11 April 1997	Torture and other cruel, inhumane or degrading treatment or punishment	Without a vote
1997/57	15 April 1997	Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote
1997/58	15 April 1997	Situation of human rights in Zaire	Without a vote
1997/59	15 April 1997	Situation of human rights in the Sudan	Without a vote
1997/62	24 April 1997	Human rights in Cuba	19-10-24
1997/65	16 April 1997	Situation of human rights in Afghanistan	Without a vote
1997/77	18 April 1997	Situation of human rights in Burundi	Without a vote
1997/78	18 April 1997	Rights of the child	Without a vote
1998/1	27 March 1998	Question of the violation of human rights in the occupied Arab territories, including Palestine	31-1-20
1998/6	27 March 1998	The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination	35-9-8
1998/38	17 April 1998	Torture and other cruel, inhuman or degrading treatment or punishment	Without a vote
1998/52	17 April 1998	The elimination of violence against women	Without a vote
1998/53	17 April 1998	Impunity	Without a vote
1998/60	17 April 1998	Situation of human rights in Cambodia	Without a vote
1998/62	21 April 1998	Human rights situation in Southern Lebanon and western Bekaa	52-1-0
1998/63	21 April 1998	Situation of human rights in Myanmar	Without a vote

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Number	Date	Title	Voting record
1998/67	21 April 1998	Situation of human rights in the Sudan	31-6-16
1998/70	21 April 1998	The question of human rights in Afghanistan	Without a vote
1998/73	22 April 1998	Hostage-taking	Without a vote
1998/75	22 April 1998	Abduction of children from northern Uganda	24-1-27
1998/79	22 April 1998	Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia	41-0-12
1998/82	24 April 1998	Situation of human rights in Burundi	Without a vote
1999/1	6 April 1999	Situation of human rights in Sierra Leone	Without a vote
1999/10	23 April 1999	Situation of human rights in Burundi	Without a vote
1999/33	26 April 1999	The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms	Without a vote
1999/36	26 April 1999	Right to freedom of opinion and expression	Without a vote
1999/S-4/1	27 September 1999	Situation of human rights in East Timor	Without a vote
2000/26	18 April 2000	Situation of human rights in Federal Republic of Yugoslavia (Serbia and Montenegro), the republic of Croatia and Bosnia and Herzegovina	44-1-18
2000/58	25 April 2000	Situation in the Republic of Chechnya	25-7-19
2000/S-5/1	19 October 2000	Grave and massive violations of the human rights of the Palestinian people by Israel	19-16-7
2001/7	18 April 2001	Question of the violation of human rights in the occupied Arab territories, including Palestine	28-2-22

(*cont.*)

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Number	Date	Title	Voting record
2001/12	18 April 2001	Situation of human rights in parts of south-eastern Europe	41-0-11
2001/18	20 April 2001	Situation of human rights in the Sudan	28-0-25
2001/24	20 April 2001	Situation in the Republic of Chechnya of the Russian Federation	22-12-19
2001/38	23 April 2001	Hostage-taking	Without a vote
2001/40	23 April 2001	Question of arbitrary detention	Without a vote
2001/42	23 April 2001	Elimination of all forms of religious intolerance	Without a vote
2001/46	23 April 2001	Question of enforced or involuntary disappearances	Without a vote
2001/66	25 April 2001	Convention on the Prevention and Punishment of the Crime of Genocide	Without a vote
2002/37	22 April 2002	Integrity of the judicial system	34-0-19
2002/60	25 April 2002	Missing persons	Without a vote
2002/79	25 April 2002	Impunity	Without a vote

RESOLUTIONS ADOPTED BY THE UN SUB-COMMISSION ON HUMAN RIGHTS

Number	Date of adoption	Title
15 (XXXIV)	10 September 1981	Question of the human rights of persons subjected to any form of detention or imprisonment
1982/17	7 September 1982	Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories
1983/12	5 September 1983	Question of the violation of human rights and fundamental freedoms: the situation in Guatemala
1983/18	5 September 1983	Question of the violation of human rights and fundamental freedoms: the situation in El Salvador
1984/23	29 August 1984	Question of the violation of human rights and fundamental freedoms: the situation in Guatemala
1984/26	30 August 1984	Question of the violation of human rights and fundamental freedoms: the situation in El Salvador
1985/8	28 August 1985	Consideration of the future work of the Sub-Commission [on Prevention of Discrimination and Protection of Minorities] and of the draft provisional agenda for the 39th session of the Sub-Commission
1985/18	29 August 1985	The situation in El Salvador
1985/26	29 August 1985	Question of the human rights of persons subjected to any form of detention or imprisonment
1985/27	30 August 1985	The situation in Chile
1985/28	30 August 1985	The situation in Guatemala
1987/18	2 September 1987	Situation in El Salvador
1987/19	2 September 1987	Violations of human rights in Cyprus
1988/10	31 August 1988	The situation in the Palestinian and Arab territories occupied by Israel

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Number	Date of adoption	Title
1988/13	1 September 1988	The situation of human rights in El Salvador
1988/27	1 September 1988	Respect for the right to life: elimination of chemical weapons
1989/4	31 August 1989	Situation in the Palestinian and other Arab territories occupied by Israel
1989/9	31 August 1989	Situation of human rights in El Salvador
1989/24	31 August 1989	Human rights in times of armed conflicts
1989/39	1 September 1989	Respect for the right to life: elimination of chemical weapons
1990/12	30 August 1990	Situation in the Palestinian and other Arab territories occupied by Israel
1991/4	23 August 1991	Situation in South Africa
1991/6	23 August 1991	Situation in the Palestinian and other Arab territories occupied by Israel
1992/9	26 August 1992	Situation in South Africa
1992/10	26 August 1992	Situation in the Palestinian and other Arab territories occupied by Israel
1992/13	27 August 1992	Situation of human rights in El Salvador
1992/18	27 August 1992	Situation of human rights in Guatemala
1992/20	27 August 1992	Situation in East Timor
1993/8	20 August 1993	Punishment of the crime of genocide
1993/11	20 August 1993	Situation in South Africa
1993/15	20 August 1993	Situation in the Palestinian and other Arab territories occupied by Israel
1993/16	20 August 1993	Situation of human rights in Guatemala
1993/17	20 August 1993	Situation in Bosnia and Herzegovina
1993/20	20 August 1993	Situation of human rights in Iraq
1993/23	23 August 1993	Situation of human rights in Peru
1994/1	9 August 1994	Situation in Rwanda
1995/3	18 August 1995	Situation of human rights in Iraq
1995/5	18 August 1995	Situation of human rights in Rwanda
1995/8	18 August 1995	Situation in the territory of the former Yugoslavia
1995/24	24 August 1995	Injurious effect of anti-personnel land-mines
1996/3	19 August 1996	Situation of human rights in Rwanda
1996/4	19 August 1996	Situation of human rights in Burundi
1996/5	19 August 1996	Situation of human rights in Iraq
1996/15	23 August 1996	Injurious effects of anti-personnel land-mines
1996/16	29 August 1996	International peace and security as an essential condition for the enjoyment of human rights, above all the right to life
1997/34	28 August 1997	Respect for humanitarian and human rights law provisions in United Nations peacekeeping operations

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Number	Date of adoption	Title
1997/36	28 August 1997	International peace and security as an essential condition for the enjoyment of human rights, above all the right to life
1998/18	21 August 1998	Systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict
1998/26	22 August 1998	Housing and property restitution in the context of the return of refugees and internally displaced persons
1999/16	26 August 1999	Systematic rape, sexual slavery and slavery-like practices
2000/24	18 August 2000	Role of universal or extraterritorial competence in preventive action against impunity
2001/16	16 August 2001	International protection for refugees and displaced persons
2001/22	16 August 2001	International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity
2001/24	16 August 2001	The Social Forum

RESOLUTIONS ADOPTED BY OTHER INTERNATIONAL ORGANISATIONS

Organisation of African Unity (African Union)

African Commission on Human and Peoples' Rights

No.	Date	Title
1 (XI)	2–9 March 1992	Resolution on the Right to Recourse and Fair Trial
2 (XIV)	1–10 December 1993	Resolution on the promotion and the respect of International Humanitarian Law and Human and Peoples' Rights
4 (XVII)	13–22 March 1995	Resolution on anti-personnel mines

Assembly of Heads of State and Government

No.	Date	Title
197 (XXXVI)	9–11 July 1990	Resolution on the adoption of the African Charter on the Rights and Welfare of the Child
250 (XXXII)	8–10 July 1996	Resolution on the African Commission on Human and Peoples' Rights

Conference of African Ministers of Health

No.	Date	Title
7 (V)	24–29 April 1995	Resolution on health and prison
14 (V)	26–28 April 1995	Resolution on health and war

Council of Ministers

Resolutions

No.	Date	Title
1448 (LVIII)	21–26 June 1993	Resolution on refugees, returnees and displaced persons in Africa
1526 (LX)	6–11 June 1994	Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts
1588 (LXII)	21–23 June 1995	Resolution on refugees, returnees and displaced persons in Africa
1589 (LXII)	21–23 June 1995	Resolution on the regional Conference on assistance to refugees, returnees and displaced persons in the Great Lakes region
1593 (LXII)	21–23 June 1995	Resolution on the 1980 United Nations Convention on Certain Conventional Weapons and problems posed by the proliferation of anti-personnel mines in Africa
1628 (LXIII)	26–28 February 1996	Resolution on the revision of the 1980 United Nations Convention on Certain Conventional Weapons and Problems Posed by the Proliferation of Anti-Personnel Mines in Africa
1649 (LXIV)	1–5 July 1996	Resolution on Burundi
1650 (LXIV)	1–5 July 1996	Resolution on Liberia
1653 (LXIV)	1–5 July 1996	Resolution on refugees, returnees and displaced persons in Africa
1659 (LXIV)	1–5 July 1996	Resolution on the plight of African children in situation of armed conflicts
1662 (LXIV)	1–5 July 1996	Resolution on the international humanitarian law, water and armed conflict in Africa
2004 (LXVI)	28–31 May 1997	Resolution on the report of the Secretary-General on the situation in Angola

Decisions

No.	Date	Title
362 (LXVI)	28–31 May 1997	Report of the Commission of Twenty on the situation of refugees, returnees and displaced persons in Africa
363 (LXVI)	28–31 May 1997	Report of the Secretary-General on the question of antipersonnel landmines and the international efforts to reach a total ban

Council of Europe

Parliamentary Assembly

Resolutions

No.	Date	Title
722	1 February 1980	Situation of human rights in Latin America
751	15 May 1981	Refugees from El Salvador
774	29 April 1982	Europe and Latin America – the challenge of human rights
816	21 March 1984	Situation in Cyprus
822	10 May 1984	Situation in Turkey
823	28 June 1984	Activities of the International Committee of the Red Cross (ICRC)
828	26 September 1984	Enforced disappearances
835	30 January 1985	Situation in Latin America
849	30 September 1985	War between Iraq and Iran
854	20 November 1985	Deteriorating situation in Afghanistan
881	1 July 1987	Activities of the International Committee of the Red Cross (ICRC) (1984–86)
904	30 June 1988	Protection of humanitarian medical missions
921	6 July 1989	Activities of the International Committee of the Red Cross (ICRC) (1987–88)
950	1 October 1990	Gulf crisis
954	29 January 1991	Gulf conflict
984	30 June 1992	Crisis in the former Yugoslavia
991	7 October 1992	Activities of the International Committee of the Red Cross (1989–1991)
994	3 February 1993	Massive and flagrant violations of human rights in the territory of former Yugoslavia
1010	28 September 1993	Situation of the refugees and displaced persons in Serbia, Montenegro and the former Yugoslav Republic of Macedonia
1011	28 September 1993	Situation of women and children in the former Yugoslavia

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No.	Date	Title
1019	25 January 1994	Humanitarian situation and needs of the refugees, displaced persons and other vulnerable groups in the countries of the former Yugoslavia
1022	27 January 1994	Humanitarian situation and needs of the displaced Iraqi Kurdish population
1047	10 November 1994	Conflict in Nagorno-Karabakh
1050	10 November 1994	Rwanda and the prevention of humanitarian crises
1055	2 February 1995	Russia's request for membership in the light of the situation in Chechnya
1066	27 September 1995	Situation in some parts of the former Yugoslavia
1077	24 January 1996	Albanian asylum-seekers from Kosovo
1085	24 April 1996	Activities of the International Committee of the Red Cross (ICRC), 1992–95
1119	22 April 1997	Conflicts in Transcaucasia

Recommendations

No.	Date	Title
855	2 February 1979	Statutory limitation of war crimes and crimes against humanity
868	5 June 1979	The missing political prisoners in Chile
945	2 July 1982	International humanitarian law
974	5 November 1983	Situation in Cyprus
1056	5 May 1987	National refugees and missing persons in Cyprus
1176	5 February 1992	Crisis in Yugoslavia: displaced populations
1150	24 April 1991	Situation of the Iraqi Kurdish population and other persecuted minorities
1189	1 July 1992	Establishment of an international court to judge war crimes
1198	5 November 1992	Crisis in former Yugoslavia
1218	27 September 1993	Establishing an international court to try serious violations of international humanitarian law
1239	14 April 1994	Cultural situation in the former Yugoslavia
1266	26 April 1995	Turkey's military intervention in northern Iraq and on Turkey's respect of commitments concerning constitutional and legislative reforms
1287	24 January 1996	Refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia

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No.	Date	Title
1297	25 April 1996	The implementation of the Dayton Agreements for peace in Bosnia-Herzegovina
1305	24 September 1996	Humanitarian situation of the displaced persons in Georgia
1368	22 April 1998	Latest developments in the Federal Republic of Yugoslavia and the situation in Kosovo
1376	24 June 1998	Crisis in Kosovo and situation in the Federal Republic of Yugoslavia
1377	25 June 1998	Humanitarian situation of the Kurdish refugees and displaced persons in South-East Turkey and North Iraq
1384	24 September 1998	Crisis in Kosovo and situation in the Federal Republic of Yugoslavia
1385	24 September 1998	Kosovo refugees, asylum seekers and displaced persons
1427	23 September 1999	Respect for international humanitarian law in Europe
1495	24 January 2001	Environmental impact of the war in Yugoslavia on Southeast Europe

European Parliament

Date	Title
15 October 1982	Resolution on the situation in Lebanon
18 November 1982	Resolution on the events in Argentina
16 December 1982	Resolution on the discovery of mass graves in Argentina
11 January 1983	Resolution on the problem of missing persons in Cyprus
19 May 1983	Resolution on the statement by the Argentine military junta concerning the fate of the persons who have disappeared since the last coup d'état
13 October 1983	Resolution on the situation in Argentina
12 December 1985	Resolution on mass population transfers in Ethiopia and the expulsion of MSF
12 December 1985	Resolution on the situation in Afghanistan
12 March 1988	Resolution on the situation in Kosovo
20 May 1988	Resolution on the situation in Cyprus
15 December 1988	Resolution on human rights violations in Turkey
25 May 1989	Resolution on May Day events and the continuing aggravation of the domestic political climate in Turkey
12 July 1990	Resolution on the violation of human rights in Cyprus
11 March 1993	Resolution on the Rape of Women in former Yugoslavia
12 March 1993	Resolution on Human Rights in the world and Community human rights policy for the years 1991/92
15 December 1994	Resolution on the situation in Chechnya

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Date	Title
16 February 1995	Resolution on the humanitarian situation in Chechnya and the neighbouring republics of Ingushetia, Daghestan and Northern Ossetia
16 February 1995	Resolution on the human rights situation in Chechnya
16 March 1995	Resolution on human rights in Chechnya
16 November 1995	Resolution on the failure of the international conference on anti-personnel landmines and laser weapons
24 October 1996	Resolution on the Ottawa Conference on anti-personnel landmines
14 November 1996	Resolution on the situation in Abkhazia
16 July 1998	Resolution on Kosovo
8 October 1998	Resolution on the situation in Kosovo
14 January 1999	Resolution on the situation in Sierra Leone
16 March 2000	Resolution on violations of human rights and humanitarian law in Chechnya

League of Arab States

Council

No.	Date	Title
1778	20 July 1961	Measures adopted to assist Tunisia
1984	31 March 1964	The British Aggression Against Hurayb in Yemen
2676	15 September 1970	Geneva Protocol of 1925 relative to the Prohibition of the Use of Poisonous Gases in Times of War
4237	31 March 1983	Israeli Practices Against Civilians in the Occupied Arab Territories
4238	31 March 1983	Poisoning Arab Students and Professors in the Occupied Palestinian Territories
4430	28 March 1985	Israeli Occupation of Parts of South Lebanon and the Western Bekaa and Rashia, and the Arbitrary and Inhuman Practices contrary to International Laws, Charters and Morals
4646	6 April 1987	Developments of the Iraq/Iran War
4938	13 September 1989	The Iraq/Iran Situation
5038	31 August 1990	The Situation of Civilians as a Result of the Iraqi Occupation of Kuwaiti Territory
5039	31 August 1990	The Detention by Iraq of Nationals of Third Countries
5169	29 April 1992	Israeli Occupation of Parts of South Lebanon and the Western Bekaa and Implementation of Security Council Resolution No. 425
5231	13 September 1992	Bosnia and Herzegovina

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No.	Date	Title
5324	21 September 1993	Israeli Occupation of Parts of South Lebanon and the Western Bekaa and Implementation of Security Council Resolution No. 425
5414	15 September 1994	Follow-up of the Intifada's Developments
5633	31 March 1997	The Occupied Arab Syrian Golan Heights
5635	31 March 1997	Lebanese Hostages and Prisoners in Israeli Places of Detention and Prisons

Organization of American States

General Assembly

No.	Date	Title
783 (XV-O/85)	9 December 1985	Inter-American Convention to Prevent and Punish Torture
1270 (XXIV-O/94)	10 June 1994	Respect for International Humanitarian Law
1335 (XXV-O/95)	9 June 1995	Respect for International Humanitarian Law
1408 (XXVI-O/96)	7 June 1996	Respect for International Humanitarian Law
1411 (XXVI-O/96)	7 June 1996	The Western Hemisphere as an Antipersonnel-Land-Mine-Free Zone
1550 (XXVIII-O/98)	2 June 1998	Assaults upon Freedom of the Press and Crimes against Journalists
1565 (XXVIII-O/98)	2 June 1998	Promotion of and Respect for International Humanitarian Law
1602 (XXVIII-O/98)	3 June 1998	Respect for International Humanitarian Law

Organization of the Islamic Conference

Conference of Ministers of Foreign Affairs

No.	Date	Title
49/19-P	31 July–5 August 1990	Cairo Declaration on Human Rights in Islam
1/5-EX	17–18 June 1992	Resolution on the situation in Bosnia and Herzegovina
1/6-EX	1–2 December 1992	Resolution on the situation in Bosnia and Herzegovina
1/22-P	10–12 December 1994	Resolution on the Palestinian cause and the Arab–Israeli conflict

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No.	Date	Title
6/22-P	10–12 December 1994	Resolution on Bosnia and Herzegovina
36/23-P	9–12 December 1995	Resolution on the elimination of anti-personnel mines and mine clearing operations
27/24-P	9–13 December 1996	Resolution on anti-personnel mines and mine clearing operations
28/25-P	15–17 March 1998	Resolution on anti-personnel mines and mine clearing operations

RESOLUTIONS ADOPTED BY THE INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT

4th International Conference of the Red Cross, Karlsruhe, 22–27 September 1887
Resolution VIII. Measures which have been or should be taken by the Societies in order to spread knowledge of the 1864 Geneva Convention in the army, in circles especially interested in its implementation and among the general public
15th International Conference of the Red Cross, Tokyo, 20–29 October 1934
Resolution IX. Teaching the principles of the Geneva Convention and of the Red Cross to youth
19th International Conference of the Red Cross, New Delhi, 28 October–7 November 1957
Resolution XIII. Draft rules for the limitation of the dangers incurred by the civilian population in time of war
Resolution XX. Reunion of dispersed families
Resolution XXIX. Young people and the Geneva Conventions
Resolution XXX. Practical means of spreading knowledge of the Geneva Conventions among young people
20th International Conference of the Red Cross, Vienna, 2–9 October 1965
Resolution IX. Reading of principles
Resolution XXI. Implementation and dissemination of the Geneva Conventions
Resolution XXIII. Tracing of burial places
Resolution XXIV. Treatment of prisoners of war
Resolution XXV. Application of the Geneva Conventions by the United Nations Emergency Forces
Resolution XXVI. Repression of violations of the Geneva Conventions
Resolution XXVIII. Protection of civilian populations against the dangers of indiscriminate warfare
Resolution XXX. Protection of civil medical and nursing personnel
Resolution XXXI. Protection of victims of non-international conflicts
Resolution XXXIII. Instruction of medical personnel in the Geneva Conventions
21st International Conference of the Red Cross, Istanbul, 6–13 September 1969
Resolution IX. Dissemination of the Geneva Conventions
Resolution X. Implementation of the Fourth Geneva Convention
Resolution XI. Protection of prisoners of war
Resolution XII. War crimes and crimes against humanity
Resolution XIII. Reaffirmation and development of the laws and customs applicable in armed conflicts
Resolution XIV. Weapons of mass destruction
Resolution XVI. Protection of civilian medical and nursing personnel
Resolution XVII. Protection of victims of non-international armed conflicts
Resolution XVIII. Status of combatants in non-international armed conflicts

RESOLUTIONS ADOPTED BY THE COUNCIL OF DELEGATES OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

Session of 8–15 November 1973, Teheran
Resolution on action in the struggle against racism and racial discrimination
Session of 13–14 October 1983, Geneva
Resolution 4. Red Cross and human rights
Session of 27 November 1987, Rio de Janeiro
Resolution 2. Worldwide campaign for the protection of war victims
Resolution 4. Information and dissemination of international humanitarian law as a contribution to peace
Resolution 5. Formal commitment by the Movement to obtain the full implementation of the Geneva Conventions
Session of 28–30 November 1991, Budapest
Resolution 5. Use of the emblem by National Societies
Resolution 8. Dissemination of international humanitarian law and of the principles and ideals of the Movement
Resolution 9. The International Red Cross and Red Crescent Movement and refugees
Resolution 11. Protection of victims of war
Resolution 12. Humanitarian assistance in situations of armed conflict
Resolution 13. Protection of the civilian population against famine in situations of armed conflict
Resolution 14. Child soldiers
Session of 29–30 October 1993, Birmingham
Resolution 2. The International Conference for the Protection of War Victims
Resolution 3. Mines
Resolution 4. Child soldiers
Resolution 5. Armed protection of humanitarian assistance
Resolution 7. The Movement, refugees and displaced persons
Resolution 9. Respect for and dissemination of the Fundamental Principles: Final report
Resolution 11. Principles of humanitarian assistance
Session of 1–2 December 1995, Geneva
Resolution 5. Children in armed conflicts and Plan of action concerning children in armed conflict
Resolution 9. Armed protection of humanitarian assistance
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